

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(1) LEGALITY AND VALIDITY/(i) Marriage and Civil Partnership Generally/1. Marriage.

MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS

1. FUNDAMENTAL PRINCIPLES

(1) LEGALITY AND VALIDITY

(i) Marriage and Civil Partnership Generally

1. Marriage.

Holy matrimony is the estate into which a man and a woman enter when they consent and contract to cohabit with each other and each other only¹. The solemnisation of matrimony in church is on their part the attestation in the presence of God and of the Church of their consent and contract so to do, and on the Church's part its blessing on their union². According to the doctrine of the Church of England marriage is in its nature a union permanent and life-long, for better for worse, till death them do part, of one man and one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity³.

It has been said that the only kind of marriage which English law recognises is one which is essentially the voluntary union for life of one man with one woman to the exclusion of all others⁴. If two persons of the same sex contrive to go through the formalities of a ceremony of marriage, the ceremony is not a marriage ceremony at all, but it has been held that the court in such circumstances is precluded from granting purely declaratory relief but must grant a nullity decree⁵. A marriage celebrated after 31 July 1971 is void where the parties are not respectively male and female⁶.

To be recognised by English law a marriage must at its inception be for life⁷ and must not be illusory⁸.

English law does not acknowledge the concept of a trial or temporary marriage⁹.

1 Book of Common Prayer, Form of Solemnization of Matrimony; *Harrod v Harrod* (1854) 1 K & J 4.

2 Book of Common Prayer, Form of Solemnization of Matrimony; *Harrod v Harrod* (1854) 1 K & J 4. As to the celebration of Church of England marriages see PARA 57 et seq.

3 Revised Canons Ecclesiastical, Canon B30 para 1. See also Canon B30 para 2, which states that the teaching of our Lord, affirmed by the Church of England, is expressed and maintained in the Form of Solemnization of Matrimony in the Book of Common Prayer. When application is made to a minister for a marriage in his church it is his duty to explain this doctrine to the parties: see Canon B30 para 3.

4 *Nachimson v Nachimson* [1930] P 217, CA; *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130; *Re Bethell*, *Bethell v Hildyard* (1888) 38 ChD 220; *Sowa v Sowa* [1961] P 70, [1961] 1 All ER 687, CA.

5 *Corbett v Corbett (otherwise Ashley)* [1971] P 83, [1970] 2 All ER 33 (operated male transsexual); *Re Marriage of C and D (falsely called C)* (1979) 35 FLR 340, 5 Fam LR 636; and see Application 9532/81 *Rees v United Kingdom* [1993] 2 FCR 49, [1987] 2 FLR 111, ECtHR; *Cossey v United Kingdom* [1993] 2 FCR 97, [1991] 2 FLR 492, ECtHR (inability of a post-operative male to female transsexual to obtain a birth certificate or contract a valid marriage under English law with a man); *R v Registrar General, ex p P and G* [1996] 2 FCR 588, sub nom *Re P and G (transsexuals)* [1996] 2 FLR 90, DC (two men undergoing 'gender reassignment' surgery); Case C-13/94 *P v S* [1996] All ER (EC) 397, [1996] ECR I-2143, ECJ (sex discrimination); Application 21830/93 *X, Y and Z v United Kingdom* [1997] 3 FCR 341, [1997] 2 FLR 892, ECtHR (refusal to register a post-operative transsexual as the father of a child born to a partner by artificial insemination by donor); Applications 22885/93, 23390/94 *Sheffield and Horsham v United Kingdom* [1998] 3 FCR 141, [1998] 2 FLR 928, ECtHR (no positive obligation to recognise in law the applicants' post-operative gender); *Bellinger v Bellinger* [2000] 3 FCR 733; [2001] 1 FLR 389; affd sub nom *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] UKHL 21, [2003] 2 AC 467, [2003] 2 All ER 593 (sex of wife indeterminate at birth; wife registered as male at birth; wife undergoing sex-change operation before marriage; social, medical and legal developments since *Corbett v Corbett (otherwise Ashley)* reviewed); *W v W (physical inter-sex)* [2001] Fam 111, [2001] 2 WLR 674 (same). Provision is now made in relation to civil partnerships between same-sex couples: see the Civil Partnership Act 2004; and PARA 2.

6 See the Matrimonial Causes Act 1973 s 11(c); and PARA 326.

7 See *Nachimson v Nachimson* [1930] P 217, CA; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85, [1962] 3 All ER 873.

8 *Kenward v Kenward* [1951] P 124, [1950] 2 All ER 297, CA.

9 See *Dalrymple v Dalrymple* (1811) 2 Hag Con 54.

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2. Civil partnership.

A civil partnership is a relationship between, and affording the same legal status and rights as a married couple to, two people of the same sex¹ which is formed when they register as civil partners of each other² or which they are treated³ as having formed by virtue of having registered an overseas relationship⁴. Two people are not eligible to register as civil partners of each other if they are not of the same sex⁵, or if either of them is already a civil partner or is lawfully married⁶. A civil partnership ends only on death, dissolution or annulment⁷.

1 I.e. 'civil partners': Civil Partnership Act 2004 s 1(1). The Interpretation Act 1978 Sch 1 (amended by the Civil Partnership Act 2004 Sch 27 para 59) defines 'civil partnership' as a civil partnership which exists under or by virtue of the Civil Partnership Act 2004, and provides that any reference to a 'civil partner' is to be read accordingly.

2 I.e. in the United Kingdom under the Civil Partnership Act 2004, or outside the United Kingdom under the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, or the Civil Partnership (Armed Forces) Order 2005, SI 2005/3188: Civil Partnership Act 2004 s 1(1)(a). As to registration in England and Wales see the Civil Partnership Act 2004 Pt 2 (ss 2-84); and PARA 132 et seq. As to registration abroad see PARAS 145-152; and as to registration in the armed forces see PARAS 153-160.

3 I.e. under the Civil Partnership Act 2004 Pt 5 Chapter 2 (ss 212-218) (see PARA 19).

4 Civil Partnership Act 2004 s 1(1)(b). References in the Civil Partnership Act 2004 to an 'overseas relationship' are to be read in accordance with Pt 5 Chapter 2: s 1(5). The Civil Partnership Act 2004 s 1(1) is subject to s 49 (void civil partnerships) and s 50 (voidable civil partnerships): see PARA 4; and PARA 331 et seq.

5 Civil Partnership Act 2004 s 3(1)(a). For special provisions relating to gender reassignment see PARA 334.

6 Civil Partnership Act 2004 s 3(1)(b).

7 Civil Partnership Act 2004 s 1(3). References to dissolution and annulment are to dissolution and annulment having effect under or recognised in accordance with the Civil Partnership Act 2004: s 1(4). As to dissolution, nullity and other proceedings see s 37 et seq; and PARA 346 et seq.

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3. Requisites of valid marriage and presumption of validity.

The requisites of a valid marriage according to English law are:

- 1 (1) that each of the parties should as regards age and mental and physical capacity be capable of contracting marriage¹;
- 2 (2) that they should not by reason of kindred or affinity be prohibited from marrying one another²;
- 3 (3) that, except where a second or subsequent polygamous marriage has been entered into under a law that permits polygamy³, there should not be a valid subsisting marriage or civil partnership of either of the parties with any other person⁴;
- 4 (4) that the parties, understanding the nature of the contract, should freely consent to marry one another⁵; and
- 5 (5) that certain forms and ceremonies should be observed⁶.

Persons who are deaf and dumb are competent to marry, showing their consent by signs, provided that they sufficiently understand the nature of the contract⁷.

Absence of one of the requisites of a valid marriage results in the marriage being void or voidable, and, in the case of marriages celebrated after 31 July 1971, the only grounds on which they may be void or voidable are those laid down by statute⁸.

1 See PARA 31 et seq.

2 See PARA 35 et seq.

3 As to polygamous marriages generally see PARA 9; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 234 et seq.

4 It is immaterial that there may be good faith and an honest belief in the death of the existing wife or husband, and that the circumstances may be such as would not sustain an indictment for bigamy. A marriage during the lifetime of an existing wife or husband must necessarily be void. As to absence of one of the spouses for seven years and the presumption thus raised see PARA 416; **CIVIL PROCEDURE** vol 11 (2009) PARAS 1100-1101; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 828, 831. As to the jurisdiction of the court to grant a decree of presumption of death and dissolution of marriage see PARA 750 et seq; and as to the marriage of divorced persons see PARA 34.

5 As to the consent of parents or guardians in the case of children see PARA 46 et seq. The absence of such consent does not affect the validity of the marriage: see PARA 51.

6 See PARA 53 et seq. As to sham marriages see PARA 11; and as to the effect and consequences of marriages being void see PARA 320.

7 *Harrod v Harrod* (1854) 1 K & J 4 (it is sufficient if they understand that they have agreed to cohabit together during their joint lives and not to cohabit with any other person).

8 As to the grounds on which marriages celebrated after 31 July 1971 may be void or voidable see PARA 344 et seq.

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4. Requisites of a civil partnership.

The requisites of a valid civil partnership according to English law are:

- 6 (1) that each of the parties should as regards age and mental and physical capacity be eligible to register as civil partners of each other¹;
- 7 (2) that they should not by reason of being within prohibited degrees of relationship be prohibited from registering as civil partners of one another²;
- 8 (3) that either of them is not already a civil partner or lawfully married³;
- 9 (4) that the parties, understanding the nature of the contract, should freely consent to register as civil partners⁴; and
- 10 (5) that certain forms and ceremonies should be observed⁵.

Absence of one of the requisites of a valid civil partnership results in it being void or voidable as laid down by statute⁶.

1 See the Civil Partnership Act 2004 ss 3(1)(c), 50(1)(a), (b); and PARAS 32, 33, 42.

2 See the Civil Partnership Act 2004 s 3(1)(d); and PARA 35.

3 See the Civil Partnership Act 2004 s 3(1)(b); and PARA 2.

4 See the Civil Partnership Act 2004 s 50(1)(a), (b); and PARAS 331, 332. As to the consent of parents or guardians see PARA 46 et seq. The absence of such consent does not affect the validity of the civil partnership: see PARA 51.

5 As to the forms and ceremonies to be observed in registering a civil partnership see PARA 53 et seq.

6 See the Civil Partnership Act 2004 ss 49, 50; and PARAS 327, 331-334.

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5. Validation of civil partnership.

The Lord Chancellor may, where two people have registered as civil partners of each other in England and Wales, by order¹ validate the civil partnership if it appears to him that the civil partnership is void² because at the time of registration both partners knew:

- 11 (1) that the due notice of proposed civil partnership³ had not been given⁴;
- 12 (2) the civil partnership document⁵ was not valid⁶;
- 13 (3) the place of registration⁷ was a place other than that specified in the notice or notices, or was not an approved premises⁸; or
- 14 (4) that a civil partnership registrar⁹ was not present¹⁰.

Such an order may include provisions for relieving a person from any liability for certain offences committed in relation to civil partnership schedules¹¹ and the recording of civil partnerships¹².

1 The draft of an order must be advertised in such manner as the Lord Chancellor thinks fit, not less than one month before the order is made: Civil Partnership Act 2004 s 53(3). The Lord Chancellor must also consider all objections to the order sent to him in writing during that month, and if it appears to him necessary, direct a local inquiry into the validity of any such objections: s 53(4). Such an order is subject to special parliamentary procedure: s 53(5). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq.

2 Ie under the Civil Partnership Act 2004 s 49(b) (see PARA 5).

3 As to notice of proposed civil partnership see the Civil Partnership Act 2004 s 8; and PARAS 133, 140.

4 See the Civil Partnership Act 2004 ss 49(b)(i), 53(1); and PARA 133.

5 As to civil partnership documents see the Civil Partnership Act 2004 s 7(1); and PARA 56.

6 See the Civil Partnership Act 2004 s 49(b)(ii), (iii); and PARA 327.

7 As to the place of registration see the Civil Partnership Act 2004 s 6; and PARA 56.

8 See the Civil Partnership Act 2004 s 49(b)(iv), (vi); and PARA 56.

9 As to the civil partnership registrar see the Civil Partnership Act 2004 s 29; and PARA 139 note 8.

10 See s 49(b)(v); and PARA 139.

11 Ie the offences under the Civil Partnership Act 2004 s 31(2), 32(2), 33(5) or (7). As to civil partnership schedules see the Civil Partnership Act 2004 s 14(1); and PARA 138.

12 Civil Partnership Act 2004 s 53(2).

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6. Presumption from cohabitation without ceremony.

Where a man and woman have cohabited for such a length of time, and in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed¹, even if there is no positive evidence of any marriage ceremony having taken place², particularly where the relevant facts have occurred outside the jurisdiction; and this presumption can be rebutted only by strong and weighty evidence to the contrary³.

1 Cohabitation and reputation are not, however, sufficient proof of a first marriage in bigamy proceedings: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 832.

2 As to the presumption arising where a ceremony has taken place see PARA 21.

3 *Re Shephard, George v Thyer* [1904] 1 Ch 456; *Wilkinson v Payne* (1791) 4 Term Rep 468; *Doe d Fleming v Fleming* (1827) 4 Bing 266; *Doe d Earl of Egremont v Grazebrook* (1843) 4 QB 406; *Piers v Piers* (1849) 2 HL Cas 331 (followed in *Hill v Hill* [1959] 1 All ER 281, [1959] 1 WLR 127, PC); *Goodman v Goodman* (1859) 28 LJ Ch 745 (cohabitation of a Jew with a Christian woman for 28 years); *Rooker v Rooker and Newton* (1863) 33 LJPM & A 42 (cohabitation for five years in Virginia); *Patrickson v Patrickson* (1865) LR 1 P & D 86; *Breadalbane Case, Campbell v Campbell* (1867) LR 1 Sc & Div 182, HL (a connection, adulterous at first, may become matrimonial); *Lyle v Ellwood* (1874) LR 19 Eq 98; *Collins v Bishop* (1878) 48 LJ Ch 31; *De Thoren v A-G* (1876) 1 App Cas 686, HL (Scots doctrine of 'habit and repute'); *Re M'Loughlin's Estate* (1878) 1 LR Ir 421, Ir CA; *Sastry Velaider Aronegary v Sembecutty Vaigalie* (1881) 6 App Cas 364; *Fox v Bearblock* (1881) 17 ChD 429; *Re Ivory, Chippendale v Ivory* (1886) 2 TLR 468; *Andrewes v Uthwatt* (1886) 2 TLR 895; *Elliott v Totnes Union* (1892) 9 TLR 35; *Wigley v Treasury Solicitor* [1902] P 233; *Lauderdale Peerage* (1885) 10 App Cas 692, HL; *Re Haynes, Haynes v Carter* (1906) 94 LT 431 (cohabitation of man and woman, with two children, from 1878 to 1893); *Re Thompson, Langhan v Thompson* (1904) 91 LT 680 (cohabitation as man and wife from 1856 to 1866; five children; reputed by friends and neighbours to be married; separation in 1866; marriage in 1874 of the man, during lifetime of the woman, to another woman; presumption of marriage held to have been established); *Re Green, Noyes v Pitkin* (1909) 25 TLR 222 (foreign marriage); *Re Taplin, Watson v Tate* [1937] 3 All ER 105; *McCarthy v Hastings* [1933] NI 100, CA; *Re Bradshaw, Blandy v Willis* [1938] 4 All ER 143 (presumption rebutted by certificate of later marriage between the parties); *Re Taylor, Taylor v Taylor* [1961] 1 All ER 55, [1961] 1 WLR 9, CA (evidence of cohabitation and acceptance as husband and wife by a small community for five years; no clear evidence to rebut presumption of marriage); *Rumsey v Sterne* (1967) 111 Sol Jo 113. Cf *Sackville-West v A-G* [1910] P 143 (declaration of validity refused); *Watson-Parker v Watson-Parker* (1967) Times, 2 March (Gretna Green ceremony held to be valid marriage); *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301, [1957] 2 All ER 563, CA, overruling *Holdowanski v Holdowanska (otherwise Bialoszevska) and Price* [1956] 3 All ER 457; followed in *Kochanski v Kochanska* [1958] P 147, [1957] 3 All ER 142 (marriage of Poles in what was held to be a displaced persons' camp which had been placed under the direction of the British Occupying Forces); *Merker v Merker* [1963] P 283, [1962] 3 All ER 928; *Preston (otherwise Putynski) v Preston (otherwise Putnyska) (otherwise Basinska)* [1963] P 141, [1962] 3 All ER 1057; affd [1963] P 411, [1963] 2 All ER 405, CA (courts should be reluctant to extend the instances where compliance with the lex loci was unnecessary to constitute a valid marriage); *Oleszko (formerly Pietrucha) v Pietrucha* (1963) Times, 22 March (marriage of inmates of displaced persons' camp, not members of a military force of an occupying power but part of a Polish community living separate from local population; parties held not to have subjected themselves to the local law); *Pazpena de Vire v Pazpena de Vire* [2001] 1 FLR 460, [2001] Fam Law 95 (husband claimed that he had forged marriage certificate; 35 years of cohabitation as husband and wife and public recognition as such); but see *Preston (otherwise Putynski) v Preston (otherwise Putnyska) (otherwise Basinska)*; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 211, 213. Cf *Lazarewicz (otherwise Fadanelli) v Lazarewicz* [1962] P 171, [1962] 2 All ER 5 (parties deliberately submitted themselves to the local law when celebrating their marriage; husband was Polish, wife Italian; void by local law; common law not applicable; marriage null and void in England); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 208. See also *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC; *Kalinowska v Kalinowski (Balentine intervening)* (1964) 108 Sol Jo 260; *Wicken v Wicken* [1999] Fam 224, [1999] 2 WLR 1166; *Chief Adjudication Officer v Bath* [2000] 1 FCR 419, [2000] 1 FLR 8, CA.

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7. Presumption from cohabitation after ceremony.

Where there is evidence of a ceremony of marriage having been conducted, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary¹, even though it may be necessary to presume the granting of a special licence², or the death of a former spouse³. Where the formalities are challenged, there is an equally strong presumption that they have been properly observed⁴. While this presumption as to validity of marriage may be rebutted, the evidence in rebuttal must be firm and clear⁵. In most cases a certificate of marriage will be available, and this will usually suffice to prove the marriage⁶. The principle which emerges from the corpus of legislation regulating the formation of marriages in England and Wales, and from the reported cases arising from it, is that, if a ceremony of marriage has taken place which, as a ceremony, would be sufficient to constitute a valid marriage, the courts will hold the marriage valid unless constrained by express statutory provision to hold otherwise⁷.

1 *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC. The presumption is not rendered inapplicable by cohabitation having also preceded the marriage: *Hill v Hill* [1959] 1 All ER 281, [1959] 1 WLR 127, PC. Where there has been a ceremony of marriage followed by cohabitation, the presumption of a valid marriage cannot be rebutted merely by showing that it could not be valid according to the *lex loci celebrationis*: *Re Shephard*, *George v Thyer* [1904] 1 Ch 456; *Goldstone v Smith (otherwise Goldstone)* (1922) 127 LT 32 (Jewish ceremony performed in Russia believed valid by others present; husband represented himself as married, person who performed ceremony presumed to have been an authorised person); *Spivack v Spivack* (1930) 99 LJP 52 (similar case); *McCarthy v Hastings* [1933] NI 100, HL (evidence of ceremony; cohabitation and reputation as man and wife); *Russell v A-G* [1949] P 391 (marriage at Roman Catholic church; it was alleged that 21 days had not elapsed between the date of notice of the marriage and the ceremony and that no registrar was present; validity of the marriage was to be presumed in the absence of decisive evidence to the contrary, even though it might be necessary to presume the grant of a special licence); *Taylor v Taylor* [1967] P 25, [1965] 1 All ER 872; cf *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301, [1957] 2 All ER 563, CA. See also *Chief Adjudication Officer v Bath* [2000] 1 FCR 419, [2000] 1 FLR 8, CA (where a man and a woman went through a ceremony of marriage at a place of worship which, unbeknown to them, was not registered under the Marriage Act 1949 and thereafter lived together as man and wife for 37 years; valid marriage presumed; s 49 (see PARA 330) did not render the marriage void since the parties were not aware of non-compliance with formal requirements); *A-M v A-M (divorce: jurisdiction: validity of marriage)* [2001] 2 FLR 6 (polygamous Islamic marriage).

2 *Piers v Piers* (1849) 2 HL Cas 331 (marriage solemnised by a clergyman in a private house, as if by special licence; no such licence, record of it or registration of the marriage could be found; 30 years later the bishop testified his belief that he had not granted the licence; but it might have been granted by his predecessor, who died a year and a half before the marriage; the grant of a special licence was to be presumed), followed in *Hill v Hill* [1959] 1 All ER 281, [1959] 1 WLR 127, PC; *R v Manwaring* (1856) Dears & B 132 (due registration of dissenting chapel presumed); *Sichel v Lambert* (1864) 15 CBNS 781 (evidence of solemnisation in a Roman Catholic church, followed by cohabitation; it was to be presumed that the chapel was duly registered, and that a registrar of marriages was present). See also *Lauderdale Peerage* (1885) 10 App Cas 692, HL; *Sastry Velaider Aronegary v Sembecutty Vaigalie* (1881) 6 App Cas 364.

3 *Tweney v Tweney* [1946] P 180, [1946] 1 All ER 564 (wife previously married but husband deserted her and was never heard of again, although exhaustive inquiries were made; after a lapse of ten years wife married again and described herself as a widow; she then sought a decree of dissolution of the second marriage on the ground of desertion; it was held that the court had jurisdiction to dissolve the second marriage as, it having been in proper form and duly consummated, it was to be deemed to be a valid marriage unless the contrary be proved); but see *Re Peete, Peete v Crompton* [1952] 2 All ER 599 (where it was held that the court could not accept the marriage certificate as proof of a valid marriage where the wife had described herself as a widow on hearsay evidence alone as to the death of her first husband); cf *Re Watkins, Watkins v Watkins* [1953] 2 All ER 1113 (where the facts were similar, but the lapse of time between the husband's disappearance and the wife's

remarriage was much longer; it was held that on the facts a jury would be entitled to infer the death of the husband before the remarriage, and that, in the absence of evidence to the contrary, the certificate of the remarriage should be accepted as proof of its validity). See also *Ward v Ward* [1956] CLY 2816, CA (where it was held that the disappearance of the husband for a period of over seven years before the wife's remarriage, notwithstanding efforts made to trace him, entitled the wife to assume that he had died before that ceremony, which was accordingly valid); *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721; *Thompson v Thompson* [1956] P 414, [1956] 1 All ER 603. In *Berzins (otherwise Lilje) v Berzins* [1956] CLY 2817, the petitioner had married in Latvia in 1940, and shortly afterwards her husband was arrested by the occupying forces. A year later all prisoners were released, but the husband could not be traced. In 1947 the petitioner remarried in England. In 1954 she received a letter from Latvia which indicated that the first husband might be alive, and in 1955 a letter which she swore was in his handwriting. On this evidence and having regard to *Chard v Chard (otherwise Northcott)* the second ceremony of marriage was annulled.

4 *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC.

5 *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC. See further PARA 6.

6 See PARA 25; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 906-907.

7 *Collett v Collett* [1968] P 482, [1967] 2 All ER 426.

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8. Domicile of parties.

If a marriage is celebrated in England or Wales between parties of full age¹ and capacity, with the forms and ceremonies required by English law, its validity in England is not affected by the fact that the law of the domicile of either of the parties, being a foreigner, is not complied with as regards the consent of the parents or the observance of any formalities required by that law². It follows that a marriage may be valid in England and Wales and void by the law of the domicile of both or either of the parties³.

Where satisfactory arrangements have been made with any foreign country for the issue, in the case of persons who are subject to the marriage law of that country and propose to marry British subjects in any part of the United Kingdom other than Scotland, of certificates that, after proper notices have been given, no impediment according to the law of that country has been shown to exist to the marriage, Her Majesty may by Order in Council make regulations requiring any person subject to the marriage law of that country who is to be married to a British subject in any part of the United Kingdom other than Scotland to give notice of the fact that he is subject to such law to the person by or in the presence of whom the marriage is to be solemnised, and forbidding any person to whom notice is so given to solemnise the marriage or to allow it to be solemnised until such a certificate is produced to him⁴.

Any person knowingly acting in contravention of, or failing to comply with, any such regulation is guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine⁵.

These provisions do not apply to marriages between two persons professing the Jewish religion solemnised according to the usages of the Jews in the presence of a secretary of a synagogue duly authorised to register such marriages⁶, or of a deputy appointed by that secretary by writing under his hand, and approved by the president for the time being of the London Committee of Deputies of the British Jews by writing under his hand⁷.

1 See PARA 41.

2 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 208 et seq. As to the effect of marriage on the nationality and status of women see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 17 et seq.

3 See note 2.

4 See the Marriage with Foreigners Act 1906 s 2(1); and PARA 128. At the date at which this volume states the law no such order had been made. As to marriages abroad generally see PARA 119 et seq.

5 See the Marriage with Foreigners Act 1906 s 2(2); and PARA 128.

6 Is authorised by the Marriage Act 1949 s 53(c): see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 558.

7 See the Marriage with Foreigners Act 1906 s 2(3); and PARA 128. As to the London Committee of Deputies of the British Jews see **ECCLESIASTICAL LAW** vol 14 PARA 1426.

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9. Polygamous marriages.

A marriage entered into outside England and Wales between parties neither of whom is already married is not void under English law on the ground that it is entered into under a law which permits polygamy¹ and that either party is domiciled in England and Wales². A court in England and Wales is not precluded from granting matrimonial relief³ or making a declaration concerning the validity of a marriage⁴ by reason only that either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person⁵.

1 As to polygamous marriages see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 234 et seq.

2 See the Private International Law (Miscellaneous Provisions) Act 1995 s 5(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 240. This does not affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be so determined in accordance with the rules of private international law: s 5(2).

3 For these purposes 'matrimonial relief' means: (1) any decree under the Matrimonial Causes Act 1973 Pt I (ss 1-20) (see PARA 319 et seq); (2) a financial provision order under s 27 (see PARA 542 et seq); (3) an order under s 35 (see PARA 700) altering a maintenance agreement; (4) an order under any provision of the Matrimonial Causes Act 1973 which confers a power exercisable in connection with, or in connection with proceedings for, such decree or order as is mentioned in heads (1)-(3); (5) an order under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (see PARA 530 et seq); (6) an order under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) (see PARA 553 et seq); Matrimonial Causes Act 1973 s 47(2) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 Sch 2 para 39; the Matrimonial and Family Proceedings Act 1984 Sch 1).

4 For these purposes, 'declaration concerning the validity of a marriage' means any declaration under the Family Law Act 1986 Pt III (ss 55-62) (see PARA 1000 et seq) involving a determination as to the validity of a marriage: Matrimonial Causes Act 1973 s 47(3) (substituted by the Family Law Act 1986 Sch 1 para 14).

5 Matrimonial Causes Act 1973 s 47(1) (amended by the Private International Law (Miscellaneous Provisions) Act 1995 s 8(2), Schedule para 2(3)(a)). The Matrimonial Causes Act 1973 s 47 (as originally enacted) abolished the rule in *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130, under which a party to a polygamous marriage was not entitled to matrimonial relief or to a declaration as to the validity of marriage in the English courts.

Provision may be made by rules of court: (1) for requiring notice of proceedings brought by virtue of the Matrimonial Causes Act 1973 s 47 to be served on any additional spouse of a party to the marriage in question; and (2) for conferring on any such additional spouse the right to be heard in the proceedings, in such cases as may be specified in the rules: s 47(4) (substituted by the Private International Law (Miscellaneous Provisions) Act 1995 Schedule para 2(3)(b)). As to proceedings in respect of polygamous marriages see PARA 1010.

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10. Bigamous marriages.

Bigamy, that is to say having two living spouses, is forbidden by English law, both civil¹ and criminal². A marriage will be declared null and void where one or both of the spouses was or were, at the time of the marriage the subject of the suit, party or parties to a prior valid and subsisting marriage to another person or persons, as the case may be³.

1 See the Matrimonial Causes Act 1973 s 11(b); and PARA 326.

2 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 828 et seq.

3 *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; *Chard v Chard* [1956] P 259, [1955] 3 All ER 721 (petitioner entitled to decree of nullity on the ground of his own bigamy); *Bennett v Bennett* (1961) 105 Sol Jo 885, CA (husband, then aged 40, disappeared in 1945; wife 'remarried' in 1950; it was held, on the balance of probabilities, that the first husband was alive in 1950, and so the second marriage was void for bigamy); *Kassim (otherwise Widmann) v Kassim (otherwise Hassim)* [1962] P 224, [1962] 3 All ER 426 (marriage in July 1945 by native ceremony in Southern Rhodesia; further ceremony in same month in accordance with the Southern Rhodesian Marriage Act; later the husband married another woman in South Africa, first by native custom, and secondly by Sunni law; in June 1952 the husband went through a ceremony of marriage with a third woman in Kensington in accordance with the rites of the Roman Catholic Church; on proof of the marriage of July 1945 under the Southern Rhodesia Marriage Act, and assuming that such marriage was polygamous and not monogamous, it was held that the marriage in June 1952 was bigamous and void: decree of nullity pronounced), applying *Hayes (falsely called Watts) v Watts* (1819) 3 Phillim 43; *Bowzer v Ricketts (falsely calling herself Bowzer)* (1795) 1 Hag Con 213; and *Bruce v Burke* (1825) 2 Add 471; cf *Re Kirby and Watson's Marriage* (1977) 3 Fam LR 11, 318 (no presumption that woman of 37 dead after eight years' absence). As to the standard of proof where an issue arises as to the authenticity and effect of a document purporting to dissolve an earlier marriage see *Wicken v Wicken* [1999] Fam 224, [1999] 2 WLR 1166.

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11. Sham marriages and civil partnerships.

A marriage or civil partnership is a sham marriage or civil partnership if a least one of the parties to it is neither a British citizen¹ nor a national of another EEA state² and it is entered into for the purpose or effect of avoiding United Kingdom immigration law or the immigration rules³.

If a superintendant registrar to whom notice of marriage has been given⁴, a registration authority to whom a notice of proposed civil partnership has been given⁵, or any other person who has attested a declaration accompanying such a notice⁶, has reasonable grounds for suspecting that the marriage or civil partnership will be a sham marriage or civil partnership, the person concerned must report his suspicion to the Secretary of State without delay⁷.

1 As to the meaning of 'British citizen' see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 23 et seq.

2 'EEA state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)); adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)), as it has effect for the time being: Immigration and Asylum Act 1999 s 167(1).

3 Immigration and Asylum Act 1999 ss 24(5), 24A(5) (s 24A added by the Civil Partnership Act 2004 Sch 27 para 162). 'Immigration rules' has the same meaning as in the Immigration Act 1971 (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 83): Immigration and Asylum Act 1999 s 167(2). Such a marriage or civil partnership is a sham marriage or civil partnership whether it is also void or not: Immigration and Asylum Act 1999 ss 24(5), 24A(5) (s 24A(5) as so added). As to void marriages and civil partnerships generally see PARA 326 et seq.

4 Ie under the Marriage Act 1949 s 27 (see PARA 87).

5 Ie under the Civil Partnership Act 2004 s 8 (see PARAS 133, 140).

6 Ie under the Marriage Act 1949 s 28(2) (see PARA 90) or the Civil Partnership Act 2004 s 8 (see PARAS 133, 140).

7 Immigration and Asylum Act 1999 ss 24(1)(a), (3), 24A(1)(a), (3) (s 24A as added: see note 3). Such regulations are to be made, in relation to England and Wales, by the Registrar General for England and Wales with the approval of the Chancellor of the Exchequer: ss 24(4), 24A(4) (s 24A(4) as so added; amended by SI 2008/678). Accordingly, in relation to marriages, a registration officer must: (1) report his suspicions to the Secretary of State by making a report in writing or other permanent form, giving the following information: (a) the name and surname of each party to the marriage; (b) the date of birth and/or age of each party to the marriage; (c) the condition of each party to the marriage; (d) the address (and district of residence) of each party to the marriage; (e) the nationality of each party to the marriage; (f) the date of marriage; (g) the place of marriage; (h) the time of marriage; (i) the nature of evidence produced in respect of name and age, condition and nationality of the parties to the marriage; (j) the reason for making the report; (k) the full name of the registration officer making the report; and (l) the date the report is made; and (2) forward that report to the address specified or, where the Secretary of State has notified the Registrar General of another address to be used in relation to any particular registration district, that address: Immigration and Asylum Act 1999 s 24(3); Reporting of Suspicious Marriages and Registration of Marriages (Miscellaneous Amendments) Regulations 2000, SI 2000/3164, reg 2, Sch 1 (amended by SI 2005/3177). In relation to civil partnerships, a registration officer must: (i) report his suspicions to the Secretary of State by making a report in writing or other permanent form giving the following information: (A) the name and surname of each of the civil partners; (B) the date of birth and/or age of each of the civil partners; (C) the sex of each of the civil partners; (D) the condition of each of the civil partners; (E) the address (and registration authority) of each of the civil partners; (F) the nationality of each of the civil partners; (G) the date of formation of the civil partnership; (H) the place of formation of the civil partnership; (I) the time of the civil partnership; (J) the nature of evidence produced in respect of name and age, condition and nationality of the of the civil partners; (K) the reason for making the report; (L) the full name of the registration officer making the report; (M) the name of the registration authority on whose behalf the report

is being made; and (N) the date the report is made; and (ii) forward that report to the address specified or, where the Secretary of State has notified the Registrar General of another address to be used in relation to any particular registration district, that address: Immigration and Asylum Act 1999 s 24A(3) (as so added); Reporting of Suspicious Civil Partnerships Regulations 2005, SI 2005/3174, reg 2, Sch 1.

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12. Arranged and forced marriages.

An arranged marriage is not invalid as such, although it would be otherwise if the marriage were in consequence of threats to life, limb or liberty or some equally serious threat¹. A forced marriage is similarly not unlawful, but where threats or duress are proven may well be invalid owing to an absence of consent². Provision has been made under civil law to protect persons who have been, or are at risk of being, forced into marriage by the making of forced marriage protection orders³.

1 *Singh v Kaur* (1981) 11 Fam Law 152, CA; *Hirani v Hirani* (1982) 4 FLR 232, CA.

2 See PARA 51.

3 See the Family Law Act 1996 ss 63A-63S; and PARA 723 et seq.

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13. Royal weddings.

Nothing in the Marriage Act 1949 or the Marriage Act 1983 affects any law or custom relating to the marriage of members of the royal family¹.

¹ Marriage Act 1949 s 79(5); Marriage Act 1983 s 12(3). As to the monarch's consent to royal marriages see **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 36.

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14. Statutes confirming invalid marriages.

Numerous statutes, both public and private, have from time to time been passed legalising marriages which were invalid and confirming others of doubtful validity by reason of their having been solemnised in a church or chapel or other place not duly licensed or registered for the solemnisation of marriages, or without the presence of a duly ordained clergyman, or by reason of some other irregularity or informality¹.

¹ The following are the more important Acts which contained provisions of general application in relation to England: 21 Geo 3 c 53 (1780-81) (repealed); the Marriages Confirmation Act 1804 (repealed); the Marriages Confirmation Act 1808 (repealed); 3 Geo 4 c 75 (1822) ss 2-7 (marriages solemnised without consent of parent or guardian) (repealed); 4 Geo 4 c 5 (1823) (licences granted by unauthorised persons) (repealed); the Marriages Confirmation Act 1825 (marriages in churches and chapels erected since 1753) (in part repealed); the Marriage Confirmation Act 1830 s 1 (repealed), s 3 and ss 4, 5 (repealed) (marriages during repair or rebuilding of church or chapel (cf the Marriage Act 1949 ss 18, 19; and PARA 61), marriages in certain newly-built parish churches, in churches or chapels duly consecrated but not authorised, and in chapels where consecration doubtful); the Church Building (Banns and Marriages) Act 1844 s 3 (marriages in certain district chapelries) (repealed); 10 & 11 Vict c 58 (1847) (Quakers' and Jews' marriages) (repealed); the Church Building Act 1851 s 25 (marriages at certain churches without authority before 1851) (repealed); the Places of Worship Registration Act 1855 s 13 (marriages in buildings registered but not certified) (repealed); 24 & 25 Vict c 16 (1861) s 4 (marriages in churches or chapels consecrated but not authorised) (repealed); the Greek Marriages Act 1884 (marriages of members of Greek Church in England) (repealed); the Marriages Validity Act 1886 (repealed); the Marriages Validity Act 1899 (repealed); the Marriages Validity Act 1939 (repealed) (banns published in Scotland or Ireland: see now the Marriage Act 1949 s 13; and PARA 73). In addition numerous other Acts have been passed relating eg to marriages in particular churches or chapels or to marriages in particular places abroad. As to foreign validating Acts cf *Starkowski v A-G* [1954] AC 155, [1953] 2 All ER 1272, HL.

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15. Confirmation by order.

In the case of marriages solemnised in England which appear to him to be invalid or of doubtful validity by reason of some lack of formality, the Lord Chancellor may make an order for the purpose of removing the invalidity or doubt¹. The order may include such supplemental, incidental and consequential provisions, including provisions for relieving from liability ministers who may have solemnised the marriages to which the order relates, as appear to the Lord Chancellor to be necessary or expedient². The draft of every such order must be advertised in such manner as the Lord Chancellor thinks fit, not less than one month before the order is made; and he must consider all objections to the order sent to him in writing during that month, and must, if it appears to him necessary, direct a local inquiry into the validity of any such objections³. The order is subject to special parliamentary procedure⁴.

1 Provisional Order (Marriages) Act 1905 s 1(1) (amended by SI 1949/2393).

2 Marriages Validity (Provisional Orders) Act 1924 s 1 (amended by SI 1949/2393).

3 Provisional Order (Marriages) Act 1905 s 1(2). After the holding of an inquiry the Lord Chancellor must, if requested, give the reasons for his decision: see the Tribunals and Inquiries Act 1992 s 10(1); the Tribunals and Inquiries (Discretionary Inquiries) Order 1975, SI 1975/1379, Schedule para 5; and **JUDICIAL REVIEW** vol 61 (2010) PARA 646.

4 Provisional Order (Marriages) Act 1905 s 1(3) (amended by SI 1949/2393). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq.

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16. Agreements to marry or to form civil partnership not enforceable at law.

An agreement between two persons to marry one another, or an agreement between two persons to register as civil partners of each other¹ or to enter into an overseas relationship² (a 'civil partnership agreement'³), does not have effect as a contract giving rise to legal rights, and no action lies in England and Wales for breach of such an agreement, whatever the law applicable to the agreement⁴.

1 In England and Wales under the Civil Partnership Act 2004 Pt II (ss 1-84), in Scotland under Pt 3 (ss 97-123), in Northern Ireland under Pt 4 (ss 137-209), or outside the United Kingdom under an Order in Council made under Pt 5 Chapter 1 (ss 210-211) (see PARAS 145, 153).

2 As to the meaning of 'overseas relationship' see PARA 19 note 1.

3 Civil Partnership Act 2004 s 73(3).

4 Law Reform (Miscellaneous Provisions) Act 1970 s 1(1); Civil Partnership Act 2004 s 73(1), (2). These provisions have effect in relation to agreements to marry and civil partnership agreements whenever entered into but do not affect any action concerning an agreement to marry commenced before 1 January 1971 (ie the date on which the Law Reform (Miscellaneous Provisions) Act 1970 s 1 was brought into force by virtue of s 7(3)) or any action concerning a civil partnership agreement commenced before 5 December 2005 (ie the date on which the Civil Partnership Act 2004 s 73 was brought into force by virtue of the Civil Partnership Act 2004 (Commencement No 2) Order 2005, SI 2005/3175): see the Law Reform (Miscellaneous Provisions) Act 1970 s 1(2) and the Civil Partnership Act 2004 s 73(4).

For the former law as to the formation of a contract to marry see *Vineall v Veness* (1865) 4 F & F 344 (there must be mutual promises); *Skipp v Kelly* (1926) 42 TLR 258, PC; *Jacobs v Davis* [1917] 2 KB 532; *Cohen v Sellar* [1926] 1 KB 536 (inference of mutual promises from the conduct of the parties, such as the giving of an engagement ring); *Bessela v Stern* (1877) 2 CPD 265, CA; *Harvey v Johnston* (1848) 6 CB 295 (inference drawn from parties' behaviour); *Hutton v Mansell* (1705) 3 Salk 16; *Daniel v Bowles* (1826) 2 CP 553 (behaviour to indicate acceptance of marriage offer); *Cole v Cottingham* (1837) 8 C & P 75 (declaration of intent to third party is not a promise of marriage). As to considerations of public policy under the old law where an action for breach of promise lay see *Wilson v Carnley* [1908] 1 KB 729, CA (where a promise by a married man to marry the plaintiff after the death of his wife was held void); *Robinson v Smith* [1915] 1 KB 711, CA; cf *Fender v St John-Mildmay* [1938] AC 1, sub nom *Fender v Mildmay* [1937] 3 All ER 402, HL (where it was held that the principle did not apply in the case of a promise made after a decree nisi of divorce to marry after the decree had been made absolute). A promise of marriage made in consideration of the promisee permitting the promisor to have sexual intercourse with her was void: *Morton v Fenn* (1783) 3 Doug KB 211. As to the minimum age for marriage and civil partnership see PARA 41.

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(ii) Foreign and Overseas Marriages and Civil Partnerships

17. Marriages outside England and Wales.

A marriage solemnised in the manner provided by the Foreign Marriage Act 1892 in any foreign country or place, by or before a marriage officer¹, between parties of whom at least one is a United Kingdom national, is as valid as if it had been solemnised in the United Kingdom with a due observance of all the forms required by law².

Where the local forms are inapplicable, or where there is insuperable difficulty in complying with them, a marriage is formally valid if celebrated in accordance with the English common law³.

Special provisions apply to marriages in merchant ships⁴; marriages in countries under belligerent occupation⁵; and marriages by chaplains of Her Majesty's forces⁶.

The forms and ceremonies required for marriages in British possessions overseas have been prescribed, in most cases, by local legislation⁷.

Where a marriage is intended to be solemnised or contracted in a part of Her Majesty's dominions⁸ outside the United Kingdom, or in a British protectorate⁹, to which the Marriage of British Subjects (Facilities) Act 1915 has been applied¹⁰, between a British subject resident in that part and a British subject resident in England, Wales, Scotland or Northern Ireland, a certificate for marriage may be issued in England or Wales by a superintendent registrar, or in Scotland or Northern Ireland by a registrar, in the like manner as if the marriage was to be solemnised or contracted under circumstances requiring the issue of such a certificate and as if both such British subjects were resident in England, Wales, Scotland or Northern Ireland¹¹.

1 As to marriage officers see the Foreign Marriage Act 1892 s 11; and PARA 119 et seq.

2 See the Foreign Marriage Act 1892 s 1(1); and PARA 119 et seq.

3 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 211.

4 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 212.

5 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 213.

6 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 214.

7 See eg *Hill v Hill* [1959] 1 All ER 281, [1959] 1 WLR 127, PC (Barbados); *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC (Sri Lanka). As to the validation of marriages contracted in a dependent British territory see the Colonial Marriages Act 1865 s 1; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 208, 210.

8 As to the meaning of 'Her Majesty's dominions' see **COMMONWEALTH** vol 13 (2009) PARA 707.

9 As to the extension of these provisions to protectorates see PARA 114.

10 As to the territories to which the Marriage of British Subjects (Facilities) Act 1915 has been applied see PARA 114.

11 Marriage of British Subjects (Facilities) Act 1915 s 1(1)(b).

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18. Civil partnerships outside England and Wales.

A civil partnership registered in the manner provided by the Civil Partnership Act 2004 in a specified country or territory, by or before a civil partnership officer¹, between parties of whom at least one is a United Kingdom national, is as valid as if it had been registered in the United Kingdom with a due observance of all the forms required by law².

Special provision is made for a civil partnership to be registered in a foreign country or place where one of the proposed civil partners is a member of a part of Her Majesty's forces and is employed in the country or territory³.

1 'Civil partnership officer' means a British Consular officer: Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761. As to the procedure for civil partnerships abroad see PARA 145 et seq.

2 See the Civil Partnership Act 2004 s 210; the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761; and PARAS 145-152.

3 See the Civil Partnership Act 2004 s 211; the Civil Partnership (Armed Forces) Order 2005, SI 2005/3188; and PARAS 153-160.

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19. Overseas relationships treated as civil partnerships.

Two people who have registered an overseas relationship¹ are to be treated as having formed a civil partnership if under the relevant law² they had the capacity to enter into the relationship and met all the necessary requirements³. However, they are not to be treated as having formed a civil partnership if:

- 15 (1) they were not of the same sex under United Kingdom law⁴ at the critical time⁵;
- 16 (2) at the critical time either party was under 16 or would have been within the prohibited degrees of relationship if they had been registered as civil partner in England and Wales⁶; or
- 17 (3) it was manifestly contrary to public policy to recognise the capacity, under the relevant law, of one or both of them to enter into the relationship⁷.

1 'Overseas relationship' means a relationship which is: (1) either a specified relationship or a relationship which meets the general conditions; and (2) is registered, whether before or after 18 November 2004 (ie the day that the Civil Partnership Act 2004 received the Royal Assent), with a responsible authority in a country or territory outside the United Kingdom, by two people: (a) who under the relevant law are of the same sex at the time when they do so; and (b) neither of whom is already a civil partner or lawfully married: s 212(1). 'Specified relationship' means certain relationships in the following countries or territories: Andorra, Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Spain, Sweden, and the United States of America: s 213(1), Sch 20 (Sch 20 amended by SI 2005/3129; SI 2005/3135). The Lord Privy Seal may by order add a relationship, amend the description of a relationship, or omit a relationship from the list of specified relationships: Civil Partnership Act 2004 s 213(2) (amended by SI 2007/2914). The 'general conditions' are that: (i) the relationship may not be entered into if either of the parties is already a party to a relationship of that kind or lawfully married; (ii) the relationship is of indeterminate duration; and (iii) the effect of entering into it is that the parties are treated as a couple either generally or for specified purposes, or treated as married: Civil Partnership Act 2004 s 214. 'Relevant law' means the law of the country or territory where the relationship is registered, including its rules of private international law: s 212(2).

2 As to the relevant law see note 1.

3 Civil Partnership Act 2004 s 215(1). The time when they are to be treated as having formed the civil partnership is the time when the overseas relationship is registered, under the relevant law, as having been entered into: s 215(2). If the overseas relationship is registered under the relevant law as having been entered before that date, the time when they are to be treated as having formed a civil partnership is 5 December 2005 (ie the date on which s 215 was brought into force by SI 2005/3175): Civil Partnership Act 2004 s 215(3). However it will not be so treated, if before 5 December 2005, a dissolution or annulment of the overseas relationship was obtained outside the United Kingdom and the dissolution or annulment would be recognised if the overseas relationship had been treated as a civil partnership at the time of the dissolution or annulment, and s 215(1), (2) will have effect subject to s 215(5): s 215(4). The overseas relationship is not to be treated as having been a civil partnership for the purposes of any provisions except: (1) Schs 7 (see PARA 938 et seq), 11 and 17; (2) such provisions as are specified in an order under s 259; or (3) Chapter 3 so far as necessary under heads (1) and (2): s 215(5). The following provisions have been specified: (a) in the case in the case of a marriage celebrated on or after 5 December 2005, the Marriage Act 1949 s 28A (power to require evidence) (see PARA 91), and Sch 1 (kindred and affinity) (see PARA 35 et seq); (b) in the case of a notice of marriage given on or after 5 December 2005, the Marriage Act 1949 s 27 (notice of marriage) (see PARA 87); (c) the Inheritance (Provision for Family and Dependents) Act 1975 (see PARAS 538-541; and **EXECUTORS AND ADMINISTRATORS**); (d) the Fatal Accidents Act 1976 (see **NEGLIGENCE** vol 78 (2010) PARA 24 et seq); (e) in the case of a bankruptcy where the bankruptcy order was made on or after 5 December 2005: (i) the Insolvency Act 1986 s 283A (bankrupt's home ceasing to form part of estate) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**), s 313 (charge on bankrupt's home) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 401), s 313A (low value home: application for sale, possession or charge) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**), s

332 (saving for bankrupt's home) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 606), s 335A (rights under trusts of land) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 647), s 366 (inquiry into bankrupt's dealings and property) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 307); and (ii) the Insolvency Rules 1986, SI 1986/1925, rr 6.237, 6.237A, 6.237B, 6.237D (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 401); (f) the Children Act 1989 Sch 1 (financial provision for children) (see **CHILDREN AND YOUNG PERSONS**); (g) the Family Law Act 1996 s 33 (occupation orders where application has estate or interest etc or has home rights) (see PARA 292), s 35 (one former spouse or former civil partner with no existing right to occupy) (see PARAS 297-298), s 37 (neither spouse nor civil partner entitled to occupy) (see PARAS 305-306), Sch 7 (transfer of tenancy); and (h) the Civil Partnership Act 2004 ss 9 (power to require evidence of name etc) (see PARA 134), s 65 (contribution by civil partner to property improvement) (see PARA 283), s 68 (applications under s 66 by former civil partners) (see PARA 224), Sch 1 (prohibited degrees of relationship: England and Wales) (see PARA 35 et seq): Civil Partnership (Treatment of Overseas Relationships) Order 2005, SI 2005/3042, art 2.

4 'United Kingdom law' means any enactment or rule of law applying in England and Wales, Scotland and Northern Ireland: Civil Partnership Act 2004 s 216(5).

5 Civil Partnership Act 2004 s 216(1). 'Critical time' means the time determined in accordance with s 215(2) or (3): s 216(5). If a full gender recognition certificate is issued under the Gender Recognition Act 2004 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) to a person who has registered an overseas relationship after the issue of the certificate, the relationship is no longer prevented from being treated as a civil partnership on the ground that, at the critical time, the parties were not of the same sex: Civil Partnership Act 2004 s 216(2). However, this does not apply to an overseas relationship if either of the parties has formed a subsequent civil partnership or lawful marriage: s 216(3). An 'overseas relationship' is within this provision if, at the critical time one of the parties, the first party, was regarded under the relevant law as having changed gender, but was not regarded under United Kingdom law as having done so, and the other party was, under United Kingdom law, of the gender to which the first party had changed under the relevant law: s 216(4).

6 See the Civil Partnership Act 2004 s 217(1), (2). As to the prohibited degrees see Sch 1 Pt I; and PARA 35.

7 See the Civil Partnership Act 2004 s 218.

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20. Recognition of divorces, dissolutions etc outside England and Wales.

The validity of any divorce, dissolution, annulment or judicial or legal separation granted or ordered by a court of civil jurisdiction in any part of the British Islands¹ is to be recognised² throughout the United Kingdom³, although no divorce, dissolution or annulment obtained in any part of the United Kingdom is to be regarded⁴ as effective unless granted by a court of civil jurisdiction⁵. The validity of a divorce, dissolution annulment or separation obtained in a country outside the British Islands is to be recognised⁶ in the United Kingdom if, and only if, it is entitled to recognition by virtue of the relevant statutory provisions governing the recognition of overseas divorces, dissolutions etc⁷ or any other enactment⁸.

1 As to the meaning of 'British Islands' see **STATUTES** vol 44(1) (Reissue) PARA 1383.

2 Ie subject to the Family Law Act 1986 s 51; the Civil Partnership Act 2004 ss 236, 237(2); and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104, reg 2(4), (5) (refusal of recognition): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 259.

3 See the Family Law Act 1986 s 44(2); the Civil Partnership Act 2004 s 233(2); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 253.

4 Ie, in the case of marriage, subject to the Family Law Act 1986 s 52(4), (5)(a) (for which there are no corresponding civil partnership provisions): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 253.

5 See the Family Law Act 1986 s 44(1); the Civil Partnership Act 2004 s 233(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 253.

6 Ie subject to the Family Law Act 1986 ss 45(2), 51, 52; the Civil Partnership Act 2004 ss 233(3), (4), 234(2), (3), 236; and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104, reg 2(4), (5) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 254, 259).

7 Ie by virtue of the Family Law Act 1986 s 46 and the Civil Partnership Act 2004 s 235 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 255, 256), the Family Law Act 1986 s 47 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104, regs 4, 5(1) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 255, 256), the Family Law Act 1986 s 48 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104, reg 6(1)-(3) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 255) and the Family Law Act 1986 s 49 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104, reg 2(1)-(6) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 257).

8 See the Family Law Act 1986 s 45(1); the Civil Partnership Act 2004 s 234(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 254. The Family Law Act 1986 s 45(1) does not apply to an overseas divorce, annulment or legal separation as regards which provision as to recognition is made by EC Council Regulation 2201/2003 (OJ L160, 23.12.2003, pp 9-11, 13) arts 21-27, 41(1), 42(1) (see **CONFLICT OF LAWS**): see the Family Law Act 1986 s 45(2); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 254.

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(iii) Proof

21. Marriage after banns or by common licence.

Where any marriage has been solemnised:

- 18 (1) after the publication of banns of matrimony¹, it is not necessary, in support of the marriage, to give any proof of the residence of the parties or either of them in any parish² or other ecclesiastical district³ in which the banns were published⁴;
- 19 (2) in the usual place of worship of the parties or one of them, it is not necessary, in support of the marriage, to give any proof of the actual enrolment of the parties or of one of them on the church electoral roll⁵ of the area in which the parish church or authorised chapel in which the marriage was solemnised is situated⁶; and
- 20 (3) on the authority of a common licence⁷, it is not necessary, in support of the marriage, to give any proof that the usual place of residence of one of the parties was for 15 days immediately before the grant of the licence in the parish or other ecclesiastical district in which the marriage was solemnised⁸,

and nor is any evidence to be given to prove the contrary in any proceedings touching the validity of such a marriage⁹.

1 As to banns see PARAS 58, 68.

2 As to the meaning of 'parish' see PARA 59 note 8.

3 For the purposes of the Marriage Act 1949, 'ecclesiastical district', in relation to a district other than a parish, means a district specified in a licence granted under the Marriage Act 1949 s 20 (see PARA 62), a chapelry or an extra-parochial place: s 78(1).

4 Marriage Act 1949 s 24(1). Where a marriage has been solemnised in accordance with the Church of England Marriage Measure 2008 s 1(1), (2) (see PARA 59), it will not be necessary in support of the marriage to give any proof that either party had a qualifying connection with the parish in which the marriage was solemnised and no evidence will be given to prove the contrary in any proceedings touching the validity of the marriage: s 4(2).

5 For these purposes, 'church electoral roll' means, in England, a church electoral roll provision for which is made in the Church Representation Rules contained in the Synodical Government Measure 1969 Sch 3 (Marriage Act 1949 s 72(4)), and, in Wales and Monmouthshire, an electoral roll of a parish kept in accordance with the constitution and regulations of the Church in Wales for the time being in force (Marriage (Wales and Monmouthshire) Act 1962 s 1(2)). As to church electoral rolls generally see **ECCLESIASTICAL LAW** vol 14 PARA 591 et seq.

6 Marriage Act 1949 s 72(3). Section 72 extends to Wales and Monmouthshire.

7 As to common licences see PARAS 58, 76 et seq.

8 Marriage Act 1949 s 24(2).

9 Marriage Act 1949 ss 24(1), (2), 72(3). See also *Bodman v Bodman (otherwise Perry)* (1913) 108 LT 383; *Nicholson v Squire* (1809) 16 Ves 259; *Robinson v Grant* (1811) 18 Ves 289; *Tree v Quin* (1812) 2 Phillim 14; *R v Hind* (1813) Russ & Ry 253, CCR; *Diddear (falsely called Fawcitt, otherwise Savill) v Fawcitt* (1821) 3 Phillim 580; *Ray v Sherwood and Ray* (1836) 1 Curt 193; *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC.

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22. Marriages under certificate of superintendent registrar or licence of Registrar General.

Where a marriage has been solemnised on the authority of a certificate of a superintendent registrar¹, it is not necessary, in support of the marriage, to give any proof:

- 21 (1) that before the marriage either of the parties to the marriage resided, or resided for any period, in the registration district² stated in the notices of marriage to be that of his or her place of residence³;
- 22 (2) that any person whose consent to the marriage was required⁴ had given his consent⁵;
- 23 (3) that the registered building⁶ in which the marriage was solemnised had been certified as required by law as a place of religious worship⁷;
- 24 (4) that that building was the usual place of worship of either of the parties to the marriage⁸;
- 25 (5) that the facts stated in the declaration made⁹ at the time of the notice of marriage were correct¹⁰; or
- 26 (6) that the parties, or one of them, were enrolled in the church electoral roll¹¹,

and nor is any evidence to be given to prove the contrary in any proceedings touching the validity of the marriage¹². Special provision is made in connection with marriages involving persons subject to immigration control¹³.

These provisions also apply, with the appropriate modifications, to a marriage solemnised under the authority of the Registrar General's licence¹⁴ as they apply to a marriage solemnised under the authority of a certificate of a superintendent registrar¹⁵.

1 Ie under the provisions of the Marriage Act 1949 Pt III (ss 26-52): see PARA 54 et seq. 'Superintendent registrar' means a superintendent registrar of births, deaths and marriages: Marriage Act 1949 s 78(1).

2 As to the meaning of 'registration district' see PARA 87 note 4.

3 Marriage Act 1949 s 48(1)(a) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 26).

4 Ie by the Marriage Act 1949 s 3: see PARA 46.

5 Marriage Act 1949 s 48(1)(b).

6 As to the meaning of 'registered building' see PARA 54 note 3.

7 Marriage Act 1949 s 48(1)(c). A marriage solemnised in accordance with the provisions of Pt III in a registered building which has not been certified as required by law as a place of religious worship is as valid as if the building had been so certified: s 48(2).

8 Marriage Act 1949 s 48(1)(d).

9 Ie under the Marriage Act 1949 s 35(1): see PARA 100.

10 Marriage Act 1949 s 48(1)(e).

11 Marriage Act 1949 s 72(3). As to the circumstances in which enrolment is necessary see PARA 100 note 17. As to the meaning of 'church electoral roll' see PARA 21 note 5. As to the application of s 72(3) to Wales see PARA 21 note 6.

12 Marriage Act 1949 ss 48(1), 72(3).

13 In relation to the marriage of a person who is subject to immigration control, the Marriage Act 1949 s 48 has effect as if the list of matters in s 48(1)(a)-(e) (see the text and notes 1-10) included compliance with the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19 (see PARAS 176-177): s 20(2)(b).

14 As to marriages under the authority of the Registrar General's licence see PARA 161 et seq.

15 Marriage (Registrar General's Licence) Act 1970 s 12.

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23. Marriages in naval, military and air force chapels.

Where a marriage has been solemnised in a naval, military or air force chapel¹, it is not necessary, in support of the marriage, to give any proof:

- 27 (1) that the chapel in which the marriage was solemnised was² duly certified, licensed or registered³;
- 28 (2) that either of the parties was a qualified person⁴; or
- 29 (3) in the case of a marriage according to the rites of the Church of England, that the marriage was solemnised in the presence of a clergyman⁵ duly appointed⁶ for the purpose of registering marriages⁷,

and no evidence is to be given to prove the contrary in any proceedings touching the validity of the marriage⁸.

1 le under the Marriage Act 1949 Pt V (ss 68-71): see PARAS 129-130.

2 le in accordance with the Marriage Act 1949 Pt V.

3 Marriage Act 1949 s 71(a).

4 Marriage Act 1949 s 71(b). As to the meaning of 'qualified person' see PARA 129 note 1.

5 'Clergyman' means a clerk in holy orders of the Church of England: Marriage Act 1949 s 78(1).

6 See note 1. As to the appointment of a clergyman for this purpose see PARA 130.

7 Marriage Act 1949 s 71(c).

8 Marriage Act 1949 s 71.

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24. Jewish marriages.

Jewish marriages in England and Wales may be proved in the usual way by the production of the Registrar General's certificate¹. The validity of a Jewish marriage celebrated in a foreign jurisdiction is a question of fact, to be ascertained by evidence², and it is not necessary in order to prove such a marriage to produce a written contract of marriage between the parties³.

1 See PARA 25; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 906-907. As to the duty of the secretary of a synagogue to make quarterly returns of marriages to the superintendent registrar, and as to the duty of the superintendent registrar to make quarterly returns to the Registrar General, see the Marriage Act 1949 ss 57, 58; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 618. It was said in *Prager v Prager and Goodison* (1913) 29 TLR 556 that the secretary should sign the certificate as 'secretary and registrar', but this does not seem to be required by the statutory provisions. As to proof of marriage in matrimonial proceedings see PARA 825 et seq.

2 Such a marriage may be proved by the evidence of an expert in Jewish law, as in the case of foreign marriages: *Lindo v Belisario* (1795) 1 Hag Con 216. See generally **CIVIL PROCEDURE** vol 11 (2009) PARA 1085 et seq.

3 *R v Hammer* [1923] 2 KB 786, CCA (explaining *Horn v Noel* (1807) 1 Camp 61; and overruling *R v Althausen* (1893) 17 Cox CC 630 and *R v Nasillski* (1897) 61 JP 520). See also *Lindo v Belisario* (1795) 1 Hag Con 216; *Goldstone v Goldstone* (1922) 127 LT 32; *Spivack v Spivack* (1930) 46 TLR 243. For an example of the refusal of the Registrar General to grant a licence permitting a Jewish husband to remarry in England following delivery of a get to his wife in Israel see *Berkovits v Grinberg (A-G intervening)* [1995] Fam 142, [1995] 2 All ER 681.

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25. Registers and certificates as evidence.

Registers of marriages in England kept in pursuance of statutory requirements¹, and also certified copies of entries in such registers, are admissible as evidence of marriages, and of the particulars stated in them, without further or other proof, provided, in the case of certified copies from the General Register Office, that they purport to be sealed or stamped with the seal of that office², and in the case of other copies, that they purport to be signed and certified as true copies by the officer to whose custody the register is entrusted³. Certain non-parochial marriage registers and records and certified extracts from them are also admissible in evidence⁴.

1 In accordance with the provisions of the Marriage Act 1949 Pt IV (ss 53-67): see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 558 et seq.

2 See the Marriage Act 1949 s 65(3); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 607.

3 See the Evidence Act 1851 s 14; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 884, 906-907. As to proof of marriage in matrimonial proceedings see PARA 825 et seq.

4 See **CIVIL PROCEDURE** vol 11 (2009) PARA 911 et seq.

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26. Proof of civil partnerships.

Where two people have registered as civil partners of each other in England and Wales, it is not necessary in support of the civil partnership to give any proof:

- 30 (1) that any person whose consent to the civil partnership was required¹ had given his consent²; or
- 31 (2) that before the registration either of the civil partners resided, or resided for any period, in the area stated in the notices of proposed civil partnership³ to be the area of that person's place of residence⁴,

and no evidence is to be given to prove the contrary in any proceedings touching the validity of the civil partnership⁵.

Where a civil partnership involves a person who is subject to immigration control, these provisions have effect as if the matters proof of which it is not necessary to give in support of the civil partnership include compliance with the statutory provisions governing the formation of civil partnerships by such persons⁶.

Any preserved rule of law⁷ and under which in any proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving the existence of a marriage, is to be treated in an equivalent way for the purpose of proving or disproving the existence of a civil partnership⁸.

1e under the Civil Partnership Act 2004 s 4: see PARA 46.

Civil Partnership Act 2004 s 52(1)(a). This is subject to the civil partnership being void if forbidden under s 49(c) (see PARA 327): see s 52(2).

3 As to notices of proposed civil partnership see PARAS 133, 140.

4 Civil Partnership Act 2004 s 52(1)(aa) (added by SI 2005/2000).

5 Civil Partnership Act 2004 s 52(1).

6 Civil Partnership Act 2004 Sch 23 para 7(2)(b). For the relevant statutory provisions see Sch 23 Pt 2; and PARAS 178, 179.

7 1e a rule of law preserved under the Civil Evidence Act 1995 s 7(3) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 827 et seq) or the Criminal Justice Act 2003 s 118(1) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1523 et seq).

8 Civil Partnership Act 2004 s 84(5).

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27. Proof in family proceedings of marriages or overseas relationships celebrated outside England and Wales.

The celebration of a marriage or the formation of an overseas relationship other than a marriage outside England and Wales and its validity under the law of the country where it was celebrated or formed may, in any family proceedings¹ in which the existence and validity of the marriage or relationship are not disputed, be proved by the evidence of one of the parties to it and the production of a document purporting to be a certificate or similar document issued under the law in force in that country evidencing its celebration or formation or a certified copy of an entry in a register of marriages or such relationships kept under the law in force in that country². Where a document so produced is not in English, it must, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit³.

These provisions are not to be construed as precluding the proof of a marriage, or the existence of an overseas relationship which is not a marriage, in accordance with the Evidence (Foreign, Dominion and Colonial Documents) Act 1933⁴ or in any other manner otherwise authorised⁵.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(1), (1A) (r 10.14(1A) added by SI 2005/2922).

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(2) (amended by SI 2005/2922).

4 As to the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 see **CIVIL PROCEDURE** vol 11 (2009) PARAS 922-923.

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(3) (amended by SI 2005/2922).

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28. Marriages under the Foreign Marriage Act 1892.

After a marriage has been solemnised abroad between parties of whom at least one is a United Kingdom national¹, by or before a marriage officer² under the Foreign Marriage Acts 1892³, it is not necessary, in support of the marriage, to give any proof of the residence for the required time⁴ of either of the parties previous to the marriage, or of the consent of any person whose consent was required by law; nor is any evidence to prove the contrary to be given in any legal proceedings touching the validity of the marriage⁵.

Where a marriage purports to have been solemnised and registered under the Foreign Marriage Act 1892 in the official house of a British ambassador or consul, it is not necessary, in support of the marriage, to give any proof of the authority of the marriage officer by or before whom the marriage was solemnised and registered; nor is any evidence to prove his want of authority, whether by reason of his not being a duly authorised marriage officer or of any prohibitions or restrictions or otherwise, to be given in any legal proceeding touching the validity of the marriage⁶.

1 For these purposes, 'United Kingdom national' means a person who is: (1) a British citizen, a British overseas territories citizen, a British Overseas citizen or a British National (Overseas); (2) a British subject under the British Nationality Act 1981; or (3) a British protected person: Foreign Marriage Act 1892 s 1(2). As to British citizens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 23-43. As to British overseas territories citizens and citizenship (formerly known as British dependent territories citizens and citizenship) see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 44-57. As to British national (overseas) status see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 63-65. As to British overseas citizens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 58-62. As to British subjects see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 9, 66-71. As to British protected persons see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 10, 72-76.

2 As to marriage officers see the Foreign Marriage Act 1892 s 11; and PARA 119 et seq.

3 As to such marriages generally see PARA 119 et seq; and as to evidence of such marriages see **CIVIL PROCEDURE** vol 11 (2009) PARA 919.

4 As to the period of residence required see PARAS 120-127.

5 See the Foreign Marriage Act 1892 s 13(1); and PARAS 119-128.

6 See the Foreign Marriage Act 1892 s 13(2) (amended by the Foreign Marriage Act 1947 s 4(2)); and PARAS 119-128.

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29. Civil partnerships registered abroad.

After two people, one of whom is a United Kingdom national¹, have registered as civil partners of each other by or before a civil partnership officer² it is not necessary to prove that they fulfilled any requirement of residence³ that may have been on them, that any necessary consent was obtained⁴, that the civil partnership officer had the authority to register the civil partners or that registration took place within the official house of the civil partnership officer⁵, and no evidence to prove the contrary will be given in any legal proceeding touching the validity of the civil partnership⁶.

No corresponding provision is made in relation to civil partnerships registered abroad by armed forces personnel⁷.

1 'United Kingdom National' means a person who is: (1) a British citizen, a British overseas territories citizen, a British Overseas citizen or a British National (Overseas); (2) a British subject under the British Nationality Act 1981; or (3) a British protected person, within the meaning of the British Nationality Act 1981: Civil Partnership Act 2004 s 245(1). As to these categories of citizenship see PARA 28 note 1.

2 For these purposes 'civil partnership officer' means British Consular officer: Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 1(2). As to such civil partnerships generally see PARAS 145-152.

3 As to requirements of residence see PARA 146.

4 As to necessary consent see the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7; and PARAS 119-128, 149.

5 As to the civil partnership officer's authority see PARA 145.

6 See the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 12; and PARA 151.

7 As to the registration of civil partnerships involving armed forces personnel see PARAS 153-160.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(1) LEGALITY AND VALIDITY/(iii) Proof/30. Colonial and foreign registers.

30. Colonial and foreign registers.

In certain circumstances, and where certain conditions are fulfilled, colonial and foreign registers and certified and examined copies of entries in them are admissible in English courts to prove the facts stated in those registers¹.

¹ See **CIVIL PROCEDURE** vol 11 (2009) PARA 917 et seq. As to proof of marriages solemnised abroad involving members of Her Majesty's armed forces see **CIVIL PROCEDURE** vol 11 (2009) PARA 920; and as to proof of foreign marriages in family proceedings see PARA 27.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(2) CAPACITY TO MARRY OR ENTER INTO CIVIL PARTNERSHIP/31. Legal capacity generally.

(2) CAPACITY TO MARRY OR ENTER INTO CIVIL PARTNERSHIP

31. Legal capacity generally.

Capacity¹ to marry or enter a civil partnership is governed by the law of each party's domicile and, subject to certain exceptions, a marriage or civil partnership is valid as regards capacity if each of the parties has under the law of his or her domicile, capacity to marry the other or enter into a civil partnership with the other².

Generally a marriage or civil partnership is invalid if it is or would be invalid:

- 32 (1) under the law of either party's domicile on the ground that it is within that law's prohibited degrees of consanguinity, affinity, or relationship³;
- 33 (2) under the law of either party's domicile on the ground of the impediment of lack of age⁴;
- 34 (3) under the law of either party's domicile on the ground that he or she is party to a prior subsisting marriage or civil partnership⁵;
- 35 (4) under the law of the petitioner's domicile at the date of the marriage on the ground of either party's incapacity or wilful refusal to consummate a marriage⁶.

The English court will not recognise an incapacity to marry imposed by a foreign law if to do so would be contrary to English public policy⁷.

1 'Capacity' means legal capacity. As to the law governing the consent of the parties and their physical capacity see PARA 41 et seq.

2 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 227.

3 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 228; and PARA 35 et seq.

4 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 229; and PARAS 32, 41.

5 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 230.

6 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 233.

7 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 231.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(2) CAPACITY TO MARRY OR ENTER INTO CIVIL PARTNERSHIP/32. Minimum age.

32. Minimum age.

A marriage solemnised between persons either of whom is under the age of 16 is void¹. Similarly, two people are not eligible to register as civil partners of each other if either of them is under 16².

1 See PARA 41.

2 Civil Partnership Act 2004 s 3(1)(c).

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33. Disabilities.

The law of a party's domicile, which governs his or her capacity to marry or, where applicable, to enter into a civil partnership¹, must not offend against English public policy. Thus, English law does not recognise a disability to marry, imposed by foreign law, of a religious² or penal³ character. Prohibitions against remarriage are sometimes penal, as may be discriminatory racial laws⁴. The court retains a residual discretion not to apply the law of the domicile where it is not proper to do so in the circumstances of the case⁵.

1 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 227 et seq.

2 The marriage of monks and nuns in England would be regarded as legal, if valid in other respects, as in England the disabilities of the clergy were taken away by the Clergy Marriage Act 1548 (repealed) and the Clergy Marriage Act 1551 (repealed). See also *Chetti v Chetti* [1909] P 67 (a Hindu who marries an English woman in England does not carry with him a disability of a personal character imposed by the rules of his caste); *Lepre v Lepre* [1965] P 52, [1963] 2 All ER 49 (attempt by Maltese court to impose incapacity based on creed); following *Gray (otherwise Formosa) v Formosa* [1963] P 259, subnom *Formosa v Formosa* [1962] 3 All ER 419, CA (to like effect); *R v Hammersmith Superintendent Registrar of Marriages, ex p Mir-Anwaruddin* [1917] 1 KB 634, CA (a Muslim can contract a valid monogamous marriage with an English woman, and such a marriage cannot be dissolved by any act of his under the law of his religion), distinguished in *Russ (otherwise Geffers) v Russ* [1964] P 315, [1962] 3 All ER 193, CA, and *Papadopoulos v Papadopoulos* [1930] P 55 (a member of the Greek church can contract a valid marriage in England although in a form not in accordance with the rules of that church). *Maher v Maher* [1951] P 342, [1951] 2 All ER 37 (Muslim divorce by declaration at court in Egypt not recognised in England), was disapproved in *Russ (otherwise Geffers) v Russ* (talak divorce declared in Egypt recognised). See also *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325.

3 See *Scott v A-G* (1886) 11 PD 128; *Warter v Warter* (1890) 15 PD 152; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 231.

4 See *Igra v Igra* [1951] P 404 (no notice of proceedings to respondent out of country, in time of war; not necessarily offensive to English notion of natural justice); cf *MacAlpine v MacAlpine* [1958] P 35, [1957] 3 All ER 134. The status of slavery will not be recognised in this country: *Baindail (otherwise Lawson) v Baindail* [1946] P 122, [1946] 1 All ER 342, CA.

5 *Russ (otherwise Geffers) v Russ* [1964] P 315, [1962] 3 All ER 193, CA; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85, [1962] 3 All ER 873; cf *Re Langley's Settlement Trusts, Lloyds Bank Ltd v Langley* [1962] Ch 541, [1961] 3 All ER 803, CA (status of 'incompetency' under Californian law not given effect to in regard to an English settlement). See also *Gray (otherwise Formosa) v Formosa* [1963] P 259, sub nom *Formosa v Formosa* [1962] 3 All ER 419, CA; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 231.

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34. Remarriage and entering into a new civil partnership.

Where a decree of divorce¹ has been made absolute or a conditional order for the dissolution of a civil partnership has been made final², and the time for appealing from the decree nisi or conditional order has expired without an appeal having been brought³, or an appeal has been brought but has been dismissed, either party to the marriage or civil partnership may marry again or enter into a civil partnership⁴. A decree nisi of nullity of marriage in respect of a voidable marriage, or a nullity order in respect of a voidable civil partnership, operates to annul the marriage or civil partnership only as respects any time after the decree has been made absolute or the order made final, and the marriage or civil partnership is, notwithstanding the decree or order, treated as if it had existed up to that time⁵. In certain cases marriages between persons related by affinity⁶, and civil partnerships between persons within the prohibited degrees⁷ are valid. There is nothing to prevent persons whose marriage or civil partnership has been dissolved from marrying, or re-forming a civil partnership with, one another again⁸.

1 As to the effect of decree of divorce relating only to the later of two celebrations of a marriage which has been twice celebrated see PARAS 756, 879. Where the prohibition is only temporary, it will be recognised in England: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 260.

2 As to the conditional and final order for the dissolution of a civil partnership see PARA 863 et seq.

3 See PARA 883.

4 A ceremony gone through before these requirements are fulfilled is void: see *Chichester v Mure (falsely called Chichester)* (1863) 3 Sw & Tr 223; *Rogers (otherwise Briscoe, falsely called Halmshaw) v Halmshaw* (1864) 3 Sw & Tr 509.

5 See the Matrimonial Causes Act 1973 s 16; the Civil Partnership Act 2004 s 37(3); and PARA 320. The right to remarry or enter into a civil partnership after a decree or order of nullity in the case of a void marriage or civil partnership does not depend so much on any statute as on the effect of the decree or order which declares the marriage or civil partnership to have been and to be absolutely null and void to all intents and purposes in the law whatsoever: *Lewis (falsely called Hayward) v Hayward* (1866) 35 LJP & M 105, HL; *B (otherwise A) v B* (1891) 27 LR Ir 587; *Newbould v A-G* [1931] P 75. A decree or order is not strictly necessary in the case of a void marriage or civil partnership: see *De Reneville v De Reneville* [1948] P 100, [1948] 1 All ER 56, CA per Lord Greene MR. As to the preservation of the legitimacy of children of voidable marriages see PARA 325.

6 See PARA 37.

7 See PARA 39.

8 *Fendall (otherwise Goldsmid) v Goldsmid* (1877) 2 PD 263.

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(3) PROHIBITED DEGREES OF RELATIONSHIP

35. Marriage and civil partnership within the prohibited degrees.

A marriage solemnised, or a civil partnership celebrated, between persons within the prohibited degrees of relationship is prohibited and is, in general, void¹. In reference to the prohibited degrees, relationship by the half-blood prohibits equally with relationship by the whole blood², and illegitimate equally with legitimate relationship³. It has been held that a sexual relationship without an actual and legal marriage does not constitute affinity⁴. The law of England with respect to the prohibited degrees of relationship affects all persons domiciled⁵ in England or Wales, including Jews⁶, Quakers⁷ and Roman Catholics⁸, wherever the solemnisation or celebration may take place⁹. If, however, the law of the domicile of each of the parties is complied with in this respect¹⁰, the marriage or civil partnership will be recognised as valid, even if it is within the prohibited degrees according to English law¹¹.

1 See PARAS 36, 38 (absolute prohibitions) and PARAS 37, 39 (conditional prohibitions). The Civil Partnership Act 2004 s 3(1)(d) provides that two people are not eligible to register as civil partners of each other if they are within prohibited degrees of relationship. See also the Matrimonial Causes Act 1973 s 11(a)(i); PARA 326; and *Re Wood, ex p Naden* (1874) 9 Ch App 670.

The prohibited degrees of relationship were formerly recognised in 28 Hen 8 c 7 (1536) s 7; the Ecclesiastical Licences Act 1536 s 2; the Marriage Act 1540; the Act of Supremacy 1558 s 3. The two former statutes, although repealed by 1 & 2 Phil & Mar c 8 (1554) ss 16, 17, may be referred to in order to explain the Marriage Act 1540, which was confirmed by the Act of Supremacy 1558 s 11: see *R v Chadwick* (1847) 11 QB 173; *Brook v Brook* (1861) 9 HL Cas 193; *Re Phillips*, *Re Howard*, *Charter v Ferguson* [1919] 1 Ch 128.

2 See the Marriage Act 1949 s 78(1); and PARA 36; *R v Brighton Inhabitants* (1861) 1 B & S 447 (marriage with daughter of half-sister of deceased wife); *Re Mette*, *Mette v Mette* (1859) 28 LJP & M 117 (half-sister of deceased wife).

3 *R v Brighton Inhabitants* (1861) 1 B & S 447; *Blackmore and Thorp v Brider* (1816) 2 Phillim 359; *R v Chadwick*, *R v St Giles-in-the-Fields Inhabitants* (1847) 11 QB 173 at 205, approved in *Brook v Brook* (1861) 9 HL Cas 193; *Restall (otherwise Love) v Restall* (1929) 45 TLR 518.

4 *Wing v Taylor (falsely calling herself Wing)* (1861) 30 LJPM & A 258.

5 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

6 See *Re De Wilton*, *De Wilton v Montefiore* [1900] 2 Ch 481 (where a Jewish man and his niece, both domiciled in England, went through a form of civil marriage and afterwards a marriage according to the usages of the Jews, at Wiesbaden, and also subsequently at Paris, and it was held that the marriage was void, although it would have been valid according to the local law and also according to Jewish law). The usages of the Jews permit marriages between a man and his deceased wife's sister or deceased wife's niece, or between a man and his niece or deceased nephew's wife. As to the solemnisation under superintendent registrar's certificate of marriages between persons professing the Jewish religion according to the usages of the Jews see PARA 118.

7 As to the solemnisation under superintendent registrar's certificate of marriages according to the usages of the Society of Friends see PARA 116.

8 *Peal v Peal* [1931] P 97 (marriage of nephew and aunt in India; special dispensation had been obtained; marriage nevertheless void).

9 *Re De Wilton*, *De Wilton v Montefiore* [1900] 2 Ch 481; *Brook v Brook* (1861) 9 HL Cas 193 (marriage with deceased wife's sister in Denmark); *Fenton v Livingstone* (1859) 3 Macq 497.

10 As to capacity to marry under the law of each party's ante-nuptial domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 227 et seq.

11 *Re Bozzelli's Settlement, Husey-Hunt v Bozzelli* [1902] 1 Ch 751; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85, [1962] 3 All ER 873. Cf the Marriage (Enabling) Act 1960 s 1(3) (marriages invalid under the law of domicile); and PARA 37.

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36. Marriage absolutely prohibited.

A person may not marry his adoptive child, adoptive parent, child, former adoptive child, former adoptive parent, grandparent, grandchild, parent, parent's sibling¹, sibling, or sibling's child².

A marriage solemnised between any such persons is void³.

1 For these purposes, 'sibling' means a brother, sister, half-brother or half-sister (Marriage Act 1949 Sch 1 para 1(2) (Sch 1 para 1 substituted by the Civil Partnership Act 2004 Sch 27 para 17)); 'sister' and 'brother' include sister and brother of the half-blood (Marriage Act 1949 s 78(1)).

2 Marriage Act 1949 Sch 1 para 1(1) (as substituted: see note 1). See PARA 326.

3 Marriage Act 1949 s 1(1) (substituted by the Civil Partnership Act 2004 Sch 27 para 13).

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37. Marriage conditionally prohibited.

A person may not marry a child of a former civil partner, a child of a former spouse, a former civil partner of a grandparent, a former civil partner of a parent, a former spouse of a grandparent, a former spouse of a parent, a grandchild of a former civil partner, or a grandchild of a former spouse¹.

A marriage solemnised between any such persons is, in general, void².

However, any such marriage is not void by reason only of affinity if both the parties to the marriage have attained the age of 21 at the time of the marriage and the younger party has not at any time before attaining the age of 18 been a child of the family³ in relation to the other party⁴.

No marriage contracted, whether in or out of Great Britain, between a man and a woman who is the sister, aunt or niece of a former wife of his, whether living or not, or who was formerly the wife of his brother, uncle or nephew, whether living or not, is, by reason of that relationship, void or voidable under any enactment or rule of law applying to Great Britain as a marriage between persons within the prohibited degrees of affinity⁵; but a marriage is not so validated if either party to it is at the time of the marriage domiciled⁶ in a country outside Great Britain and under the law of that country there cannot be a valid marriage between the parties⁷.

1 Marriage Act 1949 Sch 1 para 2 (added by the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 para 8; substituted by the Civil Partnership Act 2004 Sch 27 para 17).

2 Marriage Act 1949 s 1(2) (amended by the Civil Partnership Act 2004 Sch 27 para 17).

3 For the purposes of the Marriage Act 1949, 'child of the family', in relation to any person, means a child who has lived in the same household as that person and been treated by that person as a child of his family: s 78(1) (amended by the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 para 7). For the purposes of the Marriage Act 1949, 'child' means a person under the age of 18: Marriage Act 1949 s 78(1) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 10(a)).

4 Marriage Act 1949 s 1(3) (added by the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 para 2).

5 Marriage (Enabling) Act 1960 s 1(1). In s 1(1) words of kinship apply equally to kin of the whole or of the half blood: s 1(2).

6 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

7 Marriage (Enabling) Act 1960 s 1(3).

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38. Civil partnership absolutely prohibited.

A person may not enter into a civil partnership with his adoptive child¹, adoptive parent, child, former adoptive child, former adoptive parent, grandparent, grandchild, parent, parent's sibling², sibling, or sibling's child³.

1 For the purposes of the Civil Partnership Act 2004, 'child', except where used to express a relationship, means a person who is under 18: s 4(5).

2 For these purposes, 'sibling' means a brother, sister, half-brother or half-sister: Civil Partnership Act 2004 Sch 1 para 1(2).

3 Civil Partnership Act 2004 s 3(1)(d), Sch 1 para 1(1).

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39. Civil partnership conditionally prohibited.

A person may not enter into a civil partnership with a child¹ of a former civil partner, a child of a former spouse, a former civil partner of a grandparent, a former civil partner of a parent, a former spouse of a grandparent, a former spouse of a parent, a grandchild of a former civil partner or a grandchild of a former spouse unless both of them have reached 21 at the time when they register as civil partners of each other and the younger has not at any time before reaching 18 been a child of the family² in relation to the other³.

A person may not enter into a civil partnership with the former civil partner or spouse of their child unless the child and the child's other parent are dead; may not enter into a civil partnership with the parent of a former civil partner unless the former civil partner, and the former civil partner's other parent are dead; and may not enter into a civil partnership with the parent of a former spouse unless the former spouse and the former spouse's other parent are dead; and in all cases unless both parties have reached 21 at the time when they register as civil partners of each other⁴.

1 As to the meaning of 'child' see PARA 38 note 1.

2 'Child of the family' means, in relation to another person, a person who has lived in the same household as that other person and has been treated by that other person as a child of his family: Civil Partnership Act 2004 Sch 1 para 2(2).

3 Civil Partnership Act 2004 s 3(1)(d), (2), Sch 1 para 2(1).

4 Civil Partnership Act 2004 Sch 1 para 3.

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40. Saving of dignities and rights.

No right, title, estate or interest, whether in possession or expectancy, and whether vested or contingent, on the date when any of the Acts conferring exemptions from the prohibited degrees of affinity took effect¹, existing in, to or in respect of any dignity, title of honour or property, and nothing lawfully done or omitted, nor any claim by the Crown in respect of death duties due and payable, before that date is prejudicially affected, nor is any will deemed to have been revoked, by reason of any marriage contracted before that date having been rendered valid²; nor is the devolution or distribution of the real or personal estate of any intestate, not a party to the marriage, who on that date was, and until his death continues to be, a person of unsound mind so found by inquisition³ thereby affected⁴.

1 Certain marriages which would formerly have been void as being within prohibited degrees had been legalised before 1960 by earlier Acts: see the Deceased Wife's Sister's Marriage Act 1907 s 1 (which legalised as from 28 August 1907 a marriage, wherever contracted, between a man and his deceased wife's sister), as extended by the Deceased Brother's Widow's Marriage Act 1921 s 1 (which legalised as from 28 July 1921 a marriage, wherever contracted, between a man and his deceased brother's widow), and by the Marriage (Prohibited Degrees of Relationship) Act 1931 s 1 (which legalised as from 31 July 1931 a marriage, wherever contracted, between a man and his deceased wife's brother's daughter, deceased wife's sister's daughter, father's deceased brother's widow, mother's deceased brother's widow, deceased wife's father's sister, deceased wife's mother's sister, brother's deceased son's widow or sister's deceased son's widow). These enactments were repealed by the Marriage Act 1949 Sch 5 Pt I, without affecting the validity of any marriage solemnised before the repeal (see s 79(7)), and were replaced by Sch 1 Pt II (itself repealed and replaced by the Marriage (Enabling) Act 1960; the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 paras 2, 8; and the Civil Partnership Act 2004 Sch 27 para 17): see PARA 37.

2 Deceased Wife's Sister's Marriage Act 1907 s 2; Deceased Brother's Widow's Marriage Act 1921 s 1(4); Marriage (Prohibited Degrees of Relationship) Act 1931 s 1(3). Although those Acts were repealed by the Marriage Act 1949 (see note 1), their effect is preserved by s 79(9). A spes successionis of a person to a share of his brother's estate as next of kin, if he should die intestate, is not an 'interest in expectancy' for this purpose: *Re Green, Green v Meinall* [1911] 2 Ch 275; and see *Re Butler, Joyce v Brew* [1918] 1 IR 394. In *Re Whitfield, Hill v Mathie* [1911] 1 Ch 310, where the income of property was given in trust for a widow until her second marriage, and she married the husband of her deceased sister in 1904, it was held that the effect of the Deceased Wife's Sister's Marriage Act 1907 s 2 was that the income continued to be payable to her notwithstanding the marriage. See also *Re Springfield, Davies v Springfield* (1922) 38 TLR 263 (where the vested interest in remainder under a marriage settlement was held not to be affected by the legalising of the husband's second marriage with his deceased wife's sister); and *Re Crosby's Trusts, Smith v Metherell* (1919) 147 LT Jo 66.

3 Lunacy inquisitions were abolished by the Mental Health Act 1959 s 1 (repealed).

4 See the provisions cited in note 2.

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(4) CONSENT

(i) Consent of Parties

41. Minimum age of consent.

A marriage solemnised between, and a civil partnership registered by, persons either of whom is under the age of 16 is void¹. The age of the parties to a marriage or a civil partnership is in English law a matter of capacity², and the statutory minimum age requirement applies to all persons domiciled in, or who marry persons domiciled in, the United Kingdom, no matter where the marriage was celebrated or the civil partnership formed³; but it is recognised that persons domiciled otherwise than in England and Wales may have a right to marry or enter into a relationship analogous to a civil partnership under the age of 16 by the law applicable to them⁴.

Where a person who has attained the age of 16 but is not yet 18 wishes to marry or enter into a civil partnership, not being a widower or widow, certain prior consents are required⁵.

1 Marriage Act 1949 s 2; Civil Partnership Act 2004 s 3(1)(c). See also the Matrimonial Causes Act 1973 s 11(a)(ii); the Civil Partnership Act 2004 s 49(a); and PARAS 32, 326, 327. Provision as to the minimum age for marriage was first contained in the Age of Marriage Act 1929 (repealed) which applied to marriages solemnised or contracted on or after 10 May 1929, the Act not being retrospective in its operation. Before that date the age at which a person could give consent and marry was 14 in the case of males and 12 in the case of females, and a marriage under the age of consent was not absolutely void, but only voidable by either party on the person under age reaching the age of consent: see Com Dig, Baron and Femme (B5); *Corbets Case* (1482) 7 Co Rep 44a, 2 Bl Com 497; *Kenn's Case* (1606) 7 Co Rep 42b; *Arnold v Earle* (1758) 2 Lee 529; *R v Gordon* (1803) Russ & Ry 48; *Elliott v Gurr* (1812) 2 Phillim 16 at 19. See also the Report of the Committee on the Age of Majority 1967 (Cmnd 3342) 20-22.

2 As to capacity see PARA 31 et seq.

3 See *Pugh v Pugh* [1951] P 482, [1951] 2 All ER 680 (where a marriage which took place in Austria between a man domiciled in England and a woman under 16 domiciled in Hungary, and which was valid under Hungarian and Austrian law, was held to be void under the Age of Marriage Act 1929 (repealed) (cited in note 1)); cf *Vida v Vida* (1961) 105 Sol Jo 913 (where both parties to the marriage were Hungarian nationals). See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 229.

4 See the Domicile and Matrimonial Proceedings Act 1973 s 3(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 55, 229.

5 See the Marriage Act 1949 s 3; Civil Partnership Act 2004 s 4, Sch 2 Pt 1; and PARA 46.

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42. Giving of valid consent.

In order that a valid marriage or civil partnership be celebrated between the parties to it, it is essential that they should consent to marry one another or enter into the civil partnership¹. A marriage or civil partnership is voidable where either party to the marriage or civil partnership did not validly consent to it, whether in consequence of duress², mistake³, unsoundness of mind⁴ or otherwise⁵.

The test to be applied is whether the person in question was capable of understanding the nature of the contract into which he was entering, or whether his mental condition was such that he was incapable of understanding it; and that in order to ascertain the nature of the contract, that a person must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage or civil partnership⁶. There is a strong prima facie presumption that such consent has been given⁷, as the contract is a simple one which does not require a high degree of intelligence to comprehend⁸. The burden of proof on a party attempting to impeach a marriage or civil partnership on the ground of want of consent is heavier than in the case of impeaching, for example, a commercial contract⁹. Consent may be absent because of mental reasons¹⁰, because there has been abuse of or mistake as to the nature or effect of the ceremony, or because of mistake as to the person¹¹. The mental reservations of one or both of the parties to a marriage or civil partnership do not affect its validity¹².

1 *Sullivan v Sullivan (falsely called Oldacre)* (1818) 2 Hag Con 238 (affd sub nom *Sullivan v Oldacre (falsely called Sullivan)* (1819) 3 Phillim 45); *Moss v Moss* [1897] P 263. See also *Browning v Reane* (1812) 2 Phillim 69; *P v S* (1868) 37 LJP & M 80; *Vervaeke v Smith (Messina v A-G intervening)* [1983] 1 AC 145, [1982] 2 All ER 144, HL; cf *R v Immigration Appeal Tribunal, ex p Bhatia* [1985] Imm AR 39. Although these decisions and the decisions cited in notes 6-12 pre-date the concept of civil partnerships and are concerned only with consent to marry, the Civil Partnership Act 2004 confers rights on civil partners which in all practicable respects are analogous to those enjoyed by married persons, and it is reasonable to infer that they must now apply in relation to civil partnerships. See further **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 232.

2 See PARA 43.

3 See PARA 44.

4 See PARA 45.

5 See the Matrimonial Causes Act 1973 s 12(c); the Civil Partnerships Act 2004 s 50(1)(a); and PARA 331.

6 See *Hill v Hill* [1959] 1 All ER 281, [1959] 1 WLR 127, PC, approving the formulation of the test laid down in *Re Park, Park v Park* [1954] P 112, [1953] 2 All ER 1411, CA. Deaf and dumb persons may show valid consent by signs, provided that they sufficiently understand the nature of the contract: *Harrod v Harrod* (1854) 1 K & J 4.

7 *Cooper v Crane* [1891] P 369.

8 *Durham v Durham* (1885) 10 PD 80; *Re Spier, Spier and Spier v Bengen (otherwise Spier) and Mason* [1947] WN 46; *Re Park, Park v Park* [1954] P 89, [1953] 2 All ER 408 (where the cases are reviewed); affd [1954] P 112, [1953] 2 All ER 1411, CA.

9 *Swift v Kelly* (1835) 3 Knapp 257, PC; *Scott (falsely called Sebright) v Sebright* (1886) 12 PD 21; cf *Re Spier, Spier and Spier v Bengen (otherwise Spier) and Mason* [1947] WN 46. The presumption is always that the marriage or civil partnership is valid: *Russell v A-G* [1949] P 391; *Wilkinson v Payne* (1791) 4 Term Rep 468; *Cresswell v Cosins* (1815) 2 Phillim 281; *Sullivan v Oldacre (falsely called Sullivan)* (1819) 3 Phillim 45; *Miles v Chilton (falsely called Miles)* (1849) 1 Rob Eccl 684; *Harrod v Harrod* (1854) 1 K & J 4. See also *Re Peete, Peete v*

Crompton [1952] 2 All ER 599; *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC; *Singh v Singh* [1971] P 226, [1971] 2 All ER 828, CA; *H v H* [1954] P 258, [1953] 2 All ER 1229; *Szechter (otherwise Karsov) v Szechter* [1971] P 286, [1970] 3 All ER 905.

10 See PARAS 45, 332.

11 See PARA 44. If a marriage is otherwise valid, the fact that a stipulation for a perfect ecclesiastical marriage with two witnesses is not complied with is immaterial: *Ussher v Ussher* [1912] 2 IR 445; cf *Gordon (otherwise Greene) v Gordon* [1948] NI 174.

12 *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; *Bell v Graham* (1859) 13 Moo PCC 242; cf *Dysart Peerage Case* (1881) 6 App Cas 489, HL; *M'Adam v Walker* (1813) 1 Dow 148, HL; *Morgan v Morgan (otherwise Ransom)* [1959] P 92, [1959] 1 All ER 539.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(4) CONSENT/ (i) Consent of Parties/43. Duress and intoxication.

43. Duress and intoxication.

Fraudulent misrepresentation or concealment does not of itself affect the validity of a marriage or civil partnership to which the parties freely consented with a knowledge of the nature of the contract¹. If, however, a person is induced to go through a ceremony of marriage or civil partnership by threats or duress², or in a state of intoxication³, and without any real consent, it is invalid. In all such cases the test of validity is whether there was any real consent⁴.

1 *Moss v Moss* [1897] P 263 (where the wife, who was pregnant by another man at the time of the marriage, deliberately deceived the husband as to her condition and previous conduct, but it was held that that was no ground for questioning the validity of the marriage); *Templeton v Tyree* (1872) LR 2 P & D 420; *Field's Marriage Annuling Bill* (1848) 2 HL Cas 48; *Sullivan v Sullivan (falsely called Oldacre)* (1818) 2 Hag Con 238; cf *Lang v Lang* 1921 SC 44, Ct of Sess. Although these decisions and the decisions cited in notes 2-4 pre-date the concept of civil partnerships and are concerned only with consent to marry, the Civil Partnership Act 2004 confers rights on civil partners which in all practicable respects are analogous to those enjoyed by married persons, and it is reasonable to infer that they must now apply in relation to civil partnerships.

2 *Bartlett (falsely called Rice) v Rice* (1894) 72 LT 122 (petitioner, a girl of 16, threatened with a pistol; marriage not consummated; nullity decreed); *Scott (falsely called Sebright) v Sebright* (1886) 12 PD 21 (petitioner, an heiress aged 22, threatened by respondent with bankruptcy and financial ruin; respondent told her marriage only way to avoid exposure; threat to shoot her; separation immediately after the ceremony; marriage not consummated; nullity decreed); *Harford v Morris* (1776) 2 Hag Con 423 (marriage of guardian with his ward, a girl of 12, declared void on the ground of abduction and duress); cf *Cooper v Crane* [1891] P 369 (where there was a threat by the respondent to shoot himself if the petitioner, his cousin, would not marry him, and the licence for the marriage was obtained by a false declaration, the parties separating immediately after the ceremony, and the marriage never being consummated, but it was held that the evidence was insufficient to rebut the presumption of consent from the petitioner having gone through the marriage ceremony and signed the register); and see *Korel v Korel* (1921) Times, 28 May; *Hussein (otherwise Blitz) v Hussein* [1938] P 159, [1938] 2 All ER 344; *Re S's Marriage* (1980) 42 FLR 94, 5 Fam LR 831 (mental oppression constituted duress). In *H v H* [1954] P 258, [1953] 2 All ER 1229, the wife, a Hungarian citizen, intended to marry the husband, a French citizen, but for the sole purpose of acquiring his nationality and being able to flee the country; the fear of danger was held to negative consent and the marriage was held invalid. Cf *Silver (otherwise Kraft) v Silver* [1955] 2 All ER 614, [1955] 1 WLR 728 (where in a similar case in the absence of duress the marriage was held to be valid). See also *Parojcic (otherwise Ivetic) v Parojcic* [1959] 1 All ER 1, [1958] 1 WLR 1280 (girl driven to go through ceremony by fear of father's threats; decree of nullity granted); *Buckland v Buckland (otherwise Camilleri)* [1968] P 296, [1967] 2 All ER 300 (threat of unjust charge of corrupting a minor); *McLarnon v McLarnon* (1968) 112 Sol Jo 419 (wife's parents forced the marriage after husband had lied that wife was pregnant); and *NS v MI* [2006] EWHC 1646 (Fam), [2007] 2 FCR 748, [2007] 1 FLR 444 (British citizen of Pakistani origin; forced into marriage when visiting Pakistan; parents refused to allow her to return to the United Kingdom, and threatened to kill themselves if she did not marry first cousin; decree of nullity granted). It has been held that in order for duress to vitiate an otherwise valid marriage, it must be proved that a party's will has been overborne by genuine and reasonably held fear caused by threat of immediate danger, for which that party is not responsible, to life, limb or liberty: *Szechter (otherwise Karsov) v Szechter* [1971] P 286, [1970] 3 All ER 905. Cf *Singh v Singh* [1971] P 226, [1971] 2 All ER 828, CA (no lack of consent where Sikh girl went through arranged marriage out of obedience to her parents and a proper sense of duty). See also *Singh v Singh* 2005 SLT 749, OH (threats of immediate danger to applicant's liberty caused her will to be overborne and vitiated her consent to marry).

3 *Sullivan v Sullivan (falsely called Oldacre)* (1818) 2 Hag Con 238.

4 See the cases cited in notes 2, 3.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(4) CONSENT/ (i) Consent of Parties/44. Mistake.

44. Mistake.

It is necessary for a valid marriage or civil partnership that the parties should consent to marry one another or enter into a civil partnership with one another¹. If, therefore, there is a mistake as to the person with whom the contract is made, as where A goes through a ceremony of marriage with, or registers as the civil partner of, B, thinking he is marrying or entering into a civil partnership with C, or in the case of a marriage in masquerade, where one party has no knowledge as to who the other may be, the marriage or civil partnership is void². The same is the case where there is a mistake on the part of one of the parties as to the nature of the ceremony, as where a person goes through a ceremony of marriage (or, conceivably, civil partnership) believing it to be merely a ceremony of betrothal³, but it is otherwise if the mistake is only as to the effect of the ceremony⁴. No mistake as to the character or condition of the other party to the marriage or civil partnership will affect its validity⁵.

1 See PARA 42.

2 *R v Millis* (1844) 10 Cl & Fin 534, HL; *Moss v Moss* [1897] P 263; cf *Forster (otherwise Street) v Forster* (1923) 39 TLR 658 (delusions as to own identity); *C v C* [1942] NZLR 356, NZ SC (mistake not as to identity); *Re Marriage of C and D (falsely called C)* (1979) 35 FLR 340, 5 Fam LR 636; and see *Militante v Ogunwomoju* [1993] 2 FCR 355, [1994] Fam Law 17 (woman married man using assumed name and who was deported as an illegal immigrant; on her petition the marriage declared null and void; respondent's fraud going to his identity said to have vitiated woman's consent to the marriage). Although these decisions and the decisions cited in notes 3-5 pre-date the concept of civil partnerships and are concerned only with consent to marry, the Civil Partnership Act 2004 confers rights on civil partners which in all practicable respects are analogous to those enjoyed by married persons, and it is reasonable to infer that they must now apply in relation to civil partnerships.

3 *Ford v Stier* [1896] P 1; *Hall v Hall* (1908) 24 TLR 756; *Valier v Valier (otherwise Davis)* (1925) 133 LT 830; *Kelly (otherwise Hyams) v Kelly* (1932) 49 TLR 99; *Neuman v Neuman (otherwise Greenberg)* (1926) Times, 15 October; *Mehta (otherwise Kohn) v Mehta* [1945] 2 All ER 690. It would seem that a marriage under such a mistake is voidable and may be ratified: see *Valier v Valier (otherwise Davis)* (1925) 133 LT 830; *Vervaeke v Smith (Messina and A-G intervening)* [1983] 1 AC 145, [1982] 2 All ER 144, HL.

4 *Kenward v Kenward* [1951] P 124, [1950] 2 All ER 297, CA (British subject marrying Russian wife in Russia; wife not permitted to leave Russia nor husband allowed to join wife in Russia); *Kassim (otherwise Widmann) v Kassim (otherwise Hassim)* [1962] P 224, [1962] 3 All ER 426 (mistaken belief that the marriage was polygamous).

5 *Wakefield v Mackay* (1807) 1 Hag Con 394. It has been held that even if a man is the victim of a plot to procure a marriage by him with a person in all respects unworthy, the validity of the marriage is not affected, provided that he consents: *Sullivan v Sullivan (falsely called Oldacre)* (1818) 2 Hag Con 238. As to the general presumption that consent has been given see PARA 42; and as to duress see PARA 43.

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45. Unsoundness of mind.

Want of consent may be founded on unsoundness of mind¹. The burden of proving the existence of such a degree of unsoundness of mind at the time of a marriage or civil partnership as to invalidate it is in all cases on the person impugning its validity², everything being presumed in favour of the marriage or civil partnership³. If permanent unsoundness of mind is proved, however, the burden of showing that a marriage or civil partnership took place during a lucid interval lies on the person seeking to uphold its validity⁴. The validity of a marriage or civil partnership is decided by the party's capacity at the actual time of the union and not by his state of mind before or after⁵. The subsequent recovery of a person who was of unsound mind at the relevant time does not affect the question of validity⁶.

1 See the Matrimonial Causes Act 1973 s 12(c); the Civil Partnership Act 2004 s 50(1)(a), (b); and PARAS 331, 332.

2 *Durham v Durham*, *Hunter v Edney* (otherwise *Hunter*), *Cannon v Smalley* (otherwise *Cannon*) (1885) 10 PD 80; *Parker v Parker* (1757) 2 Lee 382; *Browning v Reane* (1812) 2 Phillim 69. See also *A-G v Parnter* (1792) 3 Bro CC 441; *Cochrane v Cochrane* (otherwise *Millamootz*) (1930) Times, 7 June.

3 *Countess of Portsmouth v Earl of Portsmouth* (1828) 1 Hag Ecc 355; *Harrod v Harrod* (1854) 1 K & J 4. Cf PARA 3.

4 *Turner v Meyers* (1808) 1 Hag Con 414.

5 *Parker v Parker* (1757) 2 Lee 382; *Ex p Ferne* (1801) 5 Ves 832; *Ellis v Bowman* (1851) 17 LTOS 10; *Legey v O'Brien* (1834) Milw 325; *Hancock v Peaty* (1867) LR 1 P & D 335; cf *Jackson* (otherwise *Macfarlane*) v *Jackson* [1908] P 308.

6 *Turner v Meyers* (1808) 1 Hag Con 414.

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(ii) Parental Consent

46. Marriage or civil partnership involving person aged under 18.

Where the marriage or civil partnership of a child¹, not being a widower, widow, or surviving civil partner, is intended to be solemnised on the authority of certificates issued by a superintendent registrar² or registered under the procedures for registering civil partners³, the consent⁴ of the following person or persons is required⁵:

- 36 (1) subject to heads (2) to (8), any parent of the child who has parental responsibility⁶ for him, and any guardian⁷ of the child⁸;
- 37 (2) subject to heads (3) to (7) where a special guardianship order⁹ is in force with respect to a child, each of the child's special guardians¹⁰;
- 38 (3) subject to head (5), where a care order¹¹ has effect with respect to the child, the local authority designated in the order, and each parent, guardian or special guardian¹²;
- 39 (4) subject to head (5), where a residence order¹³ has effect with respect to the child, the persons with whom the child lives, or is to live, as a result of the order¹⁴;
- 40 (5) where an adoption agency¹⁵ is authorised to place the child for adoption¹⁶ that agency or, where a care order has effect with respect to the child, the local authority¹⁷ designated in the order¹⁸;
- 41 (6) where a placement order¹⁹ is in force with respect to the child, the appropriate local authority²⁰;
- 42 (7) where a child has been placed for adoption with prospective adopters, the prospective adopters in addition to persons specified in head (5) or (6)²¹;
- 43 (8) where none of heads (2) to (7) applies but a residence order was in force with respect to the child immediately before he reached the age of 16, the persons with whom he lived, or was to live, as a result of the order²².

Nothing in these provisions dispenses with the necessity of obtaining the consent of the High Court to the marriage or registration as a civil partner of a ward of court²³.

1 For these purposes, except where the context otherwise requires, 'child' means a person under the age of 18: Marriage Act 1949 s 78(1) (amended by the Family Law Reform Act 1987 Sch 2 para 10(a)); Civil Partnership Act 2004 s 4(5).

2 I.e. under the Marriage Act 1949 Pt III (ss 26-52): see PARA 87 et seq. For these purposes, except where the context otherwise requires, 'superintendent registrar' means a superintendent registrar of births, deaths and marriages: s 78(1). As to the appointment and duties of superintendent registrars see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 609 et seq.

3 As to the registration of civil partnerships see PARA 132 et seq.

4 Consent need not be express but may be implied (*Hodgkinson v Wilkie* (1975) 1 Hag Con 262; *Smith v Huson (falsely called Smith)* (1811) 1 Phillim 287) and may be expressly retracted (*Hodgkinson v Wilkie* at 265). It does not hold good if the person who gives it dies before the marriage is solemnised or the civil partnership is celebrated: *Ex p Reibey* (1843) 12 LJ Ch 436. A marriage solemnised or a civil partnership celebrated without the requisite consent is nevertheless valid: *R v Birmingham Inhabitants* (1828) 8 B & C 29.

5 Marriage Act 1949 s 3(1) (amended by the Children Act 1975 s 108(1)(a), Sch 3 para 7; the Family Law Reform Act 1987 Sch 2 para 9; the Children Act 1989 s 108(4), (7), Sch 12 para 5(1), Sch 15; the Immigration and Asylum Act 1999 s 169(1), (3), Sch 14 paras 3, 4(a), (b), Sch 16); Civil Partnership Act 2004 Sch 2 para 1. The Marriage Act 1949 s 3(1) applies to marriages intended to be solemnised on the authority of a common licence, with the substitution of references to the ecclesiastical authority by whom the licence was granted for references to the superintendent registrar and with the substitution of a reference to the Master of Faculties for the reference to the Registrar General: s 3(2) (amended by the Adoption and Children Act 2002 Sch 3 para 5). The Dean of the Arches and Auditor, as defined by the Ecclesiastical Jurisdiction Measure 1963 s 3(2)(a) (see **ECCLESIASTICAL LAW** vol 14 PARA 1286) is ex officio the Master of the Faculties: see the Ecclesiastical Jurisdiction Measure 1963 s 13(1); and **ECCLESIASTICAL LAW** vol 14 PARA 1286. As to common licences see PARAS 58, 76 et seq. For these purposes, except where the context otherwise requires, 'Registrar General' means the Registrar General of Births, Deaths and Marriages in England: Marriage Act 1949 s 78(1). As to the appointment and duties of the Registrar General of Births, Deaths and Marriages in England see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605 et seq.

6 For these purposes, 'parental responsibility' has the same meaning as in the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 134); Marriage Act 1949 s 3(1B) (added by Children Act 1989 Sch 12 para 5; and substituted by the Adoption and Children Act 2002 Sch 3 paras 1, 3); Civil Partnership Act 2004 Sch 2 para 2.

7 For these purposes, 'guardian of a child' has the same meaning as in the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 144); Marriage Act 1949 s 3(1B) (as added and substituted: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

8 Marriage Act 1949 s 3(1A)(a) (s 3(1A) added by Children Act 1989 Sch 12 para 5; and substituted by the Adoption and Children Act 2002 Sch 3 para 3); Civil Partnership Act 2004 Sch 2 para 1.

9 For these purposes, 'special guardianship order' has the same meaning as in the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 151); Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

10 Marriage Act 1949 s 3(1A)(b) (as added: see note 8); Civil Partnership Act 2004 Sch 2 para 1. For these purposes, 'special guardian' has the same meaning as in the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 151); Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

11 For these purposes, 'care order' has the same meaning as in the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 271); Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

12 Marriage Act 1949 s 3(1A)(c) (as added: see note 8); Civil Partnership Act 2004 Sch 2 para 1.

13 For these purposes, 'residence order' has the same meaning as in the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 271 note 4); Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

14 Marriage Act 1949 s 3(1A)(d) (as added: see note 8); Civil Partnership Act 2004 Sch 2 para 1.

15 For these purposes, 'adoption agency' has the same meaning as in the Adoption and Children Act 2002 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 389); Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

16 For these purposes, 'placed for adoption' has the same meaning as in the Adoption and Children Act 2002 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 331); Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

17 For these purposes, 'local authority' has the same meaning as in the Adoption and Children Act 2002 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 331); Marriage Act 1949 s 3(1B) (as added: see note 6); and the Civil Partnership Act 2004 Sch 2 para 2.

18 Marriage Act 1949 s 3(1A)(e) (as added: see note 8); Civil Partnership Act 2004 Sch 2 para 1.

19 For these purposes, 'placement order' has the same meaning as in the Adoption and Children Act 2002 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 335); Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

20 Marriage Act 1949 s 3(1A)(f) (as added: see note 8); and the Civil Partnership Act 2004 Sch 2 para 1. 'Appropriate local authority' means the local authority authorised by the placement order to place the child for adoption: Marriage Act 1949 s 3(1B) (as added: see note 6); Civil Partnership Act 2004 Sch 2 para 2.

21 Marriage Act 1949 s 3(1A)(g) (as added: see note 8); Civil Partnership Act 2004 Sch 2 para 1. The prospective adopters will be required to give their consent only in so far as their parental responsibility has not been restricted under the Adoption and Children Act 2002 s 25(4) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 334); Marriage Act 1949 s 3(1A)(g) (as so added); Civil Partnership Act 2004 Sch 2 para 1.

22 Marriage Act 1949 s 3(1A)(h) (as added: see note 8); Civil Partnership Act 2004 Sch 2 para 1.

23 Marriage Act 1949 s 3(6); Civil Partnership Act 2004 s 4(4). As to wards of court see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 218 et seq.

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47. Where consent is unobtainable or refused.

If the superintendent registrar¹ (in the case of marriage) or the registration authority² (in the case of civil partnership) is satisfied that the consent of any person whose consent is required to the marriage or entry into a civil partnership of a child³, cannot be obtained by reason of absence or inaccessibility, or by reason of his being under any disability, the necessity for the consent of that person is to be dispensed with if there is any other person whose consent is also required⁴. If the consent of no other person is required, the Registrar General⁵ may dispense with the necessity of obtaining any consent, or, on application being made⁶, the court may consent to the marriage, or the civil partnership, and the consent of the court so given has the same effect as if it had been given by the person whose consent cannot be so obtained⁷.

If any person whose consent for the marriage or civil partnership is required refuses his consent, then, on application being made, the court may consent to the marriage or to the registration of the civil partnership; and the consent so given has the same effect as if it had been given by the person whose consent is refused⁸.

Nothing in these provisions dispenses with the necessity of obtaining the consent of the High Court to the marriage of a ward of court⁹.

1 As to the meaning of 'superintendent registrar' see PARA 46 note 2.

2 'Registration authority' means, in relation to England, a county council, the council of any district comprised in an area for which there is no county council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly, and in relation to Wales, a county council or a county borough council: Civil Partnership Act 2004 s 28. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 30, 35-39, 59 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

3 I.e. by the Marriage Act 1949 s 3(1) or the Civil Partnership Act 2004 Sch 2 Pt 1: see PARA 46. As to the meaning of 'child' see PARA 37 note 3.

4 Marriage Act 1949 s 3(1) proviso (a); Civil Partnership Act 2004 Sch 2 para 3(1), (2).

5 As to the meaning of 'Registrar General' see PARA 46 note 5.

6 As to the court to which application may be made, and as to the procedure, see PARA 48.

7 Marriage Act 1949 s 3(1) proviso (a); Civil Partnership Act 2004 Sch 2 para 3(3), (4). As to the application of these provisions to marriages intended to be solemnised on the authority of a common licence see PARA 46 note 3.

8 Marriage Act 1949 s 3(1) proviso (b); Civil Partnership Act 2004 Sch 2 para 4.

9 Marriage Act 1949 s 3(6). As to wards of court see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 218 et seq.

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48. Application for consent of the court.

Application for the consent of the court to the marriage or civil partnership of a child¹ may be made to the High Court², the county court of the district in which any applicant or respondent resides or a court of summary jurisdiction appointed for the commission area in which any applicant or respondent resides³.

An application for the consent of the court to the marriage or civil partnership of a child must be dealt with in chambers unless the court otherwise directs⁴. The application must be heard and determined by a district judge⁵. An application may be brought without the intervention of the applicant's litigation friend, unless the court otherwise directs⁶. Where such an application follows a refusal to give consent to the marriage or to the registration of the child as a civil partner, every person who has refused consent must be made a defendant to the summons or a respondent to the application, as appropriate⁷. Unless the court orders otherwise, the application must be served not less than seven days before the date on which the application is to be heard⁸.

An application for the consent of a magistrates' court to the marriage of, or the formation of a civil partnership by, a child may be made, either orally or in writing, to a justice of the peace⁹. On receiving such an application, the justice must, where the application was in consequence of a refusal to give consent to the marriage or civil partnership, give to any person whose consent is required and who has refused consent a notice of the application and of the date, time and place appointed for the hearing¹⁰.

1 As to the circumstances in which the court may give consent see PARA 47. As to the meaning of 'child' see PARA 37 note 3.

2 Proceedings for obtaining the High Court's consent to the marriage of a child are assigned to the Family Division (see the Supreme Court Act 1981 s 61(1), (3), Sch 1 para 3(c); and PARA 731) and are, therefore, 'family proceedings' for the purposes of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-42) (see PARA 749).

3 Marriage Act 1949 s 3(5) (amended by the Family Law Reform Act 1969 s 2(2); the Domestic Proceedings and Magistrates' Courts Act 1978 Sch 2 para 9; the Access to Justice Act 1999 s 106, Sch 15 Pt V; and the Courts Act 2003 Sch 8 para 85); Civil Partnership Act 2004 Sch 2 para 15(1).

4 Family Proceedings Rules 1991, SI 1991/1247, rr 3.20(1), 3.20A(1) (r 3.20A added by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, rr 3.20(2), 3.20A(2) (r 3.20A as added: see note 4). As to district judges see **COURTS** vol 10 (Reissue) PARA 661.

6 Family Proceedings Rules 1991, SI 1991/1247, rr 3.20(3), 3.20A(3) (r 3.20A as added: see note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, rr 3.20(4), 3.20A(4) (r 3.20A as added: see note 4).

8 Family Proceedings Rules 1991, SI 1991/1247, rr 3.20(5), 3.20A(5) (r 3.20A as added: see note 4).

9 Magistrates' Courts (Guardianship of Minors) Rules 1974, SI 1974/706, r 5(1) (amended by SI 1989/384; SI 2005/617).

10 Magistrates' Courts (Guardianship of Minors) Rules 1974, SI 1974/706, r 5(2) (r 5(2), (4) amended by SI 2005/2930). The Magistrates' Courts Rules 1981, SI 1981/552, r 99 (service of summons etc: see **MAGISTRATES** vol 29(2) (Reissue) PARA 690) applies in relation to the service of a notice so given as it applies in relation to the

service of a summons issued on a person other than a corporation: Magistrates' Courts (Guardianship of Minors) Rules 1974, SI 1974/706, r 5(3). The provisions of the Magistrates' Courts Act 1980 Pt II (ss 51-74) (see **MAGISTRATES**) relating to the hearing of a complaint and of the Magistrates' Courts Rules 1981, SI 1981/552, r 14 (order of evidence and speeches: see **MAGISTRATES** vol 29(2) (Reissue) PARA 728) apply to the hearing of such an application as if it were made by way of complaint but as if for any reference therein to the complainant, the complaint and his defence there were substituted references to the applicant, the application, the respondent and his case respectively: Magistrates' Courts (Guardianship of Minors) Rules 1974, SI 1974/706, r 5(4) (as so amended).

UPDATE

48 Application for consent of the court

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(4) CONSENT/(ii) Parental Consent/49. Evidence of consent.

49. Evidence of consent.

Where, for the purpose of obtaining a certificate for marriage or for a civil partnership schedule, a person declares that the consent of any person or persons whose consent is required has been obtained, the superintendent registrar or registration authority may refuse to issue the certificate or schedule, unless satisfied by the production of written evidence that the consent of that person or of those persons has in fact been obtained¹.

If any person for the purpose of procuring a marriage or a civil partnership, or a notice, certificate or licence relating to a marriage or civil partnership, knowingly and wilfully makes or signs a false declaration, he is guilty of an offence².

¹ See the Family Law Reform Act 1969 s 2(3); the Civil Partnership Act 2004 Sch 2 para 7; and PARAS 90, 138. As to forbidding the issue of a certificate or schedule see PARAS 95, 137. As to the persons whose consent is required see PARA 46. As to the meaning of 'child' see PARA 37 note 3. It is not necessary that the consent of any person whose consent is required to a marriage or civil partnership of a child should be given in any particular manner, and consent may be implied if that person has knowledge of the relevant relationship and does not expressly dissent: *Hodgkinson v Wilkie* (1795) 1 Hag Con 262; *Smith v Huson (falsely called Smith)* (1811) 1 Phillim 287 at 306; *Cresswell v Cosins* (1815) 2 Phillim 281; cf *Balfour v Carpenter (falsely called Balfour)* (1811) 1 Phillim 221.

² See PARAS 184-185.

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50. Withdrawal of consent.

Consent may be retracted at any time before the actual solemnisation or registration of the marriage or civil partnership¹, but once it is given it must not be capriciously withdrawn², and the clearest proof of subsequent dissent is necessary to displace it³.

1 *Hodgkinson v Wilkie* (1795) 1 Hag Con 262. Although this decision and the decisions cited in notes 2, 3 pre-date the concept of civil partnerships and are concerned only with consent to marry, the Civil Partnership Act 2004 confers rights on civil partners which in all practicable respects are analogous to those enjoyed by married persons, and it is reasonable to infer that they must now apply in relation to civil partnerships.

2 *Re Brown, Ingall v Brown* [1904] 1 Ch 120.

3 *Hodgkinson v Wilkie* (1795) 1 Hag Con 262. The consent will be presumed until the contrary is proved: *Harrison v Southampton Corpn* (1853) 4 De GM & G 137. As to the position where the person who gives consent dies before a marriage is solemnised or a civil partnership is celebrated see *Ex p Reibey* (1843) 12 LJ Ch 436 (death of minor's father after consenting to his marriage; guardian unable to form opinion as to propriety of marriage; application to court for approval of marriage); cf *Yonge v Furze* (1856) 26 LJ Ch 117; on appeal 26 LJ Ch 352 (condition in will in restraint of legatee's marriage; legatee married after testator's death; testator alleged to have consented before his death to the marriage).

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/1. FUNDAMENTAL PRINCIPLES/(4) CONSENT/(ii) Parental Consent/51. Effect of absence of consent.

51. Effect of absence of consent.

Where a marriage has been duly solemnised under superintendent registrar's certificate or two people have registered as civil partners of each other, it is not necessary in support of the marriage or civil partnership to give any proof that any person whose consent is required had given his consent, nor may any evidence be given to prove the contrary in any proceedings touching the validity of the marriage or civil partnership¹.

¹ See the Marriage Act 1949 s 48(1)(b); the Civil Partnership Act 2004 s 52(1); and PARAS 22, 26. The marriage of a child without the requisite consent is not invalid, whether it is by banns or licence or superintendent registrar's certificate: *R v Birmingham Inhabitants* (1828) 8 B & C 29 (marriage by licence under the Marriage Act 1823 (repealed)). As to forbidding the issue of a certificate see PARA 95.

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52. Declaration of dissent from marriage of child.

Where the marriage of a child¹, not being a widower or widow, is intended to be solemnised after the publication of banns of matrimony², then, if any person whose consent to the marriage would have been required³ in the case of a marriage intended to be solemnised otherwise than after the publication of the banns, openly and publicly declares or causes to be declared, in the church or chapel in which the banns are published, at the time of the publication, his dissent from the intended marriage, the publication of banns is void⁴.

1 As to the meaning of 'child' see PARA 37 note 3.

2 As to banns of matrimony see PARA 58 et seq.

3 Ie under the Marriage Act 1949 s 3: see PARAS 46, 47.

4 Marriage Act 1949 s 3(3) (s 3(3), (4) amended by the Family Law Reform Act 1987 Sch 2 para 9). Affirmative consent to the marriage is not required in this case. A clergyman is not liable to ecclesiastical censure for solemnising the marriage of a child after the publication of banns without the consent of the parents or guardians of the child unless he had notice of the dissent of any person who is entitled to give notice of dissent under the Marriage Act 1949 s 3(3): s 3(4) (as so amended). If, however, a clergyman knowingly and wilfully solemnises the marriage without banns of marriage having been duly published (which would be the case if notice of dissent were given, the publication being void), except on the authority of a special or common licence or superintendent registrar's certificate, he is guilty of an offence and liable to imprisonment for a term not exceeding 14 years (s 75(1)(b)) if a prosecution is commenced within three years from the commission of the offence (s 75(4)).

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/2. FORMS AND CEREMONIES/(1) METHODS OF MARRIAGE AND CIVIL PARTNERSHIP/53. Methods of lawful marriage.

2. FORMS AND CEREMONIES

(1) METHODS OF MARRIAGE AND CIVIL PARTNERSHIP

53. Methods of lawful marriage.

Every marriage should be by banns¹, licence² or superintendent registrar's certificates or naval officer's certificate³, and, except in the case of a marriage according to the usages of the Society of Friends or between persons professing the Jewish religion according to the usages of the Jews⁴ and of a marriage by special licence⁵, should be solemnised:

- 44 (1) in a church or chapel of the Church of England⁶ in which marriages may lawfully be solemnised⁷;
- 45 (2) at a superintendent registrar's office⁸;
- 46 (3) in a Non-conformist church or building duly registered for the solemnisation of marriages⁹;
- 47 (4) in a naval, military or air force chapel¹⁰;
- 48 (5) in an approved building¹¹; or
- 49 (6) at the usual place of residence of a housebound or detained person¹².

Where, in the case of a marriage not to be solemnised according to the rites of the Church of England, one of the parties is seriously ill and cannot be moved to a place of solemnisation, the marriage may be solemnised by Registrar General's licence elsewhere than at a registered building or superintendent registrar's office¹³.

1 As to banns see PARAS 58, 68.

2 As to licences see PARA 76 et seq.

3 As to marriage on the authority of superintendent registrar's certificates see PARA 87 et seq; as to marriage on the authority of a naval officer's certificate see PARA 129 et seq.

4 See PARAS 115-118.

5 See PARA 76.

6 Any reference in the Marriage Act 1949 to the Church of England is, unless the context otherwise requires, to be construed as including a reference to the Church in Wales: s 78(2). As to the Church in Wales generally see **ECCLESIASTICAL LAW** vol 14 PARA 322 et seq. The Marriage Act 1949 applies to the performing in England or Wales of a ceremony in a form known to, and recognised by, English law as capable of producing, when there performed, a valid marriage, namely one which will prima facie confer the status of husband and wife on the two persons: *R v Bham* [1966] 1 QB 159 at 169, [1965] 3 All ER 124 at 129, CCA. The Marriage Act 1949 ss 10, 19, 20(7) (banns: see PARAS 61, 62, 67) do not extend to Wales or Monmouthshire: s 80(3), Sch 6 (amended by the Marriage (Wales and Monmouthshire) Act 1962 s 1(1); the Marriage (Wales) Act 1986 s 1). The Marriage Act 1949 ss 6(4), 9, 11(2), 15(1)(b), 16(1)(b) (so far as it relates to marriages to be solemnised in the usual place of worship of one of the parties), 35(3) and 72, which originally did not extend to Wales or Monmouthshire (see s 80(3), Sch 6 (as originally enacted)) now extend to these areas: Marriage (Wales and Monmouthshire) Act 1962 s 1(1). Any parish which is treated for the purposes of the Welsh Church Act 1914 as being wholly within or wholly without Wales or Monmouthshire is to be so treated also for the purposes of the Marriage Act 1949 and the Marriage (Wales and Monmouthshire) Act 1962: s 2. As to the treatment of border parishes see **CREMATION AND BURIAL** vol 10 (Reissue) PARA 1012.

- 7 See PARAS 59, 82.
- 8 See PARA 102.
- 9 See PARA 186 et seq.
- 10 See PARA 129.
- 11 See PARAS 190-201.
- 12 See PARAS 171, 173.
- 13 See PARA 161 et seq.

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54. Marriages on the authority of superintendent registrar's certificates.

The following marriages may¹ be solemnised on the authority of two superintendent registrar's certificates²:

- 50 (1) a marriage in a registered building³ according to such form and ceremony as the persons to be married see fit to adopt⁴;
- 51 (2) a marriage in the office of a superintendent registrar⁵;
- 52 (3) a marriage on approved premises⁶;
- 53 (4) a marriage according to the usages of the Society of Friends (commonly called Quakers)⁷;
- 54 (5) a marriage between two persons professing the Jewish religion according to the usages of the Jews⁸;
- 55 (6) the marriage, other than a marriage in pursuance of head (4) or (5) above, of a person who is housebound⁹ or is a detained person¹⁰ at the place where he or she usually resides¹¹;
- 56 (7) a marriage according to the rites of the Church of England¹² in any church or chapel in which banns of matrimony may be published¹³.

A marriage according to the rites of the Church of England may be solemnised on the authority of superintendent registrar's certificates¹⁴ in any church or chapel in which banns of matrimony may be published or, in the case of persons who are housebound or are detained persons¹⁵, the place specified in the notices of marriage and certificates as the place where the marriage is to be solemnised¹⁶; but a marriage is not to be so solemnised in any such church or chapel without the consent of the minister of the church or chapel or, wherever the marriage is solemnised, by any person other than a clergyman¹⁷.

1 le subject to the provisions of the Marriage Act 1949 Pt III (ss 26-52): see PARA 87 et seq.

2 Marriage Act 1949 s 26(1) (amended by the Immigration and Asylum Act 1999 s 161(3)). As to the meaning of 'superintendent registrar' see PARA 22 note 1. The superintendent registrar may also issue certificates in certain circumstances for the purpose of marriages abroad of British nationals: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 226. As to offences in connection with solemnisation of marriages see PARA 180.

3 For the purposes of the Marriage Act 1949, 'registered building' means a building registered under the Marriage Act 1949 Pt III (see PARA 186 et seq): s 78(1).

4 Marriage Act 1949 s 26(1)(a).

5 Marriage Act 1949 s 26(1)(b). No religious service may be used: see PARA 102.

6 Marriage Act 1949 s 26(1)(bb) (added by the Marriage Act 1994 s 1(1)). For the purposes of the Marriage Act 1949, 'approved premises' means premises approved in accordance with regulations under s 46A (see PARAS 190-201) as premises on which marriages may be solemnised in pursuance of s 26(1)(bb): s 78(1) (amended by the Marriage Act 1994 Schedule paras 1, 8). As to marriages on approved premises see PARAS 190-201.

7 Marriage Act 1949 s 26(1)(c). As to marriages according to the usages of the Society of Friends see further PARAS 115-116.

8 Marriage Act 1949 s 26(1)(d). As to marriages between persons professing the Jewish religion according to the usages of the Jews see further PARAS 117-118.

9 As to the meaning of 'housebound' see PARA 169.

10 As to the meaning of 'detained person' see PARA 170.

11 Marriage Act 1949 s 26(1)(dd) (added by the Marriage Act 1983 Sch 1 para 4(a)). For these purposes, a person who is housebound or is a detained person is to be taken, if he or she would not otherwise be, to be resident and usually resident at the place where he or she is for the time being: Marriage Act 1949 s 78(5) (added by the Marriage Act 1983 Sch 1 para 21). As to marriages of persons who are housebound or detained persons see further PARAS 169-173.

12 As to the meaning of references to the Church of England see PARA 53 note 6.

13 Marriage Act 1949 s 26(1)(e) (amended by the Marriage Act 1983 Sch 1 para 4(a)). See the text and notes 14-17; and PARA 80. As to banns of matrimony see PARAS 58, 68.

14 Is a certificate in force under the Marriage Act 1949 Pt III.

15 Is in the case of a marriage in pursuance of the Marriage Act 1949 s 26(1)(dd): see text head (6).

16 Marriage Act 1949 s 17 (amended by the Marriage Act 1983 Sch 1 para 2(a); the Immigration and Asylum Act 1999 Sch 14 paras 3, 6).

17 Marriage Act 1949 s 17 proviso (amended by the Marriage Act 1983 Sch 1 para 2(b)). As to the meaning of 'clergyman' see PARA 23 note 5. See PARA 80 et seq.

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55. Naval, military and air force marriages.

Any chapel certified by the Admiralty¹ to be a naval chapel, or by the Secretary of State to be a military or airforce chapel may be licensed to authorise the publication of banns² and the solemnisation of marriages between parties of whom at least one is a qualified person³. The Admiralty, or any person authorised by it, in the case of a naval chapel, and the Secretary of State or any person authorised by him, in the case of any other licensed chapel, must appoint one or more clergymen⁴ for the purpose of registering marriages solemnised in the chapel according to the rites of the Church of England⁵. Where one of the parties to a marriage intended to be solemnised in England on the authority of superintendent registrar's certificates⁶ is an officer, seaman or marine on the books of one of Her Majesty's ships at sea, the officer, seaman or marine may give notice of his intention to the captain or other officer commanding the ship, together with the name and address of the other party to the marriage and such other information as may be necessary to enable the officer commanding to fill up a certificate⁷.

1 As to the Admiralty see **SHIPPING AND MARITIME LAW**.

2 As to banns see PARAS 58, 68.

3 See PARA 129.

4 As to the meaning of 'clergyman' see PARA 23 note 5.

5 See PARA 130. As to such rites see PARA 57 et seq.

6 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

7 See PARA 131.

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56. Formation of civil partnership by registration.

Two people may register as civil partners of each other under:

- 57 (1) the standard procedure¹;
- 58 (2) the procedure for housebound persons²;
- 59 (3) the procedure for detained persons³; and
- 60 (4) the special procedure (which is for cases where a person is seriously ill and not expected to recover)⁴.

Within these procedures, special provision is made for exceptional and unusual circumstances⁵.

Two people are to be regarded as having registered as civil partners⁶ of each other once each of them has signed the civil partnership document⁷ at the invitation of, and in the presence of, a civil partnership registrar⁸, and in the presence of each other and two witnesses⁸. No religious service is to be used while the civil partnership registrar is officiating at the signing of a civil partnership document⁹.

The place at which two people may register as civil partners of each other must be in England or Wales, must not be in religious premises¹⁰, and must be specified in the notices, or notice, of proposed civil partnership¹¹.

1 Civil Partnership Act 2004 s 5(1)(a). As to the standard procedure see PARA 133 et seq.

2 Civil Partnership Act 2004 s 5(1)(b). As to the procedure for housebound persons see PARAS 169, 171 et seq.

3 Civil Partnership Act 2004 s 5(1)(c). As to the procedure for detained persons see PARA 170 et seq.

4 Civil Partnership Act 2004 s 5(1)(d). As to the special procedure see PARA 140 et seq.

5 Civil Partnership Act 2004 s 5(1). The procedures under heads (1) to (3) are subject to s 20 (modified procedures for certain non-residents) and Sch 3 (former spouses one of whom has changed sex): s 5(2). The procedures under heads (1) to (4) are subject to Sch 1 Pt 2 (provisions applicable in connection with prohibited degrees of relationship) (see PARA 35) and Sch 2 Pts 2, 3 (provisions applicable where proposed civil partner is under 18) (see PARA 46): s 5(3). These provisions are also subject to s 249 and Sch 23 (immigration control and formation of civil partnerships) (see PARA 178): s 5(4).

6 As to the meaning of 'civil partner' see PARA 2 note 1.

7 'Civil partnership document' means, in relation to the special procedure, a Registrar General's licence, and, in relation to any other procedure, a civil partnership schedule: Civil Partnership Act 2004 ss 2(6), 7(1).

8 Civil Partnership Act 2004 s 2(1). After the civil partnership document has been signed it must also be signed, in the presence of the civil partners and each other, by each of the two witnesses, and the civil partnership registrar: s 2(3). After the witnesses and the civil partnership registrar have signed the civil partnership document, the relevant registration authority must ensure that the fact that the two people have registered as civil partners of each other, and any other information prescribed by the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, is recorded in the register as soon as is practicable: Civil Partnership Act 2004 s 2(4). 'Relevant registration authority' means the registration authority in whose area the registration took place': s 2(7). Section 2(1) applies regardless of whether these provisions are followed: s 2(2).

9 Civil Partnership Act 2004 s 2(5).

10 'Religious premises' means premises which are used solely or mainly for religious purposes, or have been used and have not subsequently been used solely or mainly for other purposes: Civil Partnership Act 2004 s 6(2).

11 Civil Partnership Act 2004 s 6(1). In the case of registration under the standard procedure, the place must be on approved premises or in a register office: s 6(3), (3A) (s 6(3) substituted, and s 6(3A) added by SI 2005/2000). If it is in a register office provided under the Registration Service Act 1953 s 10, the place must be open to any person wishing to attend the registration: Civil Partnership Act 2004 s 6(3B), (3C) (added by SI 2005/2000).

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(2) CHURCH OF ENGLAND MARRIAGES

(i) Entitlement to be Married according to the Rites of the Church of England

57. Conditions for church service.

Persons legally qualified to intermarry¹ are in general entitled to be married according to the rites of the Church of England² in an authorised place³ if one of them possesses the legal qualification of residence⁴. Marriage in England⁵ according to the rites of the Church of England⁶ can be solemnised after publication of banns⁷, on the authority of a special or common licence⁸, or on the authority of certificates issued by a superintendent registrar⁹.

If the parties to a marriage solemnised in the presence of a superintendent registrar desire to add a Church of England service of solemnisation of matrimony they may present themselves, after giving notice to the clergyman¹⁰ or minister, and he, on the production of their marriage certificate and on payment of the customary fee, if any, may, if he sees fit, use such form of service as may be approved by the General Synod¹¹ so long as he observes the canons and General Synod regulations for the time being in force¹².

1 Each party must be at least 16 years old (Marriage Act 1949 s 2), they must not be within the prohibited degrees of kindred and affinity (Sch 1 Pt I (substituted by the Civil Partnership Act 2004 Sch 27 para 17); PARA 35 et seq), and if either party (not being a widow or widower) is under 18 years of age the appropriate consent is normally required (see PARA 46). As to the validity of marriages see PARA 3.

2 *Argar v Holdsworth* (1758) 2 Lee 515; *R v James* (1850) 3 Car & Kir 167, CCR. Persons who are not members of the Church of England are entitled to be so married: *R v James* (1850) 3 Car & Kir 167, CCR. The question whether unbaptised persons can claim to be so married has never been decided (*Jenkins v Barrett* (1827) 1 Hag Ecc 12); it is thought that even where both parties were unbaptised such a claim could not lawfully be refused, at any rate in the case of marriage after publication of banns (as distinct from marriage by licence, which is always a matter of discretion: see PARA 76). It is clear that in the event of such a marriage being solemnised it will, if otherwise legal, be a valid marriage: *Jones v Robinson* (1815) 2 Phillim 285. As to customary fees relating to marriage see **ECCLESIASTICAL LAW** vol 14 PARA 1195.

3 As to authorised places see PARA 59.

4 For residential qualifications see PARAS 59, 76. As to the marriage rights of persons residing in a parish affected by a pastoral scheme see the Pastoral Measure 1983 Sch 3 para 14; and PARAS 59, 67. As to marriage in guild churches see the City of London (Guild Churches) Act 1952 s 22; and **ECCLESIASTICAL LAW** vol 14 PARA 606.

5 The law as to previous publication of banns or licence does not apply out of England: *Culling v Culling* [1896] P 116.

6 See PARA 53 note 6.

7 Marriage Act 1949 s 5(a). As to banns see PARA 59 et seq.

8 Marriage Act 1949 s 5(b), (c); *Middleton v Crofts* (1736) 2 Atk 650. As to licences see PARA 76 et seq.

9 Marriage Act 1949 s 5(d) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 5). See further PARA 161 et seq. As to the avoidance of marriages where the requirements in the text have to the parties' knowledge not been complied with see the Marriage Act 1949 s 25(b); and PARA 328.

10 As to the meaning of 'clergyman' see PARA 23 note 5.

11 le under the Revised Canons Ecclesiastical, Canon B2 (substituted by Amending Canon).

12 Revised Canons Ecclesiastical, Canon B36 para 1 (amended by Amending Canons Nos 1, 3); Marriage Act 1949 s 46(1) (amended by the Marriage Act 1983 s 1(7) Sch 1 para 12 (which is so worded as to extend to other religious denominations); Marriage (Registrar General's Licence) Act 1970 s 11(2)). There must be no banns, licence or certificate authorising a marriage in connection with this service (Canon B36 para 2), and no record of it must be entered in the marriage registers provided by the Registrar General (Canon B36 para 2; Marriage Act 1949 s 46(2)). The civil marriage is thus not superseded or invalidated by the service in church: s 46(2). No person who is not entitled to solemnise Church of England marriages may read or celebrate such a service: s 46(3).

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58. Methods of authorising Church of England marriages.

A marriage according to the rites of the Church of England¹ may be solemnised²:

- 61 (1) after the publication of banns of matrimony³;
- 62 (2) on the authority of a special licence of marriage granted by the Archbishop of Canterbury or any other person by virtue of the Ecclesiastical Licences Act 1533 (a 'special licence')⁴;
- 63 (3) on the authority of a licence of marriage, other than a special licence, granted by an ecclesiastical authority having power to grant such a licence (a 'common licence')⁵; or
- 64 (4) on the authority of certificates issued⁶ by a superintendent registrar⁷.

No clergyman⁸ is obliged:

- 65 (a) to solemnise a marriage which, apart from statutory provision⁹, would have been void by reason of the relationship of the persons to be married¹⁰;
- 66 (b) to permit such a marriage to be solemnised in the church or chapel of which he is the minister¹¹; or
- 67 (c) to solemnise the marriage of a person if the clergyman reasonably believes that the person's gender has become¹² the acquired gender¹³.

Also, a clerk in Holy Orders of the Church in Wales is not obliged to permit the marriage of a person to be solemnised in the church or chapel of which the clerk is the minister if the clerk reasonably believes that the person's gender has become¹⁴ the acquired gender¹⁵.

Special provision is also made for the authorisation of Church of England marriages involving service personnel¹⁶ or housebound or detained persons¹⁷.

1 As to the meaning of references to the Church of England see PARA 53 note 6. As to the solemnisation of marriages in a guild church see the City of London (Guild Churches) Act 1952 s 22; and **ECCLESIASTICAL LAW** vol 14 PARA 606. The provisions of the Marriage Act 1949 s 5 relating to the publication of banns and the solemnisation of marriages according to the rites of the Church of England apply to church buildings shared by the Church of England under a sharing agreement: see the Sharing of Church Buildings Act 1969 s 6(2)-(5); and **ECCLESIASTICAL LAW** vol 14 PARA 1412.

2 As to offences relating to the solemnisation of marriages see PARA 180.

3 Marriage Act 1949 s 5(a). Section 5(a) does not apply in relation to the solemnisation of any marriage mentioned in s 1(2) (see PARA 37): s 5 proviso (added by the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 para 3). As to the publication of banns see further PARA 65 et seq.

4 Marriage Act 1949 s 5(b). See further PARA 76. Nothing in the Marriage Act 1949 affects the right of the Archbishop of Canterbury or any other person by virtue of the Ecclesiastical Licences Act 1553 to grant special licences to marry at any convenient time or place, or affects the validity of any marriage solemnised on the authority of such a licence: Marriage Act 1949 s 79(6).

5 Marriage Act 1949 s 5(c). See further PARA 76.

6 ie under the Marriage Act 1949 Pt III (ss 26-52): see PARA 87 et seq.

7 Marriage Act 1949 s 5(d) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 5).

8 As to the meaning of 'clergyman' see PARA 23 note 5.

9 In the Marriage (Prohibited Degrees of Relationship) Act 1986 and the Marriage Act 1949 (Remedial) Order 2007, SI 2007/438: Marriage Act 1949 s 5A(a) (s 5A added by the Marriage (Prohibited Degrees of Relationship) Act 1986 s 3; Marriage Act 1949 s 5A(a) amended by SI 2007/438). As to the Marriage (Prohibited Degrees of Relationship) Act 1986 see PARA 37. The Marriage Act 1949 (Remedial) Order 2007, SI 2007/438, repealed the Marriage Act 1949 s 1(4)-(8), Sch 1 Pt III, which provided that marriages between a man and the mother of his former wife or the former wife of his son, and marriages between a woman and the father of her former husband or the former husband of her daughter, were void, and was held in Application 36536/02 *B v United Kingdom* [2005] 3 FCR 353, [2006] 1 FLR 35, [2005] All ER (D) 63 (Sep) ECtHR, to be incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 12 (right to marry and found a family: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 162).

10 Marriage Act 1949 s 5A(a) (as added and amended: see note 9).

11 Marriage Act 1949 s 5A(b) (as added: see note 9).

12 In under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

13 Marriage Act 1949 s 5B(1) (s 5B added by the Gender Recognition Act 2004 Sch 4 paras 1, 3).

14 See note 12.

15 Marriage Act 1949 s 5B(2) (as added: see note 13).

16 See PARA 55.

17 See PARA 169.

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(ii) Place for Banns and Marriage

59. Places of solemnisation.

Marriage after banns must normally be solemnised in the church or chapel¹ or, as the case may be, one of the churches or chapels in which banns have been published². Where, however, after the completion of the publication of banns in any church, another church has become a church in which banns could be published in relation to the parties to the intended marriage³, the marriage may be solemnised in that other church⁴. Departure from the general rule is authorised also in certain cases where two or more benefices⁵ are held in plurality or where by virtue of a pastoral scheme there are two or more parishes or parish churches in the area of a single benefice⁶.

Marriage by common licence⁷ must be solemnised in the parish church of the parish⁸, or an authorised chapel⁹ of the ecclesiastical district¹⁰ in which one of the persons to be married has had his or her usual place of residence for 15 days immediately before the grant of the licence¹¹ or in a parish church or authorised chapel which is the usual place of worship¹² of the parties or of one of them¹³. For the purpose of marriage by common licence a parish in which there is no parish church or chapel or none in which divine service is usually solemnised every Sunday and any extra-parochial place which has no authorised chapel are deemed to belong to any adjoining parish or chapel¹⁴. Where, after the issue of a common licence for the solemnisation of the marriage in any church, another church has taken the place of that church as a church in which the marriage of the parties concerned ought to be solemnised in pursuance of a common licence¹⁵, the marriage may be solemnised in that other church¹⁶.

However, a person who intends to be married has the like, but no greater, right to have the marriage solemnised in a parish church¹⁷ of a parish as he has to have the marriage solemnised in the parish church of the parish in which he resides or which is his usual place of worship, if he has one of the following 'qualifying connections'¹⁸:

- 68 (1) that he was baptised in that parish, unless the baptism took place in a combined rite which included baptism and confirmation, or is a person whose confirmation has been entered in the register book of confirmation for any church or chapel in that parish¹⁹;
- 69 (2) that he has at any time had his usual place of residence in that parish for a period of not less than six months²⁰;
- 70 (3) he has at any time habitually attended public worship in that parish for a period of not less than six months²¹;
- 71 (4) a parent²² of that person has during the lifetime of that person had his usual place of residence in that parish for a period of not less than six months or habitually attended public worship in that parish for that period²³; or
- 72 (5) a parent or grandparent of that person has been married in that parish²⁴.

Where a parish has ceased to exist as a result of a pastoral scheme²⁵ or otherwise, or the boundaries have been altered and a person can establish a qualifying connection with a place situated within such a parish, then if that place is situated within the parish in which the church

where the marriage is to be solemnised, that person will be deemed to have a qualifying connection with that parish²⁶.

A person who has the right to have a marriage so solemnised will have the like right to have the banns of that marriage published in the parish church where the marriage is to be solemnised²⁷.

The fact that a church building is shared by the Church of England with another church is not in itself an impediment to the use of the building for the publication of banns and the solemnisation of marriages according to the rites of the Church of England²⁸.

1 Marriage in a private house or elsewhere than in a church or chapel, except under special licence, is an ecclesiastical offence: *Middleton v Crofts* (1736) 2 Atk 650. Any person who knowingly and wilfully solemnises a marriage according to the rites of the Church of England (other than a marriage by special licence or a marriage pursuant to the Marriage Act 1949 s 26(1)(dd) (marriage of housebound or detained persons: see PARA 171)) in any place other than a church or other building in which banns may be published is guilty of an offence and liable to imprisonment not exceeding 14 years if prosecuted within three years from the commission of the offence: Marriage Act 1949 s 75(1)(c), (4) (s 75(1)(c) amended by the Marriage Act 1983 Sch 1 para 20(a)). See PARA 57 note 1. As to marriages by special licence see PARA 76. As to offences relating to the solemnisation of marriages see PARA 180.

2 Marriage Act 1949 s 12(1). As to the place of publication of banns see PARA 65 et seq. Where a marriage has been solemnised after the publication of banns it is not necessary in support of the marriage to give any proof of the residence of the parties or either of them in any parish or district where banns were published and no evidence is to be given to prove the contrary in any proceedings touching the validity of the marriage: s 24(1).

3 le by virtue of, or of anything done under, the Pastoral Measure 1983; as to which see **ECCLESIASTICAL LAW**.

4 Pastoral Measure 1983 Sch 3 para 14(2).

5 As to benefices see **ECCLESIASTICAL LAW** vol 14 PARA 768.

6 Marriage Act 1949 s 23; Pastoral Measure 1983 Sch 3 para 14(4); see PARA 60. As to pastoral schemes see **ECCLESIASTICAL LAW** vol 14 PARA 856 et seq.

7 As to marriage by common licence see PARA 76.

8 'Parish' means an ecclesiastical parish, and includes a district constituted under the Church Building Act 1818 to 1884 (see **ECCLESIASTICAL LAW** vol 14 PARA 537), notwithstanding that the district has not become a new parish by virtue of the New Parishes Act 1856 s 14 (repealed), or the New Parishes Measure 1943 s 5 (repealed), being a district to which the Acts relating to the publication of banns and the solemnisation of marriages were applied by the Church Building Acts as if the district had been an ancient parish: Marriage Act 1949 s 78(1). As to the application of enactments relating to marriages to such districts see the Church Building Act 1822 s 18 (repealed); and cf generally **ECCLESIASTICAL LAW** vol 14 PARA 538 et seq. 'Parish church' must be construed in accordance with this definition of 'parish': Marriage Act 1949 s 78(1). A building designated as the parish centre of worship is deemed for the purposes of the Marriage Act 1949 to be the parish church (Pastoral Measure 1983 s 29(2); and see **ECCLESIASTICAL LAW** vol 14 PARA 539), but this is subject to the parties' right to have recourse at their option to the parish church of an adjoining parish (see the Pastoral Measure 1983 s 29(2) proviso (b); Marriage Act 1949 ss 6(3), 15(2)).

9 In relation to a chapelry, 'authorised chapel' means a chapel of the chapelry in which banns could lawfully be published immediately before the Marriage Act 1823 (repealed), or in which banns may be published and marriages may be solemnised by virtue of the Marriages Confirmation Act 1825 s 2 (which authorises the solemnisation of marriages in certain churches and chapels in which solemnisation was customary before the passing of that Act), or by virtue of an authorisation given under the Marriage Act 1823 s 3 (repealed): Marriage Act 1949 s 78(1). In relation to an extra-parochial place 'authorised chapel' means a church or chapel of that place in which banns may be published and marriages may be solemnised by virtue of the Marriage Confirmation Act 1825 s 2, or an authorisation given under the Marriage Act 1823 s 3 (repealed), or the Marriage Act 1949 s 21: s 78(1). In relation to a district specified in a licence granted under s 20 (see PARA 62) 'authorised chapel' means the chapel in which banns may be published and marriages may be solemnised by virtue of that licence: s 78(1).

10 As to the meaning of 'ecclesiastical district' see PARA 21 note 3.

11 Marriage Act 1949 s 15(1)(a). In relation to a licensed naval, military or air force chapel (as to which see PARA 129) s 15(1)(a) applies as if the chapel were the parish church of the parish in which the chapel is situated: Sch 4 Pt II. Where a marriage has been solemnised on the authority of a common licence it is not necessary in support of the marriage to give any proof that the requirements as to residence were complied with and no evidence is to be given to prove the contrary in any proceedings touching the validity of the marriage: s 24(2).

12 As to the meaning of 'usual place of worship' see PARA 66.

13 Marriage Act 1949 s 15(1)(b). Section 15(1)(b) does not apply in relation to licensed naval, military or air force chapels: see PARA 129 note 9.

14 Marriage Act 1949 s 15(2).

15 Ie by virtue of, or of anything done under, the Pastoral Measure 1983.

16 Pastoral Measure 1983 Sch 3 para 14(5).

17 For the purposes of the Church of England Marriage Measure 2008 'church' does not include a cathedral and 'parish' includes a conventional district: s 1(11), (12)(b).

18 Church of England Marriage Measure 2008 s 1(1). Where a church or other building licensed for public worship has been designated under the Pastoral Measure 1983 s 29(2) (see the text and note 8), as a parish centre of worship, these provisions apply to such a centre while the designation is in force, as they apply to a parish church: Church of England Marriage Measure 2008 s 1(2). A person who wishes to have his or her marriage solemnised in this way must provide such information, written or otherwise, as the minister of the parish in which the marriage is to be solemnised may require in order to satisfy himself that that person has a qualifying connection and: (1) the Marriage Act 1949 s 8 (see PARA 68) will apply as if the reference to clergyman were a reference to the minister; and (2) the minister will be under a duty, when considering whether any information provided to him is sufficient to satisfy himself that the person wishing to have the marriage solemnised has a qualifying connection, to have regard to any guidance issued under the Church of England Marriage Measure 2008 s 3: s 1(8). If the minister considers that it is necessary in order to satisfy himself that a person has a qualifying connection, he may require that person to supply or support any such information to be provided by means of a statutory declaration: s 1(9). The House of Bishops will from time to time issue guidance as to the exercise of any functions by a minister under s 1(8), (9) or by the authority having power to grant a common licence under s 1(8) as applied by s 2 (as to which see PARA 41): s 3. 'Minister' means: (a) where a special cure of souls has been assigned to any priest for the area in which the church where the marriage is to be solemnised is situated, whether in a team ministry or otherwise, that priest; (b) where head (a) does not apply, the incumbent of the benefice in the area of which that church is situated; (c) where neither head (a) nor (b) applies, the priest-in-charge of that benefice; (d) where heads (a)-(c) do not apply, in the case of a team ministry, the vicar, if any, appointed by the bishop to act as rector under the Pastoral Measure 1983 s 20(14) (see **ECCLESIASTICAL LAW**) or, if there is no such vicar appointed, the vicar who has held office for the longest period in that ministry; or (e) where none of the above applies, the rural dean of the deanery in which that church is situated: Church of England Marriage Measure 2008 s 1(12)(a).

19 Church of England Marriage Measure 2008 s 1(3)(a). Any reference to baptism, confirmation, marriage or public worship is to be construed as a reference to baptism, confirmation, marriage or public worship, as the case may be, according to the rites of the Church of England: s 1(12)(c).

20 Church of England Marriage Measure 2008 s 1(3)(b).

21 Church of England Marriage Measure 2008 s 1(3)(c).

22 'Parent' includes an adoptive parent and any other person who has undertaken the care and upbringing of the person seeking to establish a qualifying connection and 'grandparent' is construed accordingly: Church of England Marriage Measure 2008 s 1(4).

23 Church of England Marriage Measure 2008 s 1(3)(d).

24 Church of England Marriage Measure 2008 s 1(3)(e).

25 As to pastoral schemes see **ECCLESIASTICAL LAW** vol 14 PARA 856 et seq.

26 Church of England Marriage Measure 2008 s 1(13). The place must be appropriately situated at the time when the notice under the Marriage Act 1949 s 8 (see PARA 68) is delivered: Church of England Marriage Measure 2008 s 1(13).

27 Church of England Marriage Measure 2008 s 1(5). This is in addition to the requirements of the Marriage Act 1949 s 6 (see PARA 65) for banns to be published in the parish church of the parish where the parties to the

marriage reside or of each parish in which one of them resides: Church of England Marriage Measure 2008 s 1(6).

28 See the Sharing of Church Buildings Act 1969 s 6(2); and **ECCLESIASTICAL LAW** vol 14 PARA 330.

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60. Banns and marriages in cases of pastoral reorganisation.

Where two or more benefices¹ are held in plurality² the bishop of the diocese or, during a vacancy in the see, the guardian of the spiritualities³, may in writing direct where the banns of persons entitled to be married in any church of those benefices may be published and where marriages of those persons may be solemnised⁴, but not so as to deprive a person of the right to be married in any church in which he would have been entitled to be married if no such directions had been given⁵.

The same provision applies, subject to the necessary modifications, to a case where by virtue of anything done under the Pastoral Measure 1983 there are two or more parishes or parish churches in the area of a single benefice⁶, and to a case where by virtue of a designation in a pastoral scheme a parish has more than one parish church, in which latter case marriages may be solemnised in any of the parish churches⁷.

1 As to benefices see **ECCLESIASTICAL LAW** vol 14 PARA 768.

2 See under the Pastoral Reorganisation Measure 1949 (repealed and replaced: see now the Pastoral Measure 1983; and **ECCLESIASTICAL LAW**).

3 As to the guardian of the spiritualities see **ECCLESIASTICAL LAW** vol 14 PARA 489.

4 Marriage Act 1949 s 23. A person may be married in a church in which he would have been entitled to be married notwithstanding that the banns have by virtue of s 23 been published only in some other church: s 23 proviso (b).

5 Marriage Act 1949 s 23 proviso (a).

6 Pastoral Measure 1983 Sch 3 para 14(4).

7 Pastoral Measure 1983 Sch 3 para 14(5).

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61. Banns and marriages when church is being rebuilt or repaired.

Where any church or chapel in which banns¹ may be published and marriages solemnised is being rebuilt or repaired and on that account is not being used for divine service, banns may be published and marriages solemnised: (1) in any building licensed² by the bishop for the performance of divine service during the disuse of the church or chapel, being a building within the parish³ or other ecclesiastical district⁴ in which the disused church or chapel is situated⁵; (2) if no such building has been licensed, in any such consecrated chapel⁶ within that parish or district as the bishop may in writing direct⁷; or (3) in the absence of a licensed building or direction as to a consecrated chapel, in a church or chapel of any adjoining parish or other ecclesiastical district in which banns may be published and marriages solemnised⁸. A marriage solemnised in accordance with these provisions is registered in the marriage register books kept by the incumbent of the disused church or chapel⁹.

1 As to banns see PARAS 58, 68.

2 The place will be presumed to have been so licensed if divine service was several times performed there: *R v Cresswell* (1876) 1 QBD 446, CCR.

3 As to the meaning of 'parish' see PARA 59 note 8.

4 As to the meaning of 'ecclesiastical district' see PARA 21 note 3.

5 Marriage Act 1949 s 18(1)(a). This does not apply in relation to a licensed naval, military or air force chapel: see PARA 129 note 9. Where an order is in force under the Diocesan Reorganisation Committees Measure 1941 (repealed) deferring the church's restoration after war damage, banns of persons entitled to be married there may be solemnised in such other church, chapel or place of worship within the diocese as the bishop in writing directs: Marriage Act 1949 s 19 (which does not extend to Wales: Sch 6).

6 Any fees in respect of marriages in a consecrated chapel are to be applied as the bishop with the consent of the incumbent of the disused church or chapel may in writing direct: Marriage Act 1949 s 18(2).

7 Marriage Act 1949 s 18(1)(b). See also note 5.

8 Marriage Act 1949 s 18(1)(c). See also note 5.

9 Marriage Act 1949 s 18(3).

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62. Licensing of chapels for banns and marriages.

The bishop of the diocese in which a public chapel¹ is situated may, if he thinks it necessary to do so for the due accommodation and convenience of the inhabitants of any district² and if the incumbent of the church of the parish³ in which the chapel is situated has signified his consent under his hand and seal⁴, authorise by a licence under his hand and seal the publication of banns and solemnisation of marriages in that public chapel between parties both or either of whom reside or resides within a district⁵ limited in the licence⁶ or has a 'qualifying connection' with that district⁷. Any such licence may include such provisions as to the amount, appropriation or apportionment of dues and such other particulars as the bishop thinks fit⁸.

The bishop may grant a licence without the consent of the incumbent of the parish church after two months' notice in writing given to the incumbent by the registrar of the diocese⁹, in which case the incumbent may appeal within one month of the grant of the licence to the archbishop of the province who, after hearing the matter in a summary way, may make an order confirming, revoking or varying the licence¹⁰.

Any licence or order may at any time be revoked by the bishop by writing under his hand and seal with the written consent of the archbishop of the province¹¹.

1 In this context 'public chapel' means any public chapel with or without a chapelry annexed to it, any chapel duly licensed for the celebration of divine service according to the rites and ceremonies of the Church of England, or any chapel the minister of which is duly licensed to officiate there according to those rites and ceremonies: Marriage Act 1949 s 20(8).

2 Marriage Act 1949 s 20(1)(a); *Re St George's, Albemarle Street Petition* (1890) Trist 134 (licence to celebrate marriages).

3 As to the meaning of 'parish' see PARA 59 note 8.

4 Marriage Act 1949 s 20(1)(b) (amended by the Patronage (Benefices) Measure 1986 Sch 5).

5 The district specified in the licence may be taken out of more than one parish, in which case 'incumbent' for the purposes of the Marriage Act 1949 s 20, means the incumbent as the case may be of the church of every parish out of which the district is taken: s 20(7) (amended by the Patronage (Benefices) Measure 1986 Sch 5). This provision does not extend to Wales: Marriage Act 1949 Sch 6.

6 Marriage Act 1949 s 20(1). As to the exclusion of s 20 in relation to licensed naval, military and air force chapels see PARA 129 note 9. A notice 'that banns may be published and marriages may be solemnised in this chapel' must be placed in a conspicuous part of the interior of a chapel licensed under s 20: s 20(5).

7 The Church of England Measure 2008 s 1 (see PARA 59), which makes provision for the solemnisation of marriages including non-residents with a 'qualifying connection' to a parish, also applies to a parish church has been licensed under these provisions: s 1(10).

8 Marriage Act 1949 s 20(1).

9 Marriage Act 1949 s 20(2) (amended by the Patronage (Benefices) Measure 1986 Sch 5). An incumbent who refuses or withholds consent to the granting of the licence may deliver to the bishop under hand and seal a statement of reasons for so doing and the bishop is not to grant the licence until he has inquired into them: Marriage Act 1949 s 20(2) proviso. Instruments of consent of the incumbent, copies of notices by the registrar, and statements of reasons delivered by an incumbent with the bishop's adjudication thereon under hand and seal must be registered in the diocesan registry: s 20(6) (amended by the Patronage (Benefices) Measure 1986 Sch 5).

10 Marriage Act 1949 s 20(3) (amended by the Patronage (Benefices) Measure 1986 Sch 5). The order must be registered in the diocesan registry: Marriage Act 1949 s 20(6) (amended by the Patronage (Benefices) Measure 1986 Sch 5).

11 Marriage Act 1949 s 20(4). The revocation and consent must be registered in the diocesan registry (s 20(6)), and the registrar must notify the revocation in writing to the minister officiating in the chapel and give public notice of it by advertisement in some newspaper circulating in the county and in the London Gazette (s 20(4)). As to the disposal of the registers of marriages solemnised in a chapel under a licence after the licence is revoked see PARA 86. Where a declaration of redundancy is made in respect of a chapel of ease, any licence relating to that chapel granted under s 20 will be deemed to have been revoked: Pastoral Measure 1983 Sch 3 para 14(3).

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63. Banns and marriages in churches of extra-parochial places.

Where any extra-parochial place has belonging to it or within it any church or chapel of the Church of England, the bishop of the diocese in which the church or chapel is situated may, if he thinks fit, authorise in writing under his hand and seal the publication of banns and the solemnisation of marriages by banns or by licence in that church or chapel between parties both or either of whom reside or resides in that extra-parochial place¹.

¹ Marriage Act 1949 s 21(1). Every authorisation must be registered in the diocesan registry of the diocese: s 21(2).

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64. List of chapels.

The registrar of every diocese must, within 15 days after 1 January in every year, send by post to the Registrar General for England and Wales¹ a list of all the chapels in the diocese in which marriages may lawfully be solemnised according to the rites of the Church of England (being chapels which belong to the Church of England or licensed naval, military and air force chapels²), distinguishing those which have a parish³, chapelry or other ecclesiastical division annexed to them, those which are licensed by the bishop for limited districts⁴, and those which are licensed under the enactments relating to naval, military and air force chapels⁵. The Registrar General must make out and cause to be printed a list of all such chapels and of all registered buildings⁶ yearly⁷ and send a copy to every registrar of marriages and superintendent registrar⁸.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 As to the licensing of naval, military and air force chapels see PARA 129.

3 As to the meaning of 'parish' see PARA 59 note 8.

4 For the bishop's power to license a public chapel for the accommodation and convenience of the inhabitants of a district see PARA 62. The list sent to the Registrar General must state the district for which each chapel is licensed: Marriage Act 1949 s 73(1).

5 As to these enactments see PARA 129.

6 The buildings certified as places of religious worship and registered for the solemnisation of marriages under the Marriage Act 1949 s 41: see PARA 186.

7 Marriage Act 1949 s 73(2). The printed list must state the county and registration district within which each chapel or registered building is situated and the names and places of residence of the superintendent registrars, registrars and deputy registrars of each district: s 73(2).

8 Marriage Act 1949 s 73(3).

UPDATE

64 List of chapels

TEXT AND NOTES--Marriage Act 1949 s 73 amended: SI 2009/2821.

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(iii) Publication of Banns

65. Publication of banns in parish of residence.

Banns of marriage between two persons must normally be published in the parish church of the parish¹ in which they reside² or, if they reside in different parishes, in the parish church of each parish³, but if either of them resides in a chapelry or a district for which the bishop has licensed a chapel for the publication of banns and the solemnisation of marriages⁴ the banns may be published in an authorised chapel⁵ of that chapelry or district in which that person resides instead of in the parish church⁶.

In relation to a person who resides in an extra-parochial place this provision has effect with the substitution for references to a parish of references to the extra-parochial place and with the substitution for references to the parish church of references to an authorised chapel of that place⁷. For the purpose of publishing banns a parish in which there is no parish church or chapel or none in which divine service is usually solemnised every Sunday is to be taken as belonging to any adjoining parish or chapelry⁸.

1 As to the meanings of 'parish' and 'parish church' see PARA 59 note 8.

2 It is the minister's duty to inquire as to the residence of persons applying to be married by banns: *Priestly v Lamb* (1801) 6 Ves 421; *Wynn v Davies and Weaver* (1835) 1 Curt 69. Failure in this respect may constitute an ecclesiastical offence which is punishable in the ecclesiastical courts: *Wynn v Davies and Weaver*; see **ECCLESIASTICAL LAW** vol 14 PARA 1357. Any person who knowingly and wilfully solemnises a marriage according to the rites of the Church of England without the banns having been duly published, not being a marriage solemnised on the authority of a special licence, a common licence (see PARA 76) or superintendent registrar's certificate (see PARA 80) is guilty of an offence and liable to imprisonment not exceeding 14 years if prosecuted within three years after the commission of the offence: Marriage Act 1949 s 75(1)(b), (4) (s 75(1)(b) amended by the Immigration and Asylum Act 1999 Sch 14 para 30).

3 Marriage Act 1949 s 6(1). In relation to licensed naval, military and air force chapels (as to which see PARA 129) s 6(1) applies as if the chapel were the parish church of the parish where it is situated: Sch 4, Pt II. As to publication in Scotland, Northern Ireland or the Republic of Ireland or on board Her Majesty's ships see PARAS 73, 74.

4 See the Marriage Act 1949 s 20; and PARA 62.

5 As to the meaning of 'authorised chapel' see PARA 59 note 9.

6 Marriage Act 1949 s 6(1) proviso.

7 Marriage Act 1949 s 6(2).

8 Marriage Act 1949 s 6(3). In the case of an extra-parochial place having no authorised chapel similar provision is made: s 6(3).

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66. Publication of banns in party's usual place of worship.

Banns may also be published in any parish church¹ or authorised chapel² which is the usual place of worship of the parties to the intended marriage or one of them even though neither of them is resident in the parish³ or chapelry to which the church or chapel belongs⁴, but this publication is in addition to and not in substitution for the publication required under the provisions relating to the publication of banns in a person's parish of residence⁵. No person can claim⁶ as his usual place of worship any parish church or authorised chapel unless he is enrolled on the church electoral roll⁷ of the area in which that church or chapel is situated, but where he is enrolled on the church electoral roll of an area in which he does not reside, that enrolment is sufficient evidence that his usual place of worship is a parish church or authorised chapel in that area⁸.

1 As to the meaning of 'parish church' see PARA 59 note 8.

2 As to the meaning of 'authorised chapel' see PARA 59 note 9.

3 As to the meaning of 'parish' see PARA 59 note 8.

4 Marriage Act 1949 s 6(4). This provision does not apply in relation to a licensed naval, military or air force chapel: see PARA 129 note 9. Persons intending to be married have the like but no greater right of having their banns published and marriage solemnised by virtue of this provision and the other provisions of the Marriage Act 1949 (cited in note 6) in a parish church or authorised chapel which is the usual place of worship of one or both of them as they have in the parish church or public chapel of the parish or chapelry in which they or one of them resides: s 72(2). As to the meaning of 'authorised chapel' see PARA 57 note 9.

5 Marriage Act 1949 s 6(4) proviso. As to the publication of banns in a person's parish of residence see PARA 65.

6 See for the purpose of the Marriage Act 1949 ss 6(4), 15(1) (see PARA 59), 35(3) (see PARA 100 note 18): see s 72(1).

7 As to the church electoral roll see **ECCLESIASTICAL LAW** vol 14 PARA 591 et seq.

8 Marriage Act 1949 s 72(1), (4). Proof of actual enrolment is not necessary to support the marriage, nor can any evidence be given to prove the contrary in any proceedings touching the validity of the marriage: s 72(3). Where a bishop has licensed a guild church in the City of London for the publication of banns of marriage and the solemnisation of marriages where one or both of the parties are on the church electoral roll, the church is for the purposes of the provisions referred to in note 6, deemed to be the usual place of worship of the person who is on the electoral roll: City of London (Guild Churches) Act 1952 s 22(1), (2).

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67. Completion of banns in another church.

Publication of banns which has been duly commenced in any church may be completed either in that church or in any other church which, by virtue of the Union of Benefices Measure 1923, the New Parishes Measure 1943, or the Pastoral Measure 1983¹, has at the time of the completion taken the place of the first-mentioned church for the purpose of publication of banns either generally or in relation to the parties to the intended marriage². Where the building in which the publication has been commenced ceases to be a parish church³ or to be licensed for marriages by virtue of a scheme made under the Reorganisation Areas Measure 1944, publication may be completed in such other building being a parish church or a building licensed for marriages as the bishop may direct to take the place of the first-mentioned building for the purposes of publication of banns⁴.

1 See the Pastoral Measure 1983 Sch 3 para 14(1).

2 Marriage Act 1949 s 10(1). This section does not apply to Wales: Marriage Act 1949 Sch 6.

3 As to the meaning of 'parish church' see PARA 59 note 6.

4 Marriage Act 1949 s 10(2). Relevant provisions of the Reorganisation Areas Measure 1944 have been repealed and replaced: see now the Pastoral Measure 1983; and **ECCELSIASTICAL LAW**.

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68. Notice of banns.

No clergyman (or where applicable, minister)¹ is obliged to publish banns of matrimony unless the persons to be married, at least seven days before the date on which they wish the banns to be published for the first time, deliver or cause to be delivered to him a notice in writing, dated on the day on which it is so delivered, stating the first name and surname² and the place of residence of each of them and the period during which each has resided at his or her place of residence³.

1 These provisions apply in connection with the solemnisation by a minister of a person with a 'qualifying connection' under the Church of England Marriage Measure 2008 s 1 (see PARA 59): s 1(8)(a).

2 As to the names see PARA 69.

3 Marriage Act 1949 s 8. See also *Pouget v Tomkins* (1812) 2 Hag Con 142; *Warter v Yorke* (1815) 19 Ves 451. A clergyman or minister need not insist on this notice but if, not using due diligence, he marries persons neither of whom resides in the parish, he is liable at least to ecclesiastical censure and perhaps to other consequences: *Priestley v Lamb* (1801) 6 Ves 421; *Nicholson v Squire* (1809) 16 Ves 259; *Wynn v Davies and Weever* (1835) 1 Curt 69. In relation to a licensed naval, military or air force chapel (as to which see PARA 129) the notice must contain a statement that one at least of the persons to be married is a person qualified to be married in such a chapel and must specify the persons so qualified and the nature of the qualification (Marriage Act 1949 Sch 4 Pt II); similar provisions apply in connection with marriages involving persons with 'qualifying connection' (see PARA 59). As to the persons qualified see PARA 129 text and note 1.

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69. Mode of publication of banns.

Banns must be published in an audible manner and in the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer¹ on three Sundays preceding the solemnisation of marriage during morning service or, if there is no morning service on a Sunday on which they are to be published, during evening service².

The form of the rubric and the enactment³ contemplate mention of the true names of the persons⁴ and of the parish or parishes in which they reside, but not of their descriptions; mention of these is therefore not essential, and a misdescription is immaterial⁵. The form need not be rigidly adhered to; it is sufficient that it should be followed in substance⁶.

For the purpose of banns a person's true name is not necessarily the full and exact Christian name given in baptism and the original surname⁷. If a man has adopted a new first name in such a way as to supersede his original name, and so that it is known as his proper designation, it will be his true name for the purpose of banns⁸. Consequently there is due publication where the assumed name is one which has overridden the true name and is generally accredited⁹, and banns are not unduly published where part of the first name is suppressed, not for the sake of concealment, but because the party has not been in the habit of using it¹⁰.

If a person has acquired a name by repute, the use of the true name in the banns may be an act of concealment, and not a due publication¹¹; so also is the use of a surname which the person has never borne, even if it was entered by mistake in the baptism register¹². The use of the true name is, however, only wrong where another name has been so far obtained by repute as to obliterate it¹³.

In general, where a wrong name has been used in the publication of banns the effect on the validity of the marriage will depend on whether the wrong name was given with the wilful intention of concealing a party's identity¹⁴. The publication will be undue or otherwise according as the addition or omission was for the purpose of fraud or concealment or was innocently made, in cases where a name is added to the true names¹⁵ or is omitted from them¹⁶. The fact of the banns having been published in a wrong name is not sufficiently proved by a wrong name being entered in the record of banns¹⁷, nor by the fact of the party having been married in a wrong name¹⁸.

1 Marriage Act 1949 s 7(2). All the other rules prescribed by the rubric must, so far as they are consistent with Pt II (ss 5-25), be duly observed: s 7(2).

2 Marriage Act 1949 s 7(1); and see *Wynn v Davies and Weever* (1835) 1 Curt 69. Where a person's consent would have been required to the marriage of a minor if it had been intended to be solemnised otherwise than after publication of banns, he may declare his dissent at the time of publication: see PARA 46. As to the offence of solemnising a marriage without due publication of the banns see PARA 52 note 4. As to the fees for the publication of banns see **ECCLESIASTICAL LAW** vol 14 PARA 1195.

3 See note 2.

4 *Wakefield v Mackay* (1807) 1 Hag Con 394; *Cope v Burt* (1809) 1 Hag Con 434; *Pouget v Tomkins* (1812) 2 Hag Con 142; *Stayte v Farquharson* (1826) 3 Add 282; *Tongue v Tongue* (1836) 1 Moo PCC 90.

5 *Cope v Burt* (1809) 1 Hag Con 434; affd (1811) 1 Phillim 224; *Mayhew v Mayhew* (1812) 3 M & S 266; *Fendall (otherwise Goldsmid) v Goldsmid* (1877) 2 PD 263.

- 6 *Standen v Standen* (1791) Peake 45.
- 7 *Diddear (falsely called Faucit otherwise Savill) v Faucit* (1821) 3 Phillim 580.
- 8 *Wyatt v Henry* (1817) 2 Hag Con 215; see also *Mayhew v Mayhew* (1812) 3 M & S 266; *R v Burton-upon-Trent Inhabitants* (1815) 3 M & S 537.
- 9 *Dancer v Dancer* [1949] P 147, [1948] 2 All ER 731.
- 10 *Orme v Holloway (falsely calling herself Orme)* (1847) 5 Notes of Cases 267.
- 11 *Frankland v Nicholson* (1805) 3 M & S 259n; see also *Wilson v Brockley* (1810) 1 Phillim 132; *R v Billingshurst Inhabitants* (1814) 3 M & S 250; *R v St Faith's, Newton Inhabitants* (1823) 3 Dow & Ry KB 348; *Orme v Holloway (falsely calling herself Orme)* (1847) 5 Notes of Cases 267; *Tooth v Barrow* (1854) 1 Ecc & Ad 371.
- 12 *R v Tibshelf Inhabitants* (1830) 1 B & Ad 190.
- 13 *Fendall (otherwise Goldsmid) v Goldsmid* (1877) 2 PD 263. A person's liberty to change his surname was discussed by Sir Joseph Jekyll MR in *Barlow v Bateman* (1730) 3 P Wms 64, and by Sir William Scott in *Wakefield v Mackay* (1807) 1 Hag Con 394. In practice an illegitimate child usually bears his mother's surname: *Sullivan v Sullivan (falsely called Oldacre)* (1818) 2 Hag Con 238. If, however, he has acquired a different name by repute, his banns should be published by that name, though they might be held valid if, from an innocent misapprehension of what is correct, the mother's name was used instead of that subsequently acquired: *Tooth v Barrow* (1854) 1 Ecc & Ad 371. The name conferred on a woman by marriage becomes her actual name unless obliterated by repute: *Bon v Smith* (1596) Cro Eliz 532; *Fendall (falsely called Goldsmid) v Goldsmid* (1877) 2 PD 263.
- 14 *Chipchase v Chipchase* [1939] P 391, [1939] 3 All ER 895; subsequent proceedings reported in [1942] P 37, [1941] 2 All ER 560. See, however, *Mather v Ney* (1807) 3 M & S 265n, where it was held that publication in a wrong name from mere thoughtless levity, without fraud or any necessity for concealment, was an undue publication. A slight error in the name has been held to be immaterial: *Dobbyn v Corneck* (1812) 2 Phillim 102.
- 15 *Heffer v Heffer* (1812) 3 M & S 265n (3); *Tree v Quin* (1812) 2 Phillim 14; *Sullivan v Sullivan (falsely called Oldacre)* (1818) 2 Hag Con 238; *Dobbyn v Corneck* (1812) 2 Phillim 102; *Fellowes v Stewart* (1815) 2 Phillim 238; *Green v Dalton* (1822) 1 Add 289.
- 16 *Pouget v Tomkins* (1812) 2 Hag Con 142; *Diddear (falsely called Faucit otherwise Savill) v Faucit* (1821) 3 Phillim 580; *Stanhope v Baldwin* (1822) 1 Add 93; *Wiltshire v Prince* (1830) 3 Hag Ecc 332; *Brealy (falsely called Reed) v Reed* (1841) 2 Curt 833; *Orme v Holloway (falsely calling herself Orme)* (1847) 5 Notes of Cases 267. In *Holmes v Simmons (falsely called Holmes)* (1868) LR 1 P & D 523, Lord Penzance doubted whether a marriage would be invalidated by undue publication of banns if there was no one in existence who had a legal right to assent to or dissent from its solemnisation or if those who had such legal right assented to it; but see *Mather v Ney* (1807) 3 M & S 265n (3).
- 17 *Copps v Follon* (1794) 1 Phillim 145n (b).
- 18 *Heffer v Heffer* (1812) 3 M & S 265n.

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70. Who may publish banns.

Where on any Sunday in any church or other building in which banns may be published a clergyman¹ does not officiate at the service at which it is usual in that church or building to publish banns, the publication may be made either: (1) by a clergyman at some other service at which banns may be published²; or (2) by a layman during a public reading authorised by the bishop of a portion or portions of Morning or Evening Prayer, such public reading being at the hour when the service at which it is usual to publish banns is commonly held or at such other hour as the bishop may authorise³, and the incumbent or minister in charge of the church or building, or some other clergyman nominated in that behalf by the bishop, must have made or authorised to be made the requisite entry in the register book of banns of the church or building⁴. Except as above and in the case of a naval marriage where the banns are published at sea⁵, no person other than a clergyman may publish banns of marriage⁶.

1 As to the meaning of 'clergyman' see PARA 23 note 5.

2 Marriage Act 1949 s 9(2)(a). As to the issue of a certificate of publication see s 11(4); and PARA 72.

3 Marriage Act 1949 s 9(2)(b). Where a layman publishes banns by virtue of s 9 he must sign the register book of banns provided under s 7 (see PARA 75): s 9(3).

4 Marriage Act 1949 s 9(2) proviso.

5 See PARA 74.

6 Marriage Act 1949 s 9(1).

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71. Publication void after three months.

If a marriage is not solemnised within three months after the completion of the publication of the banns the publication is void and no clergymen may solemnise the marriage on the authority of those banns¹.

¹ Marriage Act 1949 s 12(2). As to the avoidance of a marriage solemnised on the authority of a void publication of banns if the parties knew of the defect see s 25(c); and PARA 328.

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72. Certificate of banns.

Where persons who are to be married after banns do not reside in the same parish¹ or ecclesiastical district², a clergyman³ must not solemnise a marriage in either the parish or district in which one resides without production of a certificate that the banns have been published in accordance with the statutory provisions in the other parish or district⁴. Where, because in any parish there is no parish church or chapel belonging to it or no church or chapel in which divine service is usually solemnised every Sunday, or because in any extra-parochial place there is no authorised chapel, banns have been published⁵ in a parish or chapelry adjoining that parish or extra-parochial place, a certificate that banns have been published in that parish or chapelry is sufficient⁶. Any certificate required by the foregoing provisions must be signed by the incumbent or minister in charge of the building in which the banns were published or by a clergyman nominated by the bishop⁷.

Where persons desire to be married in the usual place of worship of one of them although neither resides in the parish or chapelry to which that place of worship belongs⁸, or where one of the parties to the intended marriage only has a 'qualifying connection' to the parish in question⁹, a clergyman must not solemnise the marriage unless there is produced to him a certificate or certificates of due publication of banns in the parish or district or parishes or districts in which they reside¹⁰.

1 As to the meaning of 'parish' see PARA 59 note 8.

2 As to the meaning of 'ecclesiastical district' see PARA 21 note 3.

3 As to the meaning of 'clergyman' see PARA 23 note 5.

4 Marriage Act 1949 s 11(1). As to certificates of publication in Scotland, Northern Ireland or the Republic of Ireland, or on board ship, see PARAS 73-74.

5 I.e. by virtue of the Marriage Act 1949 s 6(3): see PARA 65.

6 Marriage Act 1949 s 11(3). The certificate has the same force and effect as a certificate that the banns have been published in a parish in which one of the parties resides: s 11(3).

7 Marriage Act 1949 s 11(4). This also applies to a marriage solemnised where one of the parties has a qualifying connection to the parish under the Church of England Marriage Measure 2008 s 1(2) (see PARA 59): s 1(7). As to certificates of publication of banns outside England see PARA 73.

8 As to banns in such a case see the Marriage Act 1949 s 6(4); and PARA 66.

9 I.e. under the Church of England Marriage Measure 2008 s 1 (see PARA 59).

10 Marriage Act 1949 s 11(2). This also applies to a marriage solemnised where one of the parties has a qualifying connection to the parish under the Church of England Marriage Measure 2008 s 1(2) (see PARA 59): s 1(7).

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73. Publication of banns outside England and Wales.

Where a marriage is intended to be solemnised in England or Wales, after the publication of banns, between parties of whom one is residing in England or Wales and the other is residing in Scotland, Northern Ireland or the Republic of Ireland, and banns have been published or proclaimed in any church of the parish or place in which that other party is residing according to the law or custom there prevailing, a certificate given in accordance with that law or custom that the banns have been so published or proclaimed is, as respects that party, a sufficient certificate¹ and the marriage is not void by reason only that the banns have not been published in the manner required for publication of banns in England and Wales².

A certificate of the publication of banns issued in certain parts of Her Majesty's dominions outside the United Kingdom has, for the purpose of an intended marriage in the United Kingdom between a British subject resident in England and a British subject resident in such a part of the dominions, the same effect as a certificate for marriage issued by a superintendent registrar³.

1 le for the purposes of the Marriage Act 1949 s 11: see PARA 72.

2 Marriage Act 1949 s 13; Wales and Berwick Act 1746 s 3. As to marriages intended to be solemnised on the authority of a superintendent registrar's certificate where one of the parties resides in Scotland or Northern Ireland, see the Marriage Act 1949 s 37 (see PARA 112) and s 38 (see PARA 113).

3 See the Marriage of British Subjects (Facilities) Act 1915 s 1(1)(a); and PARA 114. As to the meaning of 'Her Majesty's dominions' see **COMMONWEALTH** vol 13 (2009) PARA 707.

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74. Publication of banns on Her Majesty's ships.

Where a marriage is intended to be solemnised in England or Wales, after the publication of banns, between parties one of whom is residing in England or Wales and the other is an officer, seaman or marine borne on the books of one of Her Majesty's ships at sea, the banns may be published on three successive Sundays during morning service on board the ship by the chaplain or, if there is no chaplain, by the captain or other officer commanding the ship¹. Where banns have been so published the person who published them must, unless the banns have been forbidden on any of the grounds on which banns may be forbidden, give a certificate of publication², which is a sufficient certificate³ as regards the party who is an officer, seaman or marine⁴.

1 Marriage Act 1949 s 14(1).

2 Marriage Act 1949 s 14(1).

3 le for the purposes of Marriage Act 1949 s 11: see PARA 72.

4 Marriage Act 1949 s 14(2). The certificate must be in such form as may be prescribed by the Admiralty: s 14(2). All provisions of the Marriage Act 1949 (including penal provisions) relating to the publication of banns and certificates of publication and all rules regarding the time and manner of publication (see s 7; and PARA 69) apply subject to such adaptations as may be made by Her Majesty by Order in Council: s 14(2). Orders in Council made under the corresponding provisions of the Naval Marriages Act 1908 (repealed) continue in force and have effect as if made under the Marriage Act 1949: s 79(2). For the provisions for the issue on board Her Majesty's ships of certificates for marriages to be solemnised in England on the authority of a certificate of a superintendent registrar see the Marriage Act 1949 s 39; and PARA 131. As to marriages in naval, military and air force chapels see PARA 129 et seq.

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75. Register book.

The parochial church council¹ of a parish² must provide for every church and chapel in the parish in which marriages may be solemnised a register book of banns of durable materials and marked in the same manner as a register book of marriages³. All banns must be published from this book⁴ and not from loose papers, and after each publication the entry in the book must be signed by the person publishing the banns or by some person under his direction⁵.

1 In relation to an authorised chapel in an extra-parochial place, this must be construed as a reference to the chapel warden or other officer exercising analogous duties in the chapel or, if there is no such officer, such person as may be appointed by the bishop: Marriage Act 1949 s 7(4). As to the meaning of 'authorised chapel' see PARA 59 note 9. In relation to a licensed naval, army or air force chapel (as to which see PARA 129) a reference to the Admiralty in the case of a naval chapel, and a reference to a Secretary of State in the case of any other chapel, is to be substituted: Sch 4, Pt II.

2 As to the meaning of 'parish' see PARA 59 note 8.

3 Marriage Act 1949 s 7(3). As to the register book of marriages see the Marriage Act 1949 s 54; and PARA 84.

4 As to who may publish banns see PARA 70.

5 Marriage Act 1949 s 7(3).

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(iv) Marriage Licences

76. Common and special licences.

The powers of ecclesiastical authorities to grant licences dispensing with certain requirements in respect of the solemnisation of marriages have been preserved by modern legislation¹. The archbishop of each province, the bishop of every diocese and all others who of ancient right have been accustomed to issue a common licence² may grant such a licence for the solemnisation of marriage without the publication of banns at a lawful time³ and in lawful place⁴ within the several areas of their jurisdiction; and the Archbishop of Canterbury may grant a common licence for the same throughout all England⁵. The Archbishop of Canterbury has the additional power of granting a special licence for the solemnisation of marriage without the publication of banns at any convenient time or place not only within the province of Canterbury but throughout all England⁶.

The obtaining of such a licence is a matter of favour, and not of right⁷. The licence can only be used for the marriage of the parties for whose marriage it was intended to be obtained⁸ but provided it sufficiently identifies them, their true names and addresses need not be stated in it⁹.

A common licence may also be granted in respect of a marriage involving a person with a 'qualifying connection' to a parish¹⁰.

1 See the Marriage Act 1949 s 5. See also the Ecclesiastical Licences Act 1533 ss 4-12; Ecclesiastical Jurisdiction Act 1847 s 5; Canons Ecclesiastical (1603) 101, 104 (repealed); 2 Burn's Ecclesiastical Law (4th Edn) 462e; *Balfour v Carpenter* (1810) 1 Phillim 204. The power to grant marriage licences is not affected by the Supreme Court Act 1981: see s 21.

2 The reference is, it seems, to ecclesiastical judges and their surrogates: cf the Marriage Act 1949 s 16(4); and PARA 77 note 1.

3 As to the hours during which marriages may be solemnised see PARA 82.

4 As to the places at which marriages may be solemnised see PARAS 59, 65 et seq.

5 Marriage Act 1949 s 5(c). During a vacancy in an archiepiscopal or episcopal see licences may be granted by the guardian of the spiritualities: see **ECCLESIASTICAL LAW** vol 14 PARAS 432, 441, 489.

6 Marriage Act 1949 ss 5(b), 79(6); *Doe d Earl of Egremont v Grazebrook* (1843) 4 QB 406. This power is not affected by the Marriage (Registrar General's Licence) Act 1970: s 19. As to the grant of special licences by commissioners see the Ecclesiastical Licences Act 1533 s 12, and note 7. As to the Bishop of Sodor and Man's power to grant special licences in the Isle of Man see *Piers v Piers* (1849) 2 HL Cas 331.

7 See *Prince Capua v Count De Ludolf* (1836) 30 LJPM & A 71n. If the Archbishop of Canterbury, however, or the guardian of the spiritualities of the archbishopric during a vacancy, refuses a licence without reasonable cause, an appeal lies to the Lord Chancellor who may, if it seems fit, enjoin the archbishop or guardian to grant it and, in the event of his refusal to do so, may commission two other bishops to grant it: Ecclesiastical Licences Act 1533 ss 11, 12. No appeal lies against the refusal of the Archbishop of York or any diocesan bishop to grant a common licence under the dispensing power reserved to them by s 9.

8 *Cope v Burt* (1809) 1 Hag Con 434; affd (1811) 1 Phillim 224; *Lane v Goodwin* (1843) 4 QB 361. As to forgery of a marriage licence see the Forgery Act 1913 s 3(3)(i).

9 *Cope v Burt* (1809) 1 Hag Con 434; *Ewing v Wheatley* (1814) 2 Hag Con 175; *R v Burton-upon-Trent Inhabitants* (1815) 3 M & S 537; *Clowes v Jones* (1842) 3 Curt 185; *Lane v Goodwin* (1843) 4 QB 361; *Bevan (falsely called M'Mahon) v M'Mahon* (1861) 2 Sw & Tr 230, where the licence was held good although, for the purposes of concealing the woman's identity from the surrogate, one of her names was suppressed and her residence was falsely stated; *Haswell v Haswell and Gilbert* (1881) 51 LJP 15, where two Christian names had been added in the licence to the man's true name. The licence is not vitiated by an immaterial alteration in it after it has been granted: *Ewing v Wheatley*.

10 Church of England Marriage Measure 2008 s 2(1). As to marriages involving persons with a 'qualifying connection' see s 1; and PARA 59.

UPDATE

76 Common and special licences

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/2. FORMS AND CEREMONIES/(2) CHURCH OF ENGLAND MARRIAGES/(iv) Marriage Licences/77. Affidavit leading to grant of licence.

77. Affidavit leading to grant of licence.

Before a common marriage licence is granted, sworn declaration must be made by one of the parties before a surrogate¹, or other person having authority to grant it, to the effect:

- 73 (1) that the party believes that there is no impediment of kindred or alliance or any other lawful cause, nor any suit commenced in any court, to bar or hinder the solemnisation of the marriage in accordance with the licence²;
- 74 (2) that for 15 days immediately before the grant of the licence one of the parties has had his or her usual place of residence³ in the parish⁴ or other ecclesiastical district⁵ in which the marriage is to be solemnised or that the parish church⁶ or authorised chapel⁷ in which the marriage is to be solemnised is the usual place of worship⁸ of the parties or one of them⁹;
- 75 (3) where the marriage is being solemnised in a particular place by virtue of one of the parties having a 'qualifying connection'¹⁰, that one or both of the persons involved has the qualifying connection, and the nature of that connection¹¹; and
- 76 (4) where one of the parties, not being a widower or widow, is a minor, either that the consent of the person or persons whose consent to the marriage is required by statute, has been obtained, or that the necessity of obtaining that consent has been dispensed with, or that the court has consented to the marriage¹², or that there is no person whose consent to the marriage is so required¹³.

A common licence may not be granted for the solemnisation of a marriage unless the person having authority to grant the licence is satisfied by the production of evidence that both the persons to be married have attained the age of 21¹⁴; and he has received a declaration in writing made by each of those persons specifying their affinal relationship and declaring that the younger of those persons has not at any time before attaining the age of 18 been a child of the family in relation to the other¹⁵.

A person who knowingly and wilfully makes a false declaration in order to obtain a marriage licence is guilty of an offence¹⁶.

Where a marriage is solemnised by licence the responsibility as to whether one of the parties resides within the parish or district of the church or chapel in which it is proposed to be solemnised, and, it is submitted, whether a parish church or authorised chapel is the usual place of worship of the parties or one of them in instances in which the marriage is to be solemnised there¹⁷, and whether the marriage law is in other respects observed, rests with the bishop by whose authority the licence is granted and not with the officiating minister, and if a licence is produced to a minister directing or authorising the marriage of two persons in his church or chapel he is required both by his canonical obedience and by the rights of the parties to solemnise the marriage according to the licence¹⁸. If from his knowledge of certain facts he takes the responsibility of refusing to solemnise the marriage in spite of the licence, he does so at his peril¹⁹.

1 As to surrogates see **ECCELESIASTICAL LAW** vol 14 PARA 1275. Before a surrogate deputed by an ecclesiastical judge grants any licences he must take an oath before that judge, or a commissioner appointed under that

judge's seal, faithfully to execute his office according to law to the best of his knowledge: Marriage Act 1949 s 16(4) (amended by the Statute Law (Repeals) Act 1975 Sch Pt VI).

2 Marriage Act 1949 s 16(1)(a).

3 As to residence see PARA 59.

4 As to the meaning of 'parish' see PARA 59 note 8.

5 As to the meaning of 'ecclesiastical district' see PARA 21 note 3.

6 As to the meaning of 'parish church' see PARA 59 note 8.

7 As to the meaning of 'authorised chapel' see PARA 59 note 9.

8 As to the usual place of worship see PARA 66.

9 Marriage Act 1949 s 16(1)(b).

10 le under the Church of England Marriage Measure 2008 s 1 (as to which see PARA 59).

11 Church of England Marriage Measure 2008 s 2(1).

12 As to consents see PARA 48.

13 Marriage Act 1949 s 16(1)(c). In relation to licensed naval, military and air force chapels, s 16 applies as if it required the oath to include a statement that at least one of the parties is a qualified person for the purpose of marriage in such a chapel and to specify the person so qualified and the nature of his qualification: Sch 4, Pt II. As to who is so qualified see PARA 129.

14 Marriage Act 1949 s 16(1A)(a) (s 16(1A) added by the Marriage (Prohibited Degrees of Relationship) Act 1996 Sch 1 para 4).

15 Marriage Act 1949 s 16(1A)(b) (as added: see note 14).

16 Perjury Act 1911 s 3(1)(a). The punishment on conviction of an offence under s 3(1) on indictment is imprisonment for a term not exceeding seven years or a fine or both, and on summary conviction a penalty not exceeding the prescribed sum: s 3(1). 'Prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

17 See PARA 66.

18 *Tuckniss v Alexander* (1863) 32 LJ Ch 794.

19 *Tuckniss v Alexander* (1863) 32 LJ Ch 794. It may turn out that the bishop was misled in granting the licence: *Tuckniss v Alexander*. A clergyman who is aware that a statement in the licence as to the name or address of a party or otherwise is not in accordance with the facts is justified in hesitating before he solemnises the marriage (*Ewing v Wheatley* (1814) 2 Hag Con 175) and a clergyman who solemnised a marriage under a licence obtained by a false oath that the woman was of age, when she evidently appeared not to be so, was severely reprimanded in the Court of Chancery: *Millet v Rowse* (1802) 7 Ves 419.

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78. Caveat against grant of licence.

If any caveat is entered against the grant of a common licence, the caveat having been duly signed by or on behalf of the person by whom it is entered and stating his place of residence and the ground of objection on which the caveat is founded, no licence may be granted until the caveat or a copy thereof is transmitted to the ecclesiastical judge out of whose office the licence is to issue, and the judge has certified to the registrar of the diocese that he has examined into the matter of the caveat and is satisfied that it ought not to obstruct the grant of the licence, or until the caveat is withdrawn by the person who entered it¹.

A person who forbids the issue of a licence or certificate by falsely representing, knowing it to be false, that he is a person whose consent is required is guilty of an offence².

1 Marriage Act 1949 s 16(2). This is subject to the proviso that where a caveat in respect of a marriage which is void under s 1(2) (see PARA 37) on the ground that the persons to be married have not both attained the age of 21 or that one of those persons has at any time before attaining the age of 18 been a child of the family in relation to the other, then, notwithstanding that the caveat is withdrawn by the person who entered it, no licence will be issued unless the judge has certified that he has examined into that ground of objection and is satisfied that that ground ought not to obstruct the grant of the licence: s 16(2A) (s 16(2A), (2B) added by the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 para 4). In the case of such a marriage, one of the persons to be married may apply to the ecclesiastical judge out of whose office the licence is to issue for a declaration that, both those persons having attained the age of 21 and the younger of those persons not having at any time before attaining the age of 18 been a child of the family in relation to the other, there is no impediment of affinity to the solemnisation of the marriage; and where any such declaration is obtained the common licence may be granted notwithstanding that no declaration has been made under s 16(1A): s 16(2B) (as so added).

2 Perjury Act 1911 s 3(1)(c). As to the punishment see PARA 77 note 16.

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79. Period of validity of common licence.

If the marriage does not take place within three calendar months after the grant of the common licence, the licence is void and no clergyman may solemnise the marriage on its authority¹.

¹ Marriage Act 1949 s 16(3). As to the avoidance of a marriage solemnised when to the knowledge of the parties the licence has become void see s 25(c); and PARA 328.

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(v) Solemnisation of Marriage in Church

80. Who may solemnise marriage.

Marriage according to the rites of the Church of England is properly solemnised by a priest¹, but may be solemnised by a deacon², and may be solemnised on the authority of a certificate of a superintendent registrar³ in any church or chapel⁴ in which banns of matrimony may be published⁵. A clergyman cannot solemnise his own marriage⁶.

1 *R v Millis* (1844) 10 Cl & Fin 534, HL; *Catherwood v Caslon* (1844) 13 M & W 261; *Du Moulin v Druitt* (1860) 13 ICLR 212; *Beamish v Beamish* (1861) 9 HL Cas 274; *Culling v Culling* [1896] P 116. If persons knowingly and wilfully consent to or acquiesce in the solemnisation of their marriage by a person who is not in holy orders, the marriage is void (Marriage Act 1949 s 25), but it would be otherwise if he was believed to be in holy orders (*Costard v Winder* (1660) Cro Eliz 775; *Hawke v Corri* (1820) 2 Hag Con 280; *R v Millis*). A person who knowingly and wilfully solemnises a marriage according to the rites of the Church of England, falsely pretending to be in holy orders, is guilty of an offence and is liable to imprisonment for a term not exceeding five years if prosecuted within three years after the commission of the offence: Marriage Act 1949 s 75(1)(d), (4). See also *R v Ellis* (1888) 16 Cox CC 469. Where the General Synod has exercised its powers with regard to co-operation with other churches under the Church of England (Ecumenical Relations) Measure 1988 ss 1, 2 (see **ECCLESIASTICAL LAW**), no person may, unless he is a clerk in Holy Orders of the Church of England, solemnise a marriage according to the rites of the Church of England: s 3(b).

2 *R v Millis* (1844) 10 Cl & Fin 534, HL; *Cope v Barber* (1872) LR 7 CP 393. See also **ECCLESIASTICAL LAW** vol 14 PARA 664.

3 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

4 A superintendent registrar may issue a certificate for the solemnisation of a marriage in any parish church or authorised chapel which is the usual place of worship of the persons to be married or of one of them, notwithstanding that the church or chapel is not within a registration district in which either of those persons resides: Marriage Act 1949 s 35(3). For the exclusion of this provision in relation to naval, military and air force chapels see PARA 129 note 9. As to the meanings of 'parish church' and 'authorised chapel' see PARA 59 notes 8, 9; as to the meaning of 'usual place of worship' see PARA 66.

5 Marriage Act 1949 ss 17, 26. The consent of the minister of the church or chapel is requisite, and the marriage may not be celebrated by any person other than a clergyman: s 17 proviso. As to the application of this proviso in relation to a marriage in a licensed naval, military or air force chapel see PARA 129 note 9. As to the meaning of 'clergyman' see PARA 23 note 5. The certificate or, if notice has been given to more than one superintendent registrar, the certificates, must be delivered to the officiating clergyman (s 50(1)(f)), except in the case of a marriage in a licensed naval, military or air force chapel, when the certificate or certificates must be delivered to the appointed clergyman in whose presence the marriage is solemnised (Sch 4, Pt II; see PARA 129).

As to the marriages that may be solemnised on the authority of superintendent registrar's certificates see PARA 54.

6 *Beamish v Beamish* (1861) 9 HL Cas 274, where it is explained that the clergyman whose presence is essential to the validity of the marriage must be a different person from the bridegroom.

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81. Minister's duty to solemnise marriage.

A minister who without just cause refuses to marry persons entitled to be married in his church or chapel commits an ecclesiastical offence for which he is punishable in the ecclesiastical courts¹.

No clergyman² is compelled to solemnise the marriage of any person whose former marriage has been dissolved on any ground and whose former husband or wife is still living³, or to permit the marriage of such a person to be solemnised in the church or chapel of which he is the minister⁴.

Formerly a clergyman was not liable to any suit, penalty or censure for refusing to publish banns of marriage or to solemnise marriages between a man and his deceased wife's sister, or his deceased brother's widow, or between persons and their nephews or nieces by marriage⁵, although if he refused to solemnise such a marriage between persons who but for his refusal would be entitled to have it solemnised in his church or chapel he could allow it to be solemnised there by any other clergyman entitled to officiate in the diocese; and it appears that his rights in this respect are preserved⁶.

1 *Argar v Holdsworth* (1758) 2 Lee 515. It is doubtful whether in case of refusal he is liable to an action for damages (*Davis v Black* (1841) 1 QB 900), or to be indicted for the refusal (*R v James* (1850) 3 Car & Kir 167, CCR). The offence of refusal is not committed unless a definite request for the marriage has been made to the minister by both parties and the parties have presented themselves to him to be married at a time when he was not engaged in some other duty (*Davis v Black*), and when he could legally have performed the service (*R v James*). See further **ECCLESIASTICAL LAW** vol 14 PARA 1357. As to the duty of marrying by licence see PARA 77.

2 As to the meaning of 'clergyman' see PARA 23 note 5.

3 Matrimonial Causes Act 1965 s 8(2)(a).

4 Matrimonial Causes Act 1965 s 8(2)(b).

5 See the Deceased Wife's Sister's Marriage Act 1907 s 1; the Deceased Brother's Widow's Marriage Act 1921 s 1; and the Marriage (Prohibited Degrees of Relationship) Act 1931 s 1 (all repealed). See *Thompson v Dibdin* [1912] AC 533, HL; *Banister v Thompson* [1908] P 362.

6 See the Marriage Act 1949 s 79(10), which provides that nothing in the Act is to enable any proceedings to be taken in an ecclesiastical court which could not have been taken if the Act had not been passed.

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82. Time of marriage.

A marriage according to the rites of the Church of England may not be solemnised on the authority of superintendent registrar's certificates within 15 days¹, or such period as may be determined by the Registrar General² or by a superintendent registrar³ after the day on which notice was entered in the marriage notice book⁴.

A marriage may be solemnised on the authority of certificates of a superintendent registrar at any time within the period which is the applicable period⁵ in relation to that marriage⁶. If the marriage is not solemnised within the applicable period the notices of marriage and the certificates are void and no person may solemnise the marriage on the authority of those certificates⁷.

Unless it is by special licence⁸ a marriage according to the rites of the Church of England must conform to the general requirement concerning the hours for solemnisation of marriages: thus it must be solemnised between eight o'clock in the forenoon and six o'clock in the afternoon⁹.

1 Marriage Act 1949 s 31(4A)(a) (added by the Immigration and Asylum Act 1999 s 160(5)).

2 As to the meaning of 'Registrar General' see PARA 46 note 5.

3 Marriage Act 1949 s 31(4A)(b) (added by the Immigration and Asylum Act 1999 s 160(5)). As to the meaning of 'superintendent registrar' see PARA 22 note 1.

4 Marriage Act 1949 s 31(4) (amended by the Immigration and Asylum Act 1999 s 160(4)(c)); see further PARA 94. As to the marriage notice book see the Marriage Act 1949 ss 27(4), 78(1); and PARA 92. A person who knowingly and wilfully solemnises a marriage in contravention of this provision is guilty of an offence and is liable to imprisonment for a term not exceeding five years if prosecuted within three years from the commission of the offence: s 75(2)(d), (4).

5 'Applicable period' means the period beginning with the day on which the notice of marriage was entered in the marriage notice book and ending: (1) in the case of a marriage which is to be solemnised in pursuance of s 26(1)(dd), 37 or 38, on the expiry of three months; and (2) in the case of any other marriage, on the expiry of 12 months: Marriage Act 1949 s 33(3). If the notices of marriage given by each person to be married are not given on the same date, the applicable period is to be calculated by reference to the earlier of the two dates: s 33(4).

6 Marriage Act 1949 s 33(1). A person who knowingly and wilfully solemnises a marriage after the expiration of the three months is guilty of an offence and is liable to imprisonment for a term not exceeding five years, if prosecuted within three years from the commission of the offence: s 75(2)(e), (4).

7 Marriage Act 1949 s 33(2). As to the avoidance of a marriage solemnised to the parties' knowledge on the authority of a certificate which has become void, or in a place not specified in the notice of marriage and certificate, see s 25(c), (d); and PARA 328.

8 As to the special licence of the Archbishop of Canterbury see **ECCLESIASTICAL LAW** vol 14 PARA 1023.

9 Marriage Act 1949 s 4. A person who knowingly and wilfully solemnises a marriage at any other time (not being a marriage by special licence or a Quaker or Jewish marriage) is guilty of an offence and liable to imprisonment for a term not exceeding 14 years if prosecuted within three years after the commission of the offence (Marriage Act 1949 s 75(1)(a), (4)), but a marriage so solemnised would not be void (see *Catterall v Sweetman* (1845) 1 Rob Eccl 304).

UPDATE

82 Time of marriage

TEXT AND NOTES 1-3--Marriage Act 1949 s 31(4A) amended: SI 2009/2821.

NOTE 5--Marriage Act 1949 s 33(3) amended: SI 2009/2821.

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83. Conduct of marriage ceremony in church.

The actual marriage should take place in the body of the church, in the presence of the congregation, and the minister and the parties should afterwards go up to the Lord's table, before which the parties should kneel for the conclusion of the office¹.

The essential parts of the ceremony have been held to be the reciprocal agreement of the parties to take each other for wedded wife and wedded husband till parted by death, the joining together of their hands, and the pronouncement by the clergyman that they are man and wife².

The marriage ceremony is sometimes performed between persons who are already married to one another³.

A marriage solemnised according to the rites of the Church of England must be solemnised in the presence of at least two witnesses in addition to the officiating clergyman⁴, but in spite of this direction a marriage in the presence of only one additional witness is not invalid⁵.

1 Book of Common Prayer, rubrics in the Form of Solemnization of Matrimony; *R v James* (1850) 3 Car & Kir 167, CCR per Alderson B. Nevertheless a marriage in the vestry of the church is valid: *Wing v Taylor (falsely calling herself Wing)* (1861) 2 Sw & Tr 278. As to the validity of marriages generally see PARA 3.

2 *Harrod v Harrod* (1854) 1 K & J 4; *Beamish v Beamish* (1861) 9 HL Cas 274. Neither the use of the language of the marriage service, nor observance of the directions of the rubric respecting the opening address to the congregation, nor the adjuration to the parties as to confessing any lawful impediment to their union, nor the demand 'Who giveth this woman to be married to this man?', nor the putting of the ring on the bride's finger, nor the benediction, are absolutely essential to the validity of the marriage: *Weld v Chamberlaine* (1683) 2 Show 300; *Beamish v Beamish*. The giving away of the woman is not essential (*More v More* (1741) 2 Atk 157 per Lord Hardwicke LC); nor is the repetition by the parties of the words of the service essential (*Harrod v Harrod*). Therefore deaf and dumb persons can legally be married: *Harrod v Harrod*. For civil purposes the marriage is complete after the plighting of troth; what follows (the giving of the ring, joining of hands and publication by the minister of the marriage) is symbolical and declaratory of a marriage which has already taken place: *Beamish v Beamish* (1861) 9 HL Cas 274.

3 *Piers v Piers* (1849) 2 HL Cas 331. As to the addition of the marriage service to a marriage contracted at a register office see PARA 57.

4 Marriage Act 1949 s 22. As to the meaning of 'clergyman' see PARA 23 note 5.

5 *Wing v Taylor (falsely calling herself Wing)* (1861) 2 Sw & Tr 278.

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(vi) Registration

84. Duty to register marriages.

A marriage celebrated according to the rites of the Church of England must be registered by the clergyman by whom it is solemnised¹ who, immediately after solemnising a marriage, must register in duplicate in two of the marriage register books furnished by the Registrar General for England and Wales² the particulars relating to the marriage in the prescribed form³. Each entry must be signed by the clergyman, by the parties married and by two witnesses⁴.

1 Marriage Act 1949 s 53(a). In the case of a marriage according to the usages of the Society of Friends (Quakers) the marriage must be registered by the registering officer of that society appointed for the district (s 53(b)), and in the case of a Jewish marriage by the secretary of the synagogue of which the husband is a member (s 53(c)). As to the persons by whom marriages solemnised in registered buildings and register offices must be registered see s 53(d)-(f); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 558. For the exclusion of certain provisions relating to registration in relation to marriages according to Church of England rites in licensed naval, military and air force chapels see PARA 129 note 9, and PARA 130 note 5.

2 As to the Registrar General see PARA 46 note 5.

3 Marriage Act 1949 ss 54, 55(1). For the form, see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1 Form 13. As to the registration of marriages in guild churches see the City of London (Guild Churches) Act 1952 s 22(5); and **ECCLIASTICAL LAW** vol 14 PARA 606. The clergyman may ask the parties to the marriage the particulars required to be entered in the marriage register book (Marriage Act 1949 s 56), and any person who knowingly and wilfully makes or causes to be made, for the purpose of being inserted in the register, any false statement as to any of the particulars required to be registered is guilty of an offence (Perjury Act 1911 s 3(1)(b)). As to offences in relation to the solemnisation of marriage see PARA 180.

No penalties are incurred by the clergyman, however, if he discovers an error in the form or substance of the entry and within one calendar month after the discovery, in the presence of the parties married (or, in case of their death or absence, in the presence of the superintendent registrar and of two other credible witnesses, or in the presence of the churchwardens or chapel wardens of the church or chapel in which the marriage is solemnised), who attest the same, corrects the erroneous entry by entry in the margin, without any alteration of the original entry, and signs the marginal entry adding the date of the correction: Marriage Act 1949 s 61(1), (2), (5). In such case he must make the like marginal entry, attested in like manner, in the duplicate marriage register book (s 61(3)) and in the certified copy of the register book which he is required to make under s 57 or, if that copy has already been delivered, he must make and deliver to the superintendent registrar a separate certified copy of the original erroneous entry and of the marginal correction (s 61(4)).

Where a marriage is solemnised according to the rites of the Church of England of a person who is housebound or is a detained person at the place where he or she usually resides (see s 26(1)(dd); and PARA 171), the marriage must be registered in accordance with s 55 in the marriage register books of any church or chapel which is in the same parish or extra-parochial place as is the place where the marriage is solemnised or, if there is no such church or chapel, of any church or chapel in any adjoining parish: s 55(4) (s 55(4), (5) added by the Marriage Act 1983 Sch 1 para 17). Where such a clergyman is required to register a marriage in the marriage register books of a church or chapel of which he is not the incumbent, the incumbent may give the books into his custody at a convenient time before the marriage is solemnised and he must keep them safely and return them to the custody of the incumbent as soon as is reasonably practicable: Marriage Act 1949 s 55(5) (as so added). A clergyman who refuses or without reasonable cause omits to register a marriage solemnised by him is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 76(1). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard

scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144. As to the superintendent registrar's power to prosecute see the Marriage Act 1949 s 76(5).

4 Marriage Act 1949 s 55(2). Every entry must be made in consecutive order from the beginning to the end of each book and the number of the entry in each duplicate marriage register book must be the same: s 55(3).

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85. Copies of register for superintendent registrar.

In the months of January, April, July and October the incumbent¹ of every church or chapel in which marriages may be solemnised according to the rites of the Church of England must make and deliver to the superintendent registrar, on forms supplied by the Registrar General, a true copy, certified under his hand, of all the entries of marriages in the register book kept by him during the period of three months ending with the last day of the month immediately before the month in which the copy is required to be made, or, if no marriage has been entered in it since the last certificate, he must certify the fact².

1 'Incumbent' means the rector, vicar or curate in charge of the church or chapel in question: Marriage Act 1949 s 54(1).

2 Marriage Act 1949 s 57(1). See further **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 618. The superintendent registrar must pay the incumbent £2 for every entry contained in a certified copy, and that sum must be reimbursed to the superintendent registrar in the case of a registration district in the City of London, the Inner Temple and the Middle Temple, by the Common Council of the City of London; and in any other case, by the council of the non-metropolitan county, metropolitan district or London borough in which his registration district is situated: s 57(4) (amended by the Local Government Act 1972 Sch 29 para 40; and SI 2002/3076; SI 2005/1997). Refusal to deliver any copy or certificate or failure to deliver a copy or certificate during any of the specified months renders the offender liable on summary conviction to a fine not exceeding level 1 on the standard scale: Marriage Act 1949 s 76(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the superintendent registrar's power to prosecute see the Marriage Act 1949 s 76(5). As to the standard scale see PARA 84 note 3.

Section 57 does not apply to licensed naval, military or air force chapels: see PARA 129 note 9.

UPDATE

85 Copies of register for superintendent registrar

NOTE 2--The duty imposed by the Marriage Act 1949 s 57(1) may now be discharged by making a copy in the approved electronic form of each entry in the marriage register book: Marriage Act 1949 s 57(2A)-(2C) (added by SI 2009/2821).

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/2. FORMS AND CEREMONIES/(2) CHURCH OF ENGLAND MARRIAGES/(vi) Registration/86. Register books.

86. Register books.

The marriage register books must be kept safely by the incumbent¹ until filled². When they are filled one copy must be delivered to the superintendent registrar, and the other is to remain in the custody of the incumbent and must be kept by him with the registers of baptism and burials of the parish or other ecclesiastical district in which the marriages registered in it have been solemnised³.

Where any church or chapel ceases to be used for the solemnisation of marriages, whether by reason of demolition, revocation of a licence or otherwise, any marriage register books in the custody of the incumbent of that church or chapel must be delivered forthwith to the incumbent of the church which is, or becomes, the parish church of the parish in which the disused church or chapel is situated⁴. Unless the books in question are the only register books in use for the parish any such books as have not been filled must be forwarded to the Registrar General to be formally closed⁵.

Every incumbent by whom a marriage register book is kept must at all reasonable hours allow searches to be made in any such book and on payment of the prescribed fee he must give a copy certified under his hand of any entry in such a book⁶.

1 As to the meaning of 'incumbent' see PARA 85 note 1.

2 Marriage Act 1949 s 59. If he carelessly loses or injures a marriage register book or copy, or carelessly allows it to be injured while in his keeping, he is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 76(1). As to the superintendent registrar's power to prosecute see PARA 181. As to see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 351. As to offences relating to altering a register see the Forgery and Counterfeiting Act 1981 s 5; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 351. The Marriage Act 1949 ss 59, 60 do not apply to licensed naval, military or air force chapels: see PARA 129 note 9.

3 Marriage Act 1949 s 60(1). As to the meaning of 'parish' see PARA 59 note 8; and as to the meaning of 'ecclesiastical district' see PARA 21 note 3. As to the care of register books see **ECCLESIASTICAL LAW** vol 14 PARA 1112 et seq.

4 Marriage Act 1949 s 62(1). When the incumbent of the parish church next delivers to the superintendent registrar a certified copy of the entries in the marriage register book of marriages solemnised in the parish church he must deliver also a copy of all entries made in the marriage register books of the disused church or chapel after the date of the last entry of which a certified copy has already been delivered to the superintendent registrar: s 62(2)(a).

5 Marriage Act 1949 s 62(2)(b).

6 Marriage Act 1949 s 63(1). The fee for a certified copy is £3.50 where application for a copy is made at the time of registering the marriage or is made to a registrar by whom the book containing the entry is kept, and £7 in any other case: s 63(1); Registration of Births, Deaths and Marriages (Fees) Order 2002, SI 2002/3076, Schedule. As to the fee for searching the register for the period before 1837 see **ECCLESIASTICAL LAW** vol 14 PARA 1198.

UPDATE

86 Register books

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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(3) MARRIAGE ON THE AUTHORITY OF THE SUPERINTENDENT REGISTRAR'S CERTIFICATES

(i) Notices and Declarations

87. Giving and content of notice.

Where a marriage is intended to be solemnised on the authority of certificates of a superintendent registrar¹, notice of marriage in the prescribed form² must be given³:

- 77 (1) if the persons to be married have resided in the same registration district⁴ for the period of seven days immediately before the giving of the notice, by each of those persons to the superintendent registrar of that district⁵; or
- 78 (2) if the persons to be married have not resided in the same registration district for such a period of seven days, by each of those persons to the superintendent registrar of the registration district in which he or she has resided for that period⁶.

A notice of marriage must state the name and surname, occupation, place of residence⁷ and nationality of each of the persons to be married, whether either of them has previously been married or formed a civil partnership, and if so how the marriage or civil partnership ended, and, in the case of a marriage intended to be solemnised at a person's residence⁸, which residence is to be the place of solemnisation of the marriage and, in any other case, the church or other building or premises in or on which the marriage is to be solemnised⁹. The notice must state the period, not being less than seven days, during which each has resided in his or her place of residence¹⁰; but, if either of the persons to be married has resided in the place stated in the notice for more than one month, the notice may state that he or she has resided there for more than one month¹¹.

Where a marriage in a registration district in which neither party resides¹² is intended to be solemnised on the authority of certificates of a superintendent registrar, each notice of marriage given to the superintendent registrar and each certificate issued by the superintendent registrar must state, in addition to the description of the registered building¹³ or, as the case may be, the parish church¹⁴ or authorised chapel¹⁵, in which the marriage is to be solemnised, that it is the usual place of worship of the persons to be married or of one of them and, in the latter case, must state the name of the person whose usual place of worship it is¹⁶.

Additional provision is made as to the giving of notices where one or other of the parties to a marriage is subject to immigration control¹⁷.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 The Registrar General may, with the approval of the Secretary of State, by statutory instrument make regulations prescribing any thing which by the Marriage Act 1949 is required to be prescribed: s 74(b) (amended by SI 2008/678). Except where the context otherwise requires, 'prescribed' means prescribed by regulations made under the Marriage Act 1949 s 74: s 78(1). In exercise of the power so conferred the Registration of Marriages Regulations 1986, SI 1986/1442, and the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, were made. For the prescribed forms of notice see the Registration of

Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 1 (substituted by SI 2000/3164; amended by SI 2005/3177) (notice of marriage where both parties aged 18 or over); and the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 1A (added by SI 2000/3164; amended by SI 2005/3177) (notice of marriage where either or both parties under 18). For the corresponding forms in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1, Form 1 (substituted by SI 2000/3164; amended by SI 2005/3177) (notice of marriage where both parties aged 18 or over); and the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1, Form 1A (added by SI 2000/3164; amended by SI 2005/3177) (notice of marriage where either or both parties under 18). For the prescribed forms of notice where a party is subject to immigration control, see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1 Forms 1B, 1C (added by SI 2005/155; amended by SI 2005/3177). For the corresponding forms in Welsh see Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1 Forms 1B, 1C (added by SI 2005/155; amended by SI 2005/3177). As to persons subject to immigration control see PARA 176. As to the meaning of 'Registrar General' see PARA 46 note 5. For these purposes 'subject to immigration control' has the same meaning as in the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(4) (see PARA 176 note 2): Registration of Marriages Regulations 1986, SI 1986/1442, reg 2(1) (amended by SI 2005/155).

3 Marriage Act 1949 s 27(1) (amended by the Immigration and Asylum Act 1999 ss 160(2)(a), 169(1), (3), Sch 14 paras 3, 8, Sch 16).

4 For these purposes, except where the context otherwise requires, 'registration district' means the district of a superintendent registrar: Marriage Act 1949 s 78(1). As to registration districts generally see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 502.

5 Marriage Act 1949 s 27(1)(a) (amended by the Immigration and Asylum Act 1999 s 161(1)(a)).

6 Marriage Act 1949 s 27(1)(b) (amended by the Immigration and Asylum Act 1999 s 161(1)(b)). As to the procedure where one of the parties resides in Scotland or Northern Ireland see PARAS 112, 113 respectively.

7 It is not necessary in support of a marriage to give any proof that before the marriage either of the parties resided, or resided for any period, in the registration district stated in the notice of marriage to be that of his or her place of residence, nor may any evidence be given to prove the contrary in any proceedings touching the validity of the marriage: see PARA 22. As to the acquisition of a residence qualification cf PARA 59.

8 Ie in pursuance of the Marriage Act 1949 s 26(1)(dd) (see PARA 54).

9 Marriage Act 1949 s 27(3) (amended by the Marriage Act 1983 Sch 1 para 5(a); the Marriage Act 1994 Schedule paras 1, 2; the Immigration and Asylum Act 1999 s 161(2); and the Civil Partnership Act 2004 Sch 27 para 14). In relation to marriages in naval, military or air force chapels otherwise than according to the rites of the Church of England, the Marriage Act 1949 s 27(3) applies as if it required the notice of marriage to include a statement that one at least of the persons to be married is a qualified person within the meaning of Pt V (ss 68-71: see PARA 129) and to specify the person so qualified and the nature of his qualification: s 70(1)(b), Sch 4 Pt IV.

10 Marriage Act 1949 s 27(3)(a) (amended by the Immigration and Asylum Act 1999 s 160(2)(c), Sch 16).

11 Marriage Act 1949 s 27(3) proviso.

12 Ie a certificate issued under the Marriage Act 1949 s 35(2) or s 35(3): see PARA 100.

13 As to the meaning of 'registered building' see PARA 54 note 3.

14 As to the meaning of 'parish church' see PARA 59 note 8.

15 As to the meaning of 'authorised chapel' see PARA 59 note 9.

16 Marriage Act 1949 s 35(5) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 17(5)). As to when a parish church or authorised chapel is deemed to be the usual place of worship of any person see PARA 100 note 17.

17 See the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 20(1); and PARA 177.

UPDATE

87 Giving and content of notice

NOTE 2--SI 1986/1442 Sch 1 Forms 1, 1A, 1B, 1C, SI 1999/1621 Sch 1 Forms 1, 1A, 1B, 1C substituted: SI 2009/2806.

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88. Notice requiring presence of registrar.

If the persons to be married wish to be married in the presence of a registrar¹ in a registered building² for which an authorised person³ has been appointed⁴, they must, at the time when notice of marriage is given to the superintendent registrar⁵, give notice to him that they require a registrar to be present at the marriage⁶.

1 For these purposes, except where the context otherwise requires, 'registrar' means a registrar of marriages: Marriage Act 1949 s 78(1). As to registrars of marriage see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 611.

2 As to the meaning of 'registered building' see PARA 54 note 3.

3 As to the meaning of 'authorised person' see PARA 107.

4 As to the necessity for the presence of the registrar or other duly authorised person at a marriage in a registered building see PARAS 106-107.

5 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

6 Marriage Act 1949 s 27(5).

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89. Effect of want of due notice and of misdescription.

If any persons knowingly and wilfully intermarry without having given due notice of marriage to the superintendent registrar¹, the marriage is void².

A misdescription in the notice of marriage of the name, age, condition or residence of both or either of the parties does not affect the validity of the marriage, even if both parties were aware of the irregularity³, as the means resorted to by the legislature for protecting the public and the parties against such false notice are the imposition of penalties on those who sign a false notice or make a false declaration⁴. The fact that the marriage is void does not affect the duty to register all marriages solemnised⁵. The Registrar General has no power to strike out an entry altogether, or to make a note in the margin of an entry that the marriage was a void marriage⁶.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 See the Marriage Act 1949 s 49(a); and PARA 330. As to the position where one of the parties is unaware of the irregularity see PARA 330. The marriage is similarly void if the parties knowingly and wilfully intermarry in any place other than the one specified in the notice (see s 49(e); and PARA 330); and any person who knowingly and wilfully solemnises a marriage in such a place is guilty of an offence (see s 75(2)(a), (4); and PARA 180).

3 *Re Rutter, Donaldson v Rutter* [1907] 2 Ch 592 (widow was liable to forfeit property on a remarriage; her surname, and the condition and residence of both parties, were misdescribed in the notice of marriage; it was held that the irregularities did not affect the validity of the marriage); *Prowse v Spurway and Bowley* (1877) 46 LJP 49 (first Christian name of one party intentionally omitted, and false assertion that both parties were over 21); *Plummer v Plummer* [1917] P 163, CA; *R v Lamb* (1934) 50 TLR 310, CCA; and see *R v Smith* (1865) 4 F & F 1099. In this respect there is no analogy between a marriage by banns and a marriage under the superintendent registrar's certificates: *Holmes v Simmons (falsely called Holmes)* (1868) LR 1 P & D 523; *Plummer v Plummer*; and see PARA 69.

4 *Plummer v Plummer* [1917] P 163, CA; and see *R v Lamb* (1934) 50 TLR 310, CCA; and PARA 184.

5 *Dinizulu v A-G and Registrar-General* [1958] 3 All ER 555, [1958] 1 WLR 1252. As to the registration of marriages see PARA 108.

6 See note 5.

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90. Declaration to accompany notice.

No certificate for marriage is to be issued by a superintendent registrar¹ unless the notice of marriage is accompanied by a solemn declaration in writing by the party giving the notice²:

- 79 (1) that he or she believes that there is no impediment of kindred or alliance³ or other lawful hindrance to the marriage⁴;
- 80 (2) that the persons to be married have for the period of seven days immediately before the giving of the notice had their usual place of residence within the registration district⁵ or registration districts in which notice is given⁶;
- 81 (3) where one of the persons to be married is a child⁷ and is not a widower or widow, that the consent of the person or persons whose consent to the marriage is required⁸ has been obtained, that the necessity of obtaining any such consent has been dispensed with, that the court has consented to the marriage⁹, or that there is no person whose consent to the marriage is so required¹⁰.

The declaration must be in the body or at the foot of the notice of marriage and must be signed by the person by whom the notice is given, at the time it is given¹¹, in the presence of the superintendent registrar to whom it is given or his deputy, or in the presence of a registrar of births and deaths or of marriages for the registration district in which the person giving the notice, or his deputy, resides, and that official must attest the declaration by adding his name, description and place of residence¹². If any person, other than a superintendent registrar, who has so attested a declaration accompanying a notice of marriage has reasonable grounds for suspecting that the marriage will be a sham marriage¹³, he must report his suspicions to the Secretary of State without delay and in such form and manner as may be prescribed by regulations¹⁴.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 28(1) (amended by the Immigration and Asylum Act 1999 Sch 16). A person who knowingly and wilfully makes a false declaration is guilty of an offence: see PARA 184.

3 As to the prohibited degrees of consanguinity and affinity see PARAS 35-37.

4 Marriage Act 1949 s 28(1)(a).

5 As to the meaning of 'registration district' see PARA 87 note 4.

6 Marriage Act 1949 s 28(1)(b) (substituted by the Immigration and Asylum Act 1999 Sch 14 paras 3, 11). In relation to the marriage of a person who is subject to immigration control, the Marriage Act 1949 s 28(1)(b) has effect as if it required a declaration that the notice of marriage is given in compliance with the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(2) (see PARA 177) and the party subject to immigration control satisfies s 19(3)(a), (b) or (c) (see PARA 176): s 20(2)(a).

7 As to the meaning of 'child' see PARA 37 note 3.

8 I.e. under the Marriage Act 1949 s 3: see PARA 46.

9 I.e. where the minor is a ward of court (see PARA 46) or where the person whose consent is required refuses or is unable to give it (see PARAS 47-48).

10 Marriage Act 1949 s 28(1)(c) (amended by the Family Law Reform Act 1987 Sch 2 para 9). The Marriage Act 1949 s 28 also applies with modifications to certain marriages intended to be celebrated in Scotland: see PARA 112. As to the additional matters to be declared in the case of a marriage according to the usages of the Society of Friends see PARA 115.

Where, for the purpose of obtaining a certificate for marriage, a person declares that the consent of any person or persons whose consent to the marriage is required under s 3 (see PARA 46) has been obtained, the superintendent registrar may refuse to issue the certificate for marriage unless satisfied by the production of written evidence that the consent of that person or of those persons has in fact been obtained: Family Law Reform Act 1969 s 2(3) (amended by the Immigration and Asylum Act 1999 Sch 14 para 37, Sch 16).

11 Marriage Act 1949 s 28(1) (as amended: see note 2).

12 Marriage Act 1949 s 28(2).

13 As to the meaning of 'sham marriage' see PARA 11.

14 Immigration and Asylum Act 1999 s 24(1)(b), (3). As to the prescribed form and manner see PARA 11 note 7.

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91. Superintendent registrar's power to require evidence.

A superintendent registrar¹ to whom a notice of marriage is given², or any other person attesting a declaration accompanying such a notice³, may require the person giving the notice to provide him with specified evidence⁴:

- 82 (1) relating to that person⁵; or
- 83 (2) if the superintendent registrar considers that the circumstances are exceptional, relating to each of the persons to be married⁶.

Such a requirement may be imposed at any time on or after the giving of the notice of marriage but before the superintendent registrar issues⁷ his certificate⁸.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Ie under the Marriage Act 1949 s 27: see PARA 87.

3 As to the declaration accompanying the notice of marriage see PARA 90.

4 For these purposes, 'specified evidence', in relation to a person, means such evidence of that person's: (1) name and surname; (2) age; (3) previous marriage or civil partnership and, if so, the ending of the marriage or civil partnership; and (4) nationality, as may be specified in guidance issued by the Registrar General: Marriage Act 1949 s 28A(3) (s 28A added by the Immigration and Asylum Act 1999 s 162(1); Marriage Act 1949 s 28A(3) substituted by the Civil Partnership Act 2004 Sch 27 para 15). As to the meaning of 'Registrar General' see PARA 46 note 5.

5 Marriage Act 1949 s 28A(1)(a) (as added: see note 4)

6 Marriage Act 1949 s 28A(1)(b) (as added: see note 4).

7 Ie under the Marriage Act 1949 s 31: see PARA 97.

8 Marriage Act 1949 s 28A(2) (as added: see note 4).

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92. Entry in marriage notice book.

The superintendent registrar¹ must file all notices of marriage and keep them with the records of his office, and he must² also forthwith enter the particulars given in every such notice, together with the date of the notice and the name of the person by whom the notice was given, in a book (the 'marriage notice book') furnished to him for that purpose by the Registrar General³; and the marriage notice book must be open for inspection free of charge at all reasonable hours⁴. The superintendent registrar is entitled to a fee of £30 for every such entry made in the marriage notice book⁵.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Is subject to the Marriage Act 1949 s 27A (see PARA 172) and ss 27B, 27C (see PARA 93).

3 As to the meaning of 'Registrar General' see PARA 46 note 5.

4 Marriage Act 1949 ss 27(4), 78(1) (s 27(4) amended by the Marriage Act 1983 Sch 1 para 5(b)).

5 Marriage Act 1949 s 27(6) (amended by SI 2002/3076).

UPDATE

92 Entry in marriage notice book

TEXT AND NOTES--Marriage Act 1949 s 27 amended: SI 2009/2821.

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93. Notification where marriage is within the prohibited degrees.

In relation to any marriage within the prohibited degrees of affinity¹, which is intended to be solemnised on the authority of certificates of a superintendent registrar²:

- 84 (1) the superintendent registrar must not enter notice of the marriage in the marriage notice book³ unless:
- 1
1. (a) he is satisfied by the production of evidence that both the persons to be married have attained the age of 21⁴; and
 2. (b) he has received a declaration made in the prescribed form⁵ by each of those persons, each declaration having been signed and attested in the prescribed manner⁶, specifying their affinal relationship and declaring that the younger has not at any time before attaining the age of 18 been a child of the family⁷ in relation to the other⁸;
- 2
- 85 (2) the fact that a superintendent registrar has received a declaration under head (1) above must be entered in the marriage notice book together with the particulars given in the notice of marriage and any such declaration must be filed and kept with the records of the office of the superintendent registrar or, where notice of marriage is required to be given to two superintendent registrars, of each of them⁹; and
- 86 (3) where the superintendent registrar receives from some person other than the persons to be married a written statement signed by that person which alleges that the declaration made under head (1) above is false in a material particular, the superintendent registrar must not issue a certificate unless a declaration is obtained¹⁰ from the High Court¹¹.

1 In any marriage mentioned in the Marriage Act 1949 s 1(2), Sch 1 Pt 2: see PARA 37.

2 Marriage Act 1949 s 27B(1) (s 27B added by the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 paras 1, 5; Marriage Act 1949 s 27B(1) amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 10(a)). The Marriage Act 1949 s 29 (see PARA 96) does not apply in relation to a marriage to which s 27B applies, except so far as a caveat against the issue of a certificate for the marriage is entered under s 29 on a ground other than the relationship of the persons to be married: s 27B(6) (as so added; amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 10(b), Sch 16). As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 As to the meaning of 'marriage notice book' see PARA 92.

4 Marriage Act 1949 s 27B(2)(a) (as added: see note 2).

5 For the prescribed form of declaration see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 8 (substituted by SI 2005/3177); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1, Form 5 (substituted by SI 2005/3177).

6 The declaration must be signed, in the space provided, by the person making it in the presence of the superintendent registrar who must then, in the space provided, sign the declaration as witness and add his description: Registration of Marriages Regulations 1986, SI 1986/1442, reg 6(2). The superintendent registrar so

referred to is the superintendent registrar or, as the case may be, either of the two superintendent registrars to whom notice of the marriage is required to be given: reg 6(3).

7 As to the meaning of 'child of the family' see PARA 37 note 3.

8 Marriage Act 1949 s 27B(2)(b) (as added: see note 2).

9 Marriage Act 1949 s 27B(3) (as added: see note 2).

10 Either of the persons to be married may, whether or not any statement has been so received by the superintendent registrar, apply to the High Court for a declaration that, both those persons having attained the age of 21 and the younger of those persons not having at any time before attaining the age of 18 been a child of the family in relation to the other, there is no impediment of affinity to the solemnisation of the marriage; and, where such a declaration is obtained, the superintendent registrar may enter notice of the marriage in the marriage notice book and may issue a certificate, whether or not any declaration has been made under the Marriage Act 1949 s 27B(2): s 27B(5) (as added (see note 2); amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 10(c), Sch 16). Proceedings under the Marriage Act 1949 s 27B(5) are assigned to the Family Division (see the Supreme Court Act 1981 s 61(1), (3), Sch 1 para 3(c)); and are, therefore, 'family proceedings' for the purposes of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-42: see PARA 732 et seq).

11 Marriage Act 1949 s 27B(4) (as added (see note 2); amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 10(b), Sch 16). A person who makes such a declaration which he knows to be false in material particular is guilty of an offence: Perjury Act 1911 s 3(1)(d)(ii) (added by the Marriage (Prohibited Degrees of Relationship) Act 1986 ss 1(8), 4). The punishment on conviction of an offence under s 3(1) on indictment is imprisonment for a term not exceeding seven years or a fine or both, and on summary conviction a penalty not exceeding the prescribed sum: s 3(1). As to the meaning of 'prescribed sum' see PARA 77 note 16.

UPDATE

93 Notification where marriage is within the prohibited degrees

TEXT AND NOTE 4--Marriage Act 1949 s 27B(2)(a) amended: SI 2009/2821.

NOTE 9--Where the particulars given in the notice of the marriage are to be entered in an approved electronic form by virtue of s 27(4A) (see PARA 92), the duty imposed by s 27 (3) to enter in the marriage notice book the fact concerned is to be discharged by entering the fact in an approved electronic form: s 27(3A) (added by SI 2009/2821).

NOTE 10--Marriage Act 1949 s 27B(5) amended: SI 2009/2821. Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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94. Publication of notice.

Where a marriage is intended to be solemnised on the authority of certificates of a superintendent registrar¹, the superintendent registrar to whom notice of marriage has been given must suspend or affix in a conspicuous place in his office the notice of marriage, or an exact copy signed by him of the relevant particulars as entered in the marriage notice book², for 15 successive days next after the day of entry of the notice in the marriage notice book³. No marriage may be solemnised on the production of certificates of a superintendent registrar until after the expiration of the waiting period in relation to each notice of marriage⁴.

For these purposes, 'waiting period', in relation to a notice of marriage, means:

- 87 (1) the period of 15 days; or
- 88 (2) such shorter period as may be determined by the Registrar General⁵ or by a superintendent registrar⁶,

after the day on which the notice of marriage was entered in the marriage notice book⁷.

If, on an application made to the Registrar General, he is satisfied that there are compelling reasons for reducing the 15-day period⁸ because of the exceptional circumstances of the case, he may reduce that period to such shorter period as he considers appropriate⁹. Accordingly, where a marriage is intended to be solemnised on the authority of certificates of a superintendent registrar, each person has given notice of marriage and either of them has, or they each have, a reason for applying for a reduction of the 15-day period, the following provisions apply¹⁰.

The applicant¹¹ must complete the prescribed form¹² and pass the completed application¹³, together with the fee¹⁴, to the superintendent registrar of the registration district¹⁵ in which that person has given notice of marriage¹⁶. The superintendent registrar must immediately forward the completed application and fee to the Registrar General¹⁷. If, on receipt of a completed application, the Registrar General requires further information, which may include documents, before making his decision, he may request that the superintendent registrar who forwarded the completed application obtain the information from the applicant and forward it to him or request it from the applicant¹⁸. After the Registrar General has considered the completed application and, where relevant, any further information obtained, and he is satisfied that there are, or are not, as the case may be, compelling reasons for reducing the 15-day period, he must notify his decision both to the applicant and the superintendent registrar who forwarded the completed application to him¹⁹.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 As to the meaning of 'marriage notice book' see PARA 92.

3 Marriage Act 1949 s 31(1) (amended by the Immigration and Asylum Act 1999 s 160(4)(a), Sch 14 paras 3, 14(a), Sch 16).

4 Marriage Act 1949 s 31(4) (amended by the Immigration and Asylum Act 1999 s 160(4)(c), Sch 14 para 14(a), Sch 16).

5 le under the Marriage Act 1949 s 31(5A).

6 le under any provision of regulations made under the Marriage Act 1949 s 31(5D).

7 Marriage Act 1949 s 31(4A) (added by the Immigration and Asylum Act 1999 s 160(5)).

8 For these purposes, '15-day period' means the period of 15 days mentioned in the Marriage Act 1949 s 31(1) or s 31(2) (see PARA 97); s 31(5B) (added by the Immigration and Asylum Act 1999 s 160(6)).

9 Marriage Act 1949 s 31(5A) (added by the Immigration and Asylum Act 1999 s 160(6)). If the Registrar General reduces the 15-day period in a particular case, the reference to 15 days in the Marriage Act 1949 s 75(3)(a) (see PARA 180) is to be treated, in relation to that case, as a reference to the reduced period: s 31(5C) (added by the Immigration and Asylum Act 1999 s 160(6)).

The Registrar General may by regulations make provision with respect to the making, and granting, of applications under the Marriage Act 1949 s 31(5A): s 31(5D) (added by the Immigration and Asylum Act 1999 s 160(6)). The regulations: (1) may provide for the power conferred by the Marriage Act 1949 s 31(5A) to be exercised by a superintendent registrar on behalf of the Registrar General in cases falling within a category prescribed in the regulations; (2) may provide for the making of an appeal to the Registrar General against a decision taken by a superintendent registrar in accordance with regulations made by virtue of head (1); (3) may make different provision in relation to different cases; (4) require the approval of the Secretary of State: s 31(5E) (added by the Immigration and Asylum Act 1999 s 160(6); amended by SI 2008/678).

The Secretary of State may by order provide for a fee, of such an amount as may be specified in the order, to be payable on an application under the Marriage Act 1949 s 31(5A); and the order may make different provision in relation to different cases: s 31(5F), (5G) (added by the Immigration and Asylum Act 1999 s 160(6); amended by SI 2008/678).

In exercise of the powers so conferred the Registrar General, with the approval of the Secretary of State, has made the Reporting of Suspicious Marriages and Registration of Marriages (Miscellaneous Amendments) Regulations 2000, SI 2000/3164, reg 4(3).

10 Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(1) (added by SI 2000/3164).

11 For these purposes, 'applicant' means the person seeking a reduction in the 15-day period: Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(5) (added by SI 2000/3164).

12 For the prescribed form of application see the Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(2), Sch 1, Form 8A (added by SI 2000/3164); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, reg 7(1), Sch 1, Form 8A (added by SI 2000/3164).

13 For these purposes, 'completed application' means the completed application in the prescribed form together with any copy documents which support the reason given in that form for applying for a reduction of the 15-day period: Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(5) (as added: see note 11).

14 The fee so payable is £47: Registration of Births, Deaths and Marriages (Fees) Order 2002, SI 2002/3076, Schedule (amended by SI 2005/1997).

15 As to the meaning of 'registration district' see PARA 87 note 4.

16 Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(2) (added by SI 2000/3164).

17 Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(3) (added by SI 2000/3164).

18 Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(4) (added by SI 2000/3164).

19 Registration of Marriages Regulations 1986, SI 1986/1442, reg 6A(5) (added by SI 2000/3164).

UPDATE

94 Publication of notice

NOTE 3--As to where the notice was entered in an approved electronic form by virtue of the Marriage Act 1949 s 27(4A) (see PARA 92) see s 31(1A) (added by SI 2009/2821).

NOTE 7--Marriage Act 1949 s 31(4A) amended: SI 2009/2821.

NOTE 8--Marriage Act 1949 s 31(5B) amended: SI 2009/2821.

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(ii) Certification

95. Forbidding the issue of a certificate.

Any person whose consent to a marriage intended to be solemnised on the authority of certificates of a superintendent registrar¹ is required² may forbid the issue of the certificate by writing, at any time before the issue of the certificate, the word 'forbidden' opposite to the entry of the notice of marriage in the marriage notice book³, and by subscribing thereto his name and place of residence, and the capacity, in relation to either of the persons to be married, in which he forbids the issue of the certificate⁴. Where the issue of the certificate has been so forbidden, the notice of marriage and all proceedings on it are void⁵. Where, however, the court has consented to the marriage⁶ and the consent of the court has the same effect as if it had been given by a person whose consent has been refused, that person is not so entitled to forbid the issue of a certificate for that marriage and the notice of marriage and the proceedings on it are accordingly not void⁷.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Ie required under the Marriage Act 1949 s 3: see PARA 46.

3 As to the meaning of 'marriage notice book' see PARA 92.

4 Marriage Act 1949 s 30 (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 13). For observations of a general character as to the inquiries that ought to be made by a registrar on receiving notice of marriage in relation to persons appearing to be underage see *Norsworthy v Norsworthy* (1909) 26 TLR 9. To forbid the issue of a certificate for marriage by falsely representing oneself to be such a person is an offence: see PARAS 180, 184.

5 Marriage Act 1949 s 30 (as amended: see note 4).

6 Ie by virtue of the Marriage Act 1949 s 3(1) proviso (b): see PARA 47.

7 Marriage Act 1949 s 30 proviso.

UPDATE

95 Forbidding the issue of a certificate

TEXT AND NOTES--As to where the particulars given in the notice of marriage have been entered in an approved electronic form by virtue of the Marriage Act 1949 s 27(4A) (see PARA 92) see s 30(2) (added by SI 2009/2821).

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96. Caveat.

Any person may enter a caveat with the superintendent registrar¹ against the issue of a certificate for the marriage of any person named in the caveat². If any caveat is so entered and has been signed by or on behalf of the person entering it and states his place of residence and the ground of objection on which the caveat is founded, no certificate is to be issued until the superintendent registrar has examined into the matter of the caveat and is satisfied that it ought not to obstruct the issue of the certificate, or until the caveat is withdrawn by the person who entered it³. If the superintendent registrar is doubtful whether to issue a certificate, he may refer the matter of the caveat to the Registrar General⁴; and, where a superintendent registrar refuses, by reason of the caveat, to issue the certificate, the party applying for it may appeal to the Registrar General, who must either confirm the refusal or direct that a certificate be issued⁵.

Any person who enters a caveat against the issue of a certificate on grounds which the Registrar General declares to be frivolous⁶ and such that they ought not to obstruct the issue of the certificate is liable for the costs of the proceedings before the Registrar General and for damages recoverable by the person against whose marriage the caveat was entered⁷.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 29(1) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 12, Sch 16; SI 1968/1242). Cf the Marriage Act 1949 s 27B(6); and PARA 93.

3 Marriage Act 1949 s 29(2) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 12, Sch 16).

4 Marriage Act 1949 s 29(2) (as amended: see note 3). As to the meaning of 'Registrar General' see PARA 46 note 5.

5 Marriage Act 1949 s 29(3) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 12, Sch 16). There is also a remedy by way of mandatory order: see *R v Hammersmith Superintendent Registrar of Marriages, ex p Mir-Anwaruddin* [1917] 1 KB 634, CA; *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956, [1968] 3 All ER 279, DC.

6 It would seem that to be frivolous the grounds on which the caveat is entered must be such that no reasonable person could contend that there was any reason in law why the marriage should not take place: see *Norman v Mathews* (1916) 85 LJKB 857.

7 Marriage Act 1949 s 29(4) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 12, Sch 16). For the purpose of enabling any person to recover any such costs or damages, a copy of the Registrar General's declaration, purporting to be sealed with the seal of the General Register Office, is evidence that the Registrar General has declared the caveat to have been entered on frivolous grounds which ought not to obstruct the issue of the certificate: Marriage Act 1949 s 29(5) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 12, Sch 16).

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97. Issue of certificate.

At the expiration of the period of 15 successive days from the day on which the notice was entered in the marriage notice book¹, and on the request of the party giving the notice of marriage, the superintendent registrar² must issue a certificate in the prescribed form³, unless:

- 89 (1) the superintendent registrar is not satisfied that there is no lawful impediment to the issue of the certificate⁴; or
- 90 (2) the issue of the certificate has been forbidden by any person authorised in that behalf⁵.

If, relying on head (1), a superintendent registrar refuses to issue a certificate, the person applying for it may appeal to the Registrar General⁶; and, on such an appeal, the Registrar General must confirm the refusal or direct that a certificate be issued⁷. If, relying on head (1), a superintendent registrar refuses to issue a certificate as a result of a representation made to him and, on an appeal against the refusal, the Registrar General declares the representation to have been frivolous⁸ and to be such that it ought not to obstruct the issue of a certificate, the person making the representation is liable for the costs of the proceedings before the Registrar General and for damages by the applicant for the certificate⁹.

Every such certificate must set out the particulars contained in the notice of marriage, and the day on which the notice was entered in the marriage notice book, and must contain a statement that its issue has not been forbidden by anyone authorised to do so¹⁰.

If any persons knowingly and wilfully intermarry without a certificate having been duly issued, in respect of each of the persons to be married, by the superintendent registrar to whom the notice of marriage was given, or in any place other than the one specified in the certificate, the marriage is void¹¹.

1 The period referred to in the Marriage Act 1949 s 31(1): see PARA 94. As to the meaning of 'marriage notice book' see PARA 92.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 For the prescribed form of certificate see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 9 (substituted by SI 1997/2204; amended by SI 2000/3164; SI 2005/3177); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1, Form 6 (amended by SI 2000/3164; SI 2005/3177). The Registrar General must furnish every superintendent registrar with a sufficient number of forms of certificates for marriage: Marriage Act 1949 s 40(1). As to the meaning of 'Registrar General' see PARA 46 note 5. As to offences by superintendent registrars in relation to the issue of certificates without licence see s 75(3); PARA 181; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 535.

4 The entry of a caveat may furnish a ground for refusing to issue a certificate: see PARA 96.

5 Marriage Act 1949 s 31(2) (amended by the Immigration and Asylum Act 1999 ss 160(4)(b), 163(1)). As to the persons who may forbid the issue of a certificate see PARA 95. No marriage may be solemnised on the production of the certificates of a superintendent registrar until after the period of 15 days: see the Marriage Act 1949 s 31(4); and PARA 94. Any person who knowingly and wilfully solemnises a marriage under these provisions within that period is guilty of an offence: see PARA 180. See *R (on the application of the Crown Prosecution Service) v Registrar General of Births, Deaths and Marriages* [2002] EWCA Civ 1661, [2003] QB

1222, [2003] 1 All ER 450 (issue of a certificate relating to a marriage between prisoner awaiting trial and compellable witness not prevented on ground of public policy).

6 Marriage Act 1949 s 31A(1) (added by the Immigration and Asylum Act 1999 s 163(2)).

7 Marriage Act 1949 s 31A(2) (added by the Immigration and Asylum Act 1999 s 163(2)).

8 As to the meaning of 'frivolous' see PARA 96 note 6.

9 Marriage Act 1949 s 31A(3) (added by the Immigration and Asylum Act 1999 s 163(2)).

10 Marriage Act 1949 s 31(3).

11 See the Marriage Act 1949 s 49(b), (e); and PARA 330. Any person who knowingly and wilfully solemnises a marriage, other than a marriage by special licence or a Quaker or Jewish marriage, in any place other than the one specified in the certificate is guilty of an offence: see PARA 180.

UPDATE

97 Issue of certificate

NOTE 3--SI 1986/1442 Sch 1 Form 9, and SI 1999/1621 Sch 1 Form 6 substituted: SI 2009/2806.

NOTE 10--Marriage Act 1949 s 31(3) amended: SI 2009/2821.

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98. Delivery of certificate.

Where a marriage is intended to be solemnised on the authority of certificates of a superintendent registrar¹, the certificates must be delivered²:

- 91 (1) if the marriage is to be solemnised in a registered building or at a person's residence in the presence of a registrar³, to that registrar⁴;
- 92 (2) if the marriage is to be solemnised in a registered building⁵ without the presence of the registrar, to the authorised person⁶ in whose presence the marriage is to be solemnised⁷;
- 93 (3) if the marriage is to be solemnised in the office of a superintendent registrar⁸, to the registrar in whose presence the marriage is to be solemnised⁹;
- 94 (4) if the marriage is to be solemnised on approved premises¹⁰, to the registrar in whose presence the marriage is to be solemnised¹¹;
- 95 (5) if the marriage is to be solemnised according to the usages of the Society of Friends¹², to the registering officer of that Society¹³ for the place where the marriage is to be solemnised¹⁴;
- 96 (6) if the marriage is to be solemnised according to the usages of persons professing the Jewish religion¹⁵, to the officer of a synagogue by whom the marriage is required¹⁶ to be registered¹⁷;
- 97 (7) if the marriage is to be solemnised according to the rites of the Church of England, to the officiating clergyman¹⁸.

For every marriage in his presence the registrar is entitled to receive a fee from the parties¹⁹.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 50(1) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 28(a), Sch 16).

3 As to the meaning of 'registrar' see PARA 88 note 1.

4 Marriage Act 1949 s 50(1)(a) (amended by the Marriage Act 1983 Sch 1 para 14).

5 As to the meaning of 'registered building' see PARA 54 note 3.

6 As to the meaning of 'authorised person' see PARA 107.

7 Marriage Act 1949 s 50(1)(b). Before permitting the solemnisation of a marriage in his presence to begin, an authorised person must require the production of every document on the authority of which the marriage is to be solemnised, and must by scrutiny of the documents satisfy himself that the marriage may be lawfully solemnised in his presence on the authority of the documents: Marriage Act 1949 s 50(3) (amended by the Immigration and Asylum Act 1999 Sch 14 para 3, 28(c)); Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 9(1). The authorised person must make a note on every certificate delivered to him of the number of the entry in the marriage register books in which the marriage has been registered (see PARA 108) and must preserve every such certificate, in the fire-resisting receptacle required to be provided in the registered building (see PARA 109), until the end of the quarter, when it must be delivered to the superintendent registrar with the corresponding certified copy of the marriage entry (see PARA 108): reg 9(2) (amended by SI 2000/3164). The certificates must be produced with the marriage register books as and when required by the Registrar General: Marriage Act 1949 s 50(3) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 28(c)).

- 8 As to the meaning of 'superintendent registrar' see PARA 22 note 1.
- 9 Marriage Act 1949 s 50(1)(c). See also PARA 102.
- 10 As to the meaning of 'approved premises' see PARA 54 note 6.
- 11 Marriage Act 1949 s 50(1)(cc) (added by the Marriage Act 1994 Sch 1 paras 1, 4).
- 12 As to marriages according to the usages of the Society of Friends see PARA 116.
- 13 As to the meaning of 'registering officer of the Society of Friends' see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 520.
- 14 Marriage Act 1949 s 50(1)(d).
- 15 As to marriages between persons professing the Jewish religion according to the usages of the Jews see PARA 118.
- 16 Ie under the Marriage Act 1949 Pt IV (ss 53-67): see **REGISTRATION CONCERNING THE INDIVIDUAL**.
- 17 Marriage Act 1949 s 50(1)(e).
- 18 Marriage Act 1949 s 50(1)(f).
- 19 Marriage Act 1949 s 51(1) (renumbered by the Marriage Act 1983 Sch 1 para 15). The registrar's fee under the Marriage Act 1949 s 51(1) is £40 for attending a marriage at a register office and £47 for attending at a registered building or at the place where a housebound or detained person usually resides: Registration of Births, Deaths and Marriages (Fees) Order 2002, SI 2002/3076, art 2, Schedule (amended by SI 2005/1997).
- In the case of persons married on approved premises in pursuance of the Marriage Act 1949 s 26(1)(bb) (see PARA 54), s 51(1) does not apply but the superintendent registrar in whose presence the persons are married is entitled to receive from them a fee of an amount determined in accordance with regulations under s 46A (see PARA 190) by the local authority that approved the premises: s 51(1A) (added by the Marriage Act 1994 Schedule para 5).
- A superintendent registrar is entitled to receive from persons married in his presence in pursuance of the Marriage Act 1949 s 26(1)(dd) (see PARA 54) the sum of £40: s 51(2) (added by the Marriage Act 1983 Sch 1 para 15; amended by SI 2002/3076).

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99. Marriage without the presence of a registrar.

Where a marriage is to be solemnised in a registered building¹ for which an authorised person² has been appointed, and no notice requiring a registrar³ to be present at the marriage has been given⁴ to the superintendent registrar⁵, the superintendent registrar must, when issuing the certificate, give to the person by whom notice of marriage was given, printed instructions in the prescribed form⁶ for the due solemnisation of the marriage⁷.

1 As to the meaning of 'registered building' see PARA 54 note 3.

2 As to the meaning of 'authorised person' see PARA 107.

3 As to the meaning of 'registrar' see PARA 88 note 1.

4 Ie under the Marriage Act 1949 s 27(5): see PARA 88.

5 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

6 For the prescribed form of instructions see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1 Form 12 (substituted by SI 1997/2204; amended by SI 2000/3164); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1 Form 8 (amended by SI 2000/3164).

7 Marriage Act 1949 s 31(5) (amended by the Immigration and Asylum Act 1999 s 169(1), Sch 14 paras 3, 14(b)).

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100. Marriage in registration district in which neither party resides.

In general, a superintendent registrar¹ must not issue a certificate for the solemnisation of a marriage elsewhere than within a registration district² in which one of the persons to be married has resided for seven days immediately before the giving of the notice of marriage³.

A superintendent registrar may, however:

- 98 (1) issue a certificate for the solemnisation of a marriage in a registered building⁴ which is not within a registration district in which either of the persons to be married resides, where the person giving the notice of marriage declares by indorsement on it in the prescribed form⁵:
- 3
3. (a) that the persons to be married desire the marriage to be solemnised according to a specified form, rite or ceremony, being a form, rite or ceremony of a body or denomination of Christians or other persons meeting for religious worship to which one of them professes to belong⁶;
4. (b) that, to the best of his or her belief, there is not within the registration district in which one of them resides any registered building in which marriage is solemnised according to that form, rite or ceremony⁷;
5. (c) the registration district nearest to the residence of that person in which there is a registered building in which marriage may be solemnised⁸; and
6. (d) the registered building in that district in which the marriage is intended to be solemnised⁹,
- 4
- 99 and where any such certificate is issued in respect of each of the persons to be married, the marriage may be solemnised in the registered building stated in the notice¹⁰;
- 100 (2) issue a certificate for the solemnisation of a marriage in a registered building which is the usual place of worship of the persons to be married, or of one of them, notwithstanding that the building is not within a registration district in which either of those persons resides¹¹;
- 101 (3) issue a certificate for the solemnisation of a marriage in the office of another superintendent registrar, notwithstanding that the office is not within a registration district in which either of the persons to be married resides¹²;
- 102 (4) issue a certificate for the solemnisation of a marriage on approved premises¹³, notwithstanding that the premises are not within the registration district in which either of the persons to be married resides¹⁴;
- 103 (5) issue a certificate for the solemnisation of a marriage in any parish church¹⁵ or authorised chapel¹⁶ which is the usual place of worship¹⁷ of the persons to be married or one of them, notwithstanding that the church or chapel is not within a registration district in which either of those persons resides¹⁸; and
- 104 (6) issue a certificate for the solemnisation of a marriage according to the usages of the Society of Friends¹⁹ or between persons professing the Jewish religion according to the usages of the Jews²⁰, notwithstanding that the building or place in

which the marriage is to be solemnised is not within a registration district in which either of the persons to be married resides²¹.

- 1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.
- 2 As to the meaning of 'registration district' see PARA 87 note 4.
- 3 Marriage Act 1949 s 34 (substituted by the Immigration and Asylum Act 1999 Sch 14 paras 3, 16). As to the giving of notice of marriage see PARA 87.
- 4 As to the meaning of 'registered building' see PARA 54 note 3.
- 5 For the prescribed form of indorsement see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1 Form 4 (amended by SI 2000/3164); and for the corresponding forms in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1 Form 3 (amended by SI 2000/3164).
- 6 Marriage Act 1949 s 35(1)(a) (substituted by the Marriage Act 1949 (Amendment) Act 1954 s 2).
- 7 Marriage Act 1949 s 35(1)(b).
- 8 Marriage Act 1949 s 35(1)(c).
- 9 Marriage Act 1949 s 35(1)(d).
- 10 Marriage Act 1949 s 35(1) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 17(1), (2), Sch 16). In such cases, the notice of marriage and the certificate must state that the building is the usual place of worship of one of the parties (see PARA 87), but it is not necessary to the validity of the marriage to give proof of that fact (see PARA 22).
- 11 Marriage Act 1949 s 35(2) (substituted by the Marriage Act 1949 (Amendment) Act 1954 s 2; amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 17(1), (3), Sch 16). See also note 10.
- 12 Marriage Act 1949 s 35(2A) (added by the Marriage Act 1994 s 2(1); amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 17(1), (4), Sch 16). See also note 10.
- 13 As to the meaning of 'approved premises' see PARA 54 note 6.
- 14 Marriage Act 1949 s 35(2B) (added by the Marriage Act 1994 s 2(1); amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 17(1), (4), Sch 16). See also note 10.
- 15 As to the meaning of 'parish church' see PARA 59 note 8.
- 16 As to the meaning of 'authorised chapel' see PARA 59 note 9.
- 17 No parish church or authorised chapel is deemed to be the usual place of worship of any person unless he is enrolled on the church electoral roll for that area: see the Marriage Act 1949 s 72(1); and PARA 66. As to proof of these matters see PARA 22.
- 18 Marriage Act 1949 s 35(3). In such cases, the notice of marriage and the certificate must state that the church or chapel is the usual place of worship of one of the parties (see PARA 87), but it is not necessary to the validity of the marriage to give proof of that fact (see PARA 22).
- 19 As to notice of marriage according to the usages of the Society of Friends see PARA 115.
- 20 As to notice of marriage between persons professing the Jewish religion according to the usages of the Jews see PARA 117.
- 21 Marriage Act 1949 s 35(4) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 17(1), (2), Sch 16).

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101. Time for solemnisation of marriage.

A marriage may be solemnised on the authority of certificates of a superintendent registrar¹ at any time within the period which is the applicable period in relation to that marriage². If the marriage is not solemnised within the applicable period, the notice of marriage and the certificates are void and no person may solemnise the marriage on the authority of those certificates³. If any persons knowingly and wilfully intermarry on the authority of certificates which are so void, the marriage is itself void⁴.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 33(1) (substituted by the Immigration and Asylum Act 1999 Sch 14 paras 3, 15). For these purposes the 'applicable period', in relation to a marriage, is the period beginning with the day on which the notice of marriage was entered in the marriage notice book and ending: (1) in the case of a marriage which is to be solemnised in pursuance of the Marriage Act 1949 s 26(1)(dd) (see PARA 54), s 37 (see PARA 112) or s 38 (see PARA 113), on the expiry of three months; and (2) in the case of any other marriage, on the expiry of 12 months: Marriage Act 1949 s 33(3) (added by SI 1997/986; substituted by the Immigration and Asylum Act 1999 Sch 14 paras 3, 15). Where a gender recognition certificate has been issued as a result of a final nullity order on the ground of an interim certificate being issued, and the former civil partners wish to marry, the applicable period is one month beginning with the day on which the notice of marriage was entered in the marriage notice book: Marriage Act 1949 s 39A(5) (added by SI 2005/3129). If the notices of marriage given by each person to be married are not given on the same date, the applicable period is to be calculated by reference to the earlier of the two dates: Marriage Act 1949 s 33(4) (added by the Immigration and Asylum Act 1999 Sch 14 paras 3, 15). As to the meaning of 'marriage notice book' see PARA 92.

3 Marriage Act 1949 s 33(2) (substituted by the Immigration and Asylum Act 1999 Sch 14 paras 3, 15). If a person does so solemnise a marriage, he is guilty of an offence: see PARA 180.

4 See the Marriage Act 1949 s 49(d); and PARA 330.

UPDATE

101 Time for solemnisation of marriage

NOTE 2--Marriage Act 1949 s 33(3) amended: SI 2009/2821.

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(iii) Place and Manner of Solemnisation

A. SOLEMNISATION AT SUPERINTENDENT REGISTRAR'S OFFICE

102. Marriage at superintendent registrar's office.

Where a marriage is intended to be solemnised on the authority of certificates of a superintendent registrar¹, the persons to be married may state in the notices of marriage that they wish to be married in the office of the superintendent registrar or one of the superintendent registrars, as the case may be, to whom notice of marriage is given². Where any such notices have been given and the certificates have been issued accordingly³, the marriage may be solemnised in that office, with open doors⁴, in the presence of the superintendent registrar and a registrar⁵ of the registration district⁶ of that superintendent registrar and of two witnesses⁷. The marriage must be solemnised within the applicable period⁸, and between the hours of 8 am and 6 pm⁹. The persons to be married must make the declarations and use the form of words¹⁰ used in the case of marriages in registered buildings¹¹; but no religious service is to be used at any marriage solemnised in the office of a superintendent registrar¹².

If a marriage is solemnised in the presence of a registrar of marriages and before, during or immediately after solemnisation of the marriage the registrar has reasonable grounds for suspecting that the marriage will be, or is, a sham marriage¹³, he must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations¹⁴.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 45(1) (amended by the Marriage Ceremony (Prescribed Words) Act 1996 s 1(2); and the Immigration and Asylum Act 1999 Sch 14 paras 3, 24(a)-(d)). As to the giving of notice of marriage see PARA 87 et seq.

3 As to the issue of a certificate see PARA 97.

4 A marriage will not be invalidated by reason of the doors of the register office being closed during its solemnisation, since there is no statutory provision declaring it void: see *Campbell v Corley* (1856) 28 LTOS 109, 4 WR 675, PC.

5 As to the meaning of 'registrar' see PARA 88 note 1.

6 As to the meaning of 'registration district' see PARA 87 note 4.

7 Marriage Act 1949 s 45(1) (as amended: see note 2). If any persons knowingly and wilfully intermarry in such an office in the absence of the superintendent registrar or of a registrar for the district, the marriage is void: see s 49(g); and PARA 330. Any person who knowingly and wilfully solemnises a marriage in such an office in the absence of a registrar for the district is guilty of an offence: see PARA 180.

8 See PARA 101.

9 See the Marriage Act 1949 s 4; and PARA 82.

10 le the declarations and form of words set out in the Marriage Act 1949 s 44(3) or s 44(3A) (see PARA 105). As to the use of the Welsh language see PARA 105 note 3.

11 Marriage Act 1949 s 45(1) (as amended: see note 2). As to the meaning of 'registered building' see PARA 54 note 3.

12 Marriage Act 1949 s 45(2). A religious ceremony may, however, follow a marriage before a superintendent registrar (see s 46; and PARA 57); but the religious ceremony may not be entered as a marriage in any marriage register book kept under the Marriage Act 1949 (see s 46(2); and PARA 57).

13 As to the meaning of 'sham marriage' see PARA 11.

14 Immigration and Asylum Act 1999 s 24(2), (3). As to the prescribed form and manner see PARA 11.

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103. Delivery of certificate to district registrar.

Where a marriage is solemnised in the office of a superintendent registrar¹, the certificate must be delivered to the registrar in whose presence the marriage is solemnised²; and it is his duty to register the marriage immediately after its solemnisation³. The registrar is entitled to receive a fee from the persons married in his presence⁴. Every registrar by whom a marriage register book is kept must allow searches to be made in it at all reasonable hours, and give a copy certified under his hand of any entry in the book, on payment of a fee⁵.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 See the Marriage Act 1949 s 50(1)(c); and PARA 98.

3 See Marriage Act 1949 ss 53(f), 55(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 558, 559. For the prescribed form of registration see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 13 (amended by SI 2000/3164); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, reg 7(1), Sch 1, Form 9 (amended by SI 2000/3164).

4 See the Marriage Act 1949 s 51(1); and PARA 98.

5 See the Marriage Act 1949 s 63(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 524. The fee, when the application is made at the time of the register is £3.50, and in any other case is £7: Registration of Births, Deaths and Marriages (Fees) Order 2002, SI 2002/3076, Schedule.

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B. SOLEMNISATION IN A REGISTERED BUILDING

104. When and how marriage may be solemnised.

In general, where the notices of marriage and certificates issued by a superintendent registrar¹ state that a marriage between the persons named in them is intended to be solemnised in a registered building², the marriage may be solemnised in that building according to such form and ceremony as those persons may see fit to adopt³. The marriage may take place after the expiration of 15 days from the day of entry of notice of marriage⁴ and within the applicable period⁵. No marriage may, however, be solemnised in any registered building without the consent of the minister or of one of the trustees, owners, deacons or managers of the building, or, in the case of a registered building of the Roman Catholic Church, without the consent of the officiating minister⁶.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 As to the meaning of 'registered building' see PARA 54 note 3.

3 Marriage Act 1949 s 44(1) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 23). As to the form of marriage see further PARA 105; and as to the hours between which the marriage must be solemnised see PARA 101.

4 See PARA 97.

5 See PARA 101.

6 Marriage Act 1949 s 44(1) proviso. Such consent is not required in the case of a marriage in a naval, military or air force chapel: see PARA 129. As to the consent required in the case of a shared church building see **ECCLESIASTICAL LAW** vol 14 PARA 1412 note 4.

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105. Forms and ceremonies.

A marriage in a registered building¹ may be solemnised according to such forms and ceremonies as the parties think fit to adopt²; but in some part of the ceremony each of the persons contracting the marriage must make the following declaration: 'I do solemnly declare that I know not of any lawful impediment why I, AB, may not be joined in matrimony to CD', and each party must say to the other, 'I call upon these persons here present to witness that I, AB, do take thee, CD, to be my lawful wedded wife [*or husband*]'³.

As an alternative to the declaration set out above the persons contracting the marriage may make the requisite declaration either by saying: 'I declare that I know of no legal reason why I [*name*] may not be joined in marriage to [*name*]', or by replying: 'I am' to the question put to them successively, 'Are you [*name*] free lawfully to marry [*name*]?'; and as an alternative to the words of contract set out above the persons to be married may say to each other: 'I [*name*] take you [*or thee*] [*name*] to be my wedded wife [*or husband*]'⁴.

The declaration and form of contracting words must be spoken in the presence of the registrar⁵ or authorised person⁶ and of the witnesses⁷.

If a marriage is solemnised in the presence of a registrar of marriages and before, during or immediately after solemnisation of the marriage the registrar has reasonable grounds for suspecting that the marriage will be, or is, a sham marriage⁸, he must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations⁹.

1 As to the meaning of 'registered building' see PARA 54 note 3.

2 See PARA 104.

3 Marriage Act 1949 s 44(3) (amended by the Marriage Ceremony (Prescribed Words) Act 1996 s 1(1)). In places where the Welsh language is commonly used, a true and exact translation into that language of the declarations and forms of words may be used, the authorised translation being furnished by the Registrar General to every registrar of marriages in Wales and in every place where the Welsh language is commonly used: Marriage Act 1949 s 52 (amended by the Marriage Ceremony (Prescribed Words) Act 1996 s 1(3)).

4 Marriage Act 1949 s 44(3A) (added by the Marriage Ceremony (Prescribed Words) Act 1996 s 1(1)).

5 As to the meaning of 'registrar' see PARA 88 note 1.

6 As to the meaning of 'authorised person' see PARA 107.

7 Marriage Act 1949 s 44(3).

8 As to the meaning of 'sham marriage' see PARA 11.

9 Immigration and Asylum Act 1999 s 24(2), (3). As to the prescribed form and manner see PARA 11.

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106. Presence of authorised person and other requirements.

In general, a marriage in a registered building¹ must be solemnised with open doors between the hours of 8 am and 6 pm, in the presence of two or more witnesses², and in the presence of either:

- 105 (1) a registrar³ of the registration district⁴ in which the registered building is situated⁵; or
- 106 (2) an authorised person⁶ whose name and address have been certified⁷ by the trustees or governing body of that registered building or of some other registered building in the same registration district⁸.

If any persons knowingly and wilfully intermarry on the authority of superintendent registrar's certificates in a registered building, not being a marriage in the presence of an authorised person, in the absence of a registrar, the marriage is void⁹; and any person who knowingly and wilfully solemnises such a marriage commits an offence¹⁰. A marriage may not be solemnised in a registered building without the presence of a registrar until duplicate register books have been supplied¹¹ by the Registrar General¹² to the authorised person or to the trustees or governing body of the building¹³.

1 As to the meaning of 'registered building' see PARA 54 note 3.

2 Marriage Act 1949 ss 4, 44(2).

3 As to the meaning of 'registrar' see PARA 88 note 1.

4 As to the meaning of 'registration district' see PARA 87 note 4.

5 Marriage Act 1949 s 44(2)(a). A marriage in a registered building for which an authorised person has been appointed will ordinarily take place in the presence of the authorised person, unless the parties request the presence of the registrar: see s 27(5); and PARA 88.

6 As to the meaning of 'authorised person' see PARA 107.

7 Ie certified in accordance with the Marriage Act 1949 s 43: see PARA 107.

8 Marriage Act 1949 s 44(2)(b).

9 See the Marriage Act 1949 s 49(f); and PARA 330.

10 See the Marriage Act 1949 s 75(2)(b); and PARA 180.

11 Ie under the Marriage Act 1949 Pt IV (ss 53-67): see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 504.

12 As to the meaning of 'Registrar General' see PARA 46 note 5.

13 Marriage Act 1949 s 44(4).

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107. Appointment of authorised person.

For the purpose of enabling marriages to be solemnised in a registered building¹ without the presence of a registrar², the trustees or governing body³ of that building may authorise a person to be present at the solemnisation of marriages in that building; and, where a person is so authorised in respect of any registered building, the trustees or governing body of that building must certify the name and address of the person so authorised (the 'authorised person') to the Registrar General⁴ and to the superintendent registrar⁵ of the district in which the building is situated⁶, within one day from the date when he is authorised⁷.

No authorised person may act until his appointment has been certified⁸. The power to authorise a person to be present at the solemnisation of marriages is not exercisable before the expiration of one year from the date of registration of the building or, where the congregation on whose behalf the building is registered previously used for the purpose of public religious worship another building of which the registration has been cancelled not earlier than one month before that date of registration, one year from the date of registration of that other building⁹.

Where an authorised person for a registered building ceases to be authorised to be present at the solemnisation of marriages in the building, the trustees or governing body¹⁰ of the building must thereupon inform the Registrar General of the fact and must state whether they intend to certify, in place of that person, some other person to act as authorised person; and, where, when the vacancy occurs, there is no other authorised person for the building, the trustees or governing body must further inform the Registrar General what provision is being made for the solemnisation and registration of marriages in the building, and, if necessary, for the preparation and delivery of certain certified copies required to be delivered to the superintendent registrar¹¹, while there is no authorised person¹².

A person duly authorised to act for one registered building may officiate at any other registered building in the same registration district, but not at one in another registration district¹³.

1 As to the meaning of 'registered building' see PARA 54 note 3.

2 As to the meaning of 'registrar' see PARA 88 note 1.

3 For these purposes, unless the context otherwise requires, 'trustees or governing body' includes, in relation to Roman Catholic registered buildings, a bishop or vicar-general of the diocese (Marriage Act 1949 s 78(1)), and means, in relation to a naval, military or air force chapel, the Admiralty or a Secretary of State, as the case may be, or any person authorised by it or him (s 70(1), Sch 4 Pt IV).

4 As to the meaning of 'Registrar General' see PARA 46 note 5.

5 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

6 Marriage Act 1949 ss 43(1), (2), 78(1). Nothing in s 43 is to be taken to relate or have any reference to marriages solemnised according to the usages of the Society of Friends (see PARA 116) or of persons professing the Jewish religion (see PARA 118): s 43(3). As to authorised persons for shared church buildings see **ECCLESIASTICAL LAW** vol 14 PARA 1412 note 4.

The Registrar General may, with the approval of the Chancellor of the Exchequer, by statutory instrument make regulations prescribing the duties of authorised persons under the Marriage Act 1949: s 74(a) (amended by the

Registration Service Act 1953 s 23(2), Sch 2; SI 1996/273). In exercise of the power so conferred the Marriage (Authorised Persons) Regulations 1952, SI 1952/1869 (amended by SI 1971/1216; SI 1974/573; SI 1986/1444; SI 2000/3164; SI 2005/3177; SI 2007/2164) were made.

7 Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 4(1). The name and address of any such person must be certified in the prescribed form or in a form substantially to the like effect: reg 4(2). For the prescribed form of certification see reg 4(2), Schedule.

8 See the Marriage Act 1949 s 44(2)(b); and PARA 106.

9 Marriage Act 1949 s 43(1) proviso (added by the Marriage Acts Amendment Act 1958 s 1(2)). The Marriage Act 1949 s 43(1) proviso does not apply to naval, military and air force chapels (see PARA 129 note 8), or shared church buildings (see the Sharing of Church Buildings Act 1969 s 6(1), Sch 1 para 5; and **ECCLESIASTICAL LAW** vol 14 PARA 1412), and, if a sharing Church withdraws from the sharing of a registered church building, then, for the purpose of the application of the Marriage Act 1949 s 43(1) proviso to another building registered on behalf of the congregation of the withdrawing Church, the registration is deemed to have been cancelled at the time of the withdrawal (see the Sharing of Church Buildings Act 1969 Sch 1 para 5; and **ECCLESIASTICAL LAW** vol 14 PARA 1412).

10 For these purposes, 'trustees or governing body', in relation to Roman Catholic registered buildings, includes a bishop or vicar-general of the diocese and, in relation to chapels registered under the Marriage Act 1949 s 70 (see PARA 129), the Admiralty or any person authorised by it, in the case of a naval chapel registered under s 70, and a Secretary of State or any person authorised by him, in the case of any other chapel so registered: Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 2(1).

11 le under the Marriage Act 1949 s 57: see PARA 108; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 618.

12 Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 5.

13 See the Marriage Act 1949 s 44(2)(b); and PARA 106.

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108. Registration of marriage by authorised person.

A marriage solemnised in a registered building¹ or at a person's residence in the presence of a registrar² must be registered by that registrar³. A marriage solemnised in a registered building without the presence of a registrar must be registered by the authorised person⁴ in whose presence the marriage is solemnised⁵. An authorised person must not register any marriage to which he is a party or witness⁶. Marriage register books and forms for making certified copies of entries must be furnished by the Registrar General to the authorised person appointed in respect of a registered building, or to the trustees or governing body⁷. Where a marriage is required to be registered by an authorised person, he must immediately after the solemnisation of the marriage register the particulars relating to it in duplicate in two marriage register books in a prescribed form⁸. The marriage must be registered in the registered building in the presence of the parties and two witnesses⁹ and the entry signed by the authorised person and by the parties and two witnesses¹⁰.

Provision is made for the correction of errors in entries in marriage register books¹¹.

Every authorised person must deliver quarterly to the superintendent registrar certified copies of all entries made in the marriage register book or a certificate on a form supplied by the Registrar General that no marriage has been registered¹².

1 As to the meaning of 'registered building' see PARA 54 note 3.

2 As to the meaning of 'registrar' see PARA 88 note 1.

3 Marriage Act 1949 s 53(d) (amended by the Marriage Act 1983 Sch 1 paras 1, 16). As to the registration of marriages by registrars see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 558-560. As to the registration of a person's residence see PARA 169 et seq.

4 As to the meaning of 'authorised person' see PARA 107.

5 Marriage Act 1949 s 53(e).

6 Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 6. A person who refuses or without reasonable cause omits to register a marriage which he is required to register is guilty of an offence: see PARA 181.

7 See the Marriage Act 1949 s 54; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 504. As to the meaning of 'trustees or governing body' see PARA 107 note 3. As to the inscribing of new register books by authorised persons see the Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 10 (amended by SI 1965/528; SI 1974/573). Where a church building is shared, the appointment of two or more authorised persons in respect of that building does not require any additional set or sets of duplicate marriage register books to be supplied: see the Sharing of Church Buildings Act 1969 s 6(1), Sch 1 para 7; and **ECCLESIASTICAL LAW** vol 14 PARA 1412. As to the registration of shared church buildings for the solemnisation of marriage generally see **ECCLESIASTICAL LAW** vol 14 PARA 1412.

8 See the Marriage Act 1949 s 55(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 559. For the prescribed form of particulars see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 13 (amended by SI 2000/3164); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, reg 7(1), Sch 1, Form 9 (amended by SI 2000/3164). Entries must be made in consecutive order from the beginning to the end of each book and the number of each entry must be the same in each duplicate marriage register book: Marriage Act 1949 s 55(3). For detailed instructions as to the making of entries see the Marriage (Authorised Persons) Regulations 1952, SI

1952/1869, reg 11 (cancelling of blank spaces), reg 13 (amended by SI 1965/528; SI 1974/573) (heading), the Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 14 (date of marriage), regs 15-21 (amended by SI 1986/1444; SI 2000/3164; SI 2007/2164) (names and surnames, ages, condition, ranks or professions and residence of parties; names and surnames and ranks or professions of parties' fathers). Entries must be in durable ink: Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 7. As to the power of an authorised person to ask for particulars from the parties see the Marriage Act 1949 s 56; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 560.

9 Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 12.

10 Marriage Act 1949 s 55(2). For the prescribed form of particulars of attestation see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 13 (amended by SI 2000/3164); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, reg 7(1), Sch 1, Form 9 (amended by SI 2000/3164). As to the entering up of the form of attestation and the signing of the register see the Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 22 (amended by SI 2000/3164) and the Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 23. An entry is complete when the authorised person has signed it and appended to his signature his official description: reg 24.

11 See the Marriage Act 1949 s 61; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 519. As to the examination of entries by authorised persons, and as to the manner of correction by them of errors discovered before completion of the entry, see the Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, regs 23(3), 25. An authorised person must not correct an error discovered after completion of the entry without first reporting to the Registrar General and must comply with any instructions which the Registrar General may give for the purpose of verifying the facts and ascertaining the parties or witnesses who will be available to witness a correction: reg 26.

12 See the Marriage Act 1949 s 57(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 618. The superintendent registrar must pay to the authorised person £2 for every entry in the certified copy: s 57(4) (amended by SI 2002/3076). The entries in certified copies must be in ink of durable quality: Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 7. A person who refuses to deliver a certified copy or certificate or fails to deliver any such copy or certificate during any month in which he is required to do so is guilty of an offence: see PARA 181.

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109. Custody of marriage register books.

Provision is made for the safe custody of marriage register books before they are filled, and of filled register books¹. The marriage register books for a registered building must be kept in the custody of the authorised person for that building or, where there are two or more authorised persons, such one of them as is notified to the Registrar General by the trustees or governing body², or, in default of an authorised person, the trustees or governing body until another authorised person is appointed³. The marriage register books and certified copies must, when not actually in use, be kept locked up in a strong fire-resisting receptacle in the registered building or in some other place approved by the Registrar General⁴.

If the Registrar General is not satisfied with respect to any building registered or proposed to be registered for the solemnisation of marriages that sufficient security exists for the due registration of marriages by an authorised person⁵ and for the safe custody of the marriage register books, he may in his discretion attach to the continuance of the registration, or to the registration, of the building a condition that no marriage may be solemnised there without the presence of a registrar⁶.

1 See the Marriage Act 1949 ss 59, 60; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 520, 521.

2 As to the meaning of 'trustees or governing body' see PARA 107 note 3.

3 Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 8(1), (4).

4 Marriage (Authorised Persons) Regulations 1952, SI 1952/1869, reg 8(2). As to the meaning of 'Registrar General' see PARA 46 note 5. As to the custody of the keys of the receptacle see reg 8(3). If the registration of the building is cancelled, or if the trustees or governing body decide that marriages are no longer to be solemnised without the presence of a registrar, or the Registrar General attaches a condition to that effect (see text to notes 5, 6), the books must be sent to the Registrar General in order that they may be closed and deposited in appropriate custody: reg 8(5). A person having the custody of a marriage register book or a certified copy who carelessly loses or injures the book or copy or allows it to be injured while in his keeping is guilty of an offence: see PARA 181.

5 See under the Marriage Act 1949 Pt IV (ss 53-67): see PARA 186 et seq; and **REGISTRATION CONCERNING THE INDIVIDUAL**. As to the meaning of 'authorised person' see PARA 107.

6 Marriage Act 1949 s 44(5). As to the meaning of 'registrar' see PARA 88 note 1.

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110. Searches in register books.

In the case of a registered building¹ for which an authorised person² has been appointed, the person having custody of a marriage register book³ must at all reasonable hours allow searches to be made in it, and must give a copy certified under his hand of any entry in that book, on payment of a fee⁴.

1 As to the meaning of 'registered building' see PARA 54.

2 As to the meaning of 'authorised person' see PARA 107.

3 As to the person having custody of a marriage register book see PARA 109.

4 See the Marriage Act 1949 s 63; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 524.

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C. SOLEMNISATION ON APPROVED PREMISES

111. Solemnisation of marriage on approved premises.

Any marriage on approved premises¹ must be solemnised in the presence of two witnesses and the superintendent registrar² and a registrar³ of the registration district⁴ in which the premises are situated⁵.

Each of the persons contracting such a marriage must make the prescribed declaration and use the prescribed form of words⁶ applicable in the case of marriages in registered buildings⁷.

No religious service is to be used at a marriage⁸ on approved premises⁹.

If a marriage is solemnised in the presence of a registrar of marriages and before, during or immediately after solemnisation of the marriage the registrar has reasonable grounds for suspecting that the marriage will be, or is, a sham marriage¹⁰, he must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations¹¹.

A marriage solemnised on approved premises¹² must be registered by the registrar in whose presence the marriage is solemnised¹³.

1 Ie in pursuance of the Marriage Act 1949 s 26(1)(bb) (see PARA 54). As to the meaning of 'approved premises' see PARA 54 note 6.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 As to the meaning of 'registrar' see PARA 88 note 1.

4 As to the meaning of 'registration district' see PARA 87 note 4.

5 Marriage Act 1949 s 46B(1) (added by the Marriage Act 1994 s 1(2)).

6 Ie the declaration and form of words set out in the Marriage Act 1949 s 44(3) or s 44(3A); see PARA 105.

7 Marriage Act 1949 s 46B(3) (added by the Marriage Act 1994 s 1(2); amended by the Marriage (Prescribed Words) Act 1996 s 1(2)). As to the meaning of 'registered building' see PARA 54 note 3.

8 See note 1.

9 Marriage Act 1949 s 46B(4) (added by the Marriage Act 1994 s 1(2)). If any persons knowingly and wilfully intermarry, in the case of a marriage on approved premises, in the absence of the superintendent registrar of the registration district in which the premises are situated or in the absence of a registrar of that district, the marriage is void: see s 49(gg); and PARA 330.

10 As to the meaning of 'sham marriage' see PARA 11.

11 Immigration and Asylum Act 1999 s 24(2), (3). As to the prescribed form and manner see PARA 11.

12 Ie in pursuance of the Marriage Act 1949 s 26(1)(bb) (see PARA 54).

13 See Immigration and Asylum Act 1999 s 53(g) (added by the Marriage Act 1994 Schedule paras 1, 6); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 558.

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(iv) Parties Resident outside England and Wales

112. One party resident in Scotland.

Where a marriage is intended to be solemnised in England on the authority of certificates of a superintendent registrar¹ between parties of whom one is residing in Scotland and the other is residing in England, the following provisions have effect²:

- 107 (1) the party residing in Scotland may give notice of the intended marriage in accordance with the appropriate provision applying in Scotland³;
- 108 (2) the party residing in England may⁴ give notice of the intended marriage as if both parties were residing in different registration districts⁵ in England⁶;
- 109 (3) a certificate as to capacity to marry issued in Scotland has the same force and effect in all respects as a certificate issued⁷ by a superintendent registrar⁸; and
- 110 (4) the notice given in Scotland is deemed⁹ to have been entered in a marriage notice book¹⁰ by a superintendent registrar in England on the day on which it was given¹¹.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 37(1) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 19).

3 Marriage Act 1949 s 37(1)(a) (substituted by the Marriage (Scotland) Act 1977 Sch 2 para 4(a)).

4 Ie subject to and in accordance with the provisions of the Marriage Act 1949 s 27 (see PARAS 87, 92), s 27A (see PARA 172) and s 28 (see PARA 90).

5 As to the meaning of 'registration district' see PARA 87 note 4.

6 Marriage Act 1949 s 37(1)(b) (amended by the Marriage Act 1983 Sch 1 para 8). The provisions of the Marriage Act 1949 Pt III (ss 26-52) (see PARA 54 et seq) relating to notices of marriage and the issue of certificates for marriage apply accordingly: s 37(1)(b).

7 Ie under the Marriage Act 1949 Pt III: see PARA 54 et seq.

8 Marriage Act 1949 s 37(1)(c) (substituted by the Marriage (Scotland) Act 1977 Sch 2 para 4(b)).

9 Ie for the purposes of the Marriage Act 1949 s 33: see PARA 101.

10 As to the meaning of 'marriage notice book' see PARA 92.

11 Marriage Act 1949 s 37(1)(d).

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113. One party resident in Northern Ireland.

Where a marriage is intended to be solemnised in England on the authority of certificates of a superintendent registrar¹ between parties of whom one is residing in Northern Ireland and the other is residing in England, the party residing in Northern Ireland may give notice of marriage, in the form used for that purpose in Northern Ireland or to the like effect, to the registrar of the district in Northern Ireland in which he or she has resided for not less than seven days immediately before the giving of the notice². The notice must state the name and surname, marital status, occupation, age, place of residence and nationality of each of the persons to be married, and the period, not being less than seven days³, during which each of them has resided in that place, and the place where the marriage is to be solemnised⁴. The notice must be dealt with, and a certificate issued, in the manner prescribed by the law of Northern Ireland⁵; but the registrar must not issue a certificate until the expiration of 15 days from the day on which the notice was entered in the marriage notice book⁶.

The production to the person solemnising the marriage of a certificate so issued is as valid for authorising that person to solemnise the marriage as would be the production of a certificate for marriage of a superintendent registrar of a registration district⁷ in England in the case of a person residing in that district⁸.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 38(1) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 20(1), (2)).

3 If either of the persons to be married has resided in the place stated for more than one month, the notice may state that he or she has resided there for more than one month: Marriage Act 1949 s 38(2) proviso.

4 Marriage Act 1949 s 38(2) (amended by the Marriage Act 1938 Sch 1 para 9; the Immigration and Asylum Act 1999 Sch 14 paras 3, 20(1), (3)).

5 Marriage Act 1949 s 38(3).

6 Marriage Act 1949 s 38(3) proviso (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 20(1), (4)).

7 As to the meaning of 'registration district' see PARA 87 note 4.

8 Marriage Act 1949 s 38(4).

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114. One party resident in Her Majesty's dominions.

Where a marriage is intended to be solemnised or contracted in the United Kingdom between a British subject¹ resident in England, Scotland or Northern Ireland and a British subject resident in any part of Her Majesty's dominions or protectorates² to which the Marriage of British Subjects (Facilities) Act 1915 has been applied³, a certificate of the publication of banns or a certificate of notice of marriage issued in accordance with the law in force in that part of Her Majesty's dominions has in England the same effect as a certificate for marriage issued by a superintendent registrar⁴.

Where Her Majesty is satisfied that the law in force in any part of Her Majesty's dominions outside the United Kingdom makes due provision:

- 111 (1) for the publication of banns or for the giving of notice in respect of marriage between British subjects intended to be solemnised or contracted in the United Kingdom; and
- 112 (2) for the recognition of certificates for marriages issued by superintendent registrars in England⁵ as sufficient notice in respect of marriages to be solemnised in that part of Her Majesty's dominions,

Her Majesty may by Order in Council declare that the 1915 Act is to apply to that part of Her dominions⁶; but the condition in head (2) above may be waived where the dominion law does not require notice of marriage on the part of the person resident in the United Kingdom⁷.

1 As to the meaning of 'British subject' see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 9.

2 Her Majesty may by Order in Council extend the Marriage of British Subjects (Facilities) Act 1915 (see the test and notes 3-7) to protectorates and, on the making of any such Order, the Marriage of British Subjects (Facilities) Act 1915 has effect, subject to the provisions of the Order, as if the protectorate were part of Her Majesty's dominions: Marriage of British Subjects (Facilities) Act 1915 s 2. As to the meaning of 'Her Majesty's dominions' see **COMMONWEALTH** vol 13 (2009) PARA 707.

3 The Marriage of British Subjects (Facilities) Act 1915 has been applied by Order in Council to: Bahamas (SR & O 1917/1242); Barbados (SR & O 1917/1242); Basutoland (SR & O 1917/1242); Bechuanaland (SR & O 1917/1243); Bermuda (SR & O 1917/210); British Honduras (SR & O 1917/210); Ceylon (now Sri Lanka) and its dependencies (SR & O 1918/249); Cyprus (SR & O 1925/1324); Dominica (SR & O 1916/555 (amended by SR & O 1939/1896)); Fiji (SR & O 1918/1285); Gambia Colony (SR & O 1916/555); Gambia Protectorate (SR & O 1916/556); Gibraltar (SR & O 1917/1242); Gilbert and Ellice Islands Colony (SR & O 1917/747); Gold Coast Colony (SR & O 1916/555); Grenada (SR & O 1917/1242); Guernsey (SR & O 1927/1084); Hong Kong (SR & O 1916/555); Isle of Man (SR & O 1925/1032); Jamaica (SR & O 1917/747); Jersey (SR & O 1930/229); Kenya (SR & O 1916/556); Labuan (see Straits Settlements); Leeward Islands (SR & O 1916/555); Malacca (see Straits Settlements); Mauritius (SR & O 1916/555); New Zealand (SR & O 1920/2081); Newfoundland (SR & O 1916/632); Nigeria Colony and Protectorate (SR & O 1920/826); Northern Rhodesia Protectorate (SR & O 1919/473); Nyasaland Protectorate (SR & O 1917/748); Pacific Protectorate (SR & O 1917/749); Penang (see Straits Settlements); St Lucia (SR & O 1916/862); St Vincent (SR & O 1916/555); Seychelles (SR & O 1916/862); Sierra Leone Colony (SR & O 1916/862); Sierra Leone Protectorate (SR & O 1916/822); Singapore (see Straits Settlements); Straits Settlements (Labuan, Malacca, Penang and Singapore) (SR & O 1916/555); Swaziland Protectorate (SR & O 1917/1243); Trinidad and Tobago (SR & O 1916/555); Uganda Protectorate (SR & O 1916/556); Victoria (SR & O 1916/632); Zanzibar Protectorate (SR & O 1917/748); and Zimbabwe (SR & O

1918/1066 (amended by SI 1980/701)). The above list is to be read in the light of the many constitutional changes and alterations in the names of territories: see **COMMONWEALTH** vol 13 (2009) PARA 726 et seq.

4 Marriage of British Subjects (Facilities) Act 1915 s 1(1)(a). The superintendent registrar of the district in which the party in England is residing has power to accept notice of the marriage given by that party as if both parties were residing in different districts in England, and the normal statutory provisions (see PARA 54 et seq) apply: Marriage Act 1939 s 2(1), (3) (amended by the Marriage Act 1949 Sch 5 Pt I).

5 The Marriages of British Subjects (Facilities) Act 1915 may also be applied where that law makes due provision for the recognition of certificates for marriage issued by registrars and certificates of proclamation of banns in Scotland, and certificates for marriage issued by Northern Ireland: see the Marriage of British Subjects (Facilities) Act 1915 s 1.

6 Marriage of British Subjects (Facilities) Act 1915 s 1.

7 See the Marriage of British Subjects (Facilities) Amendment Act 1916 s 1.

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(v) Quaker and Jewish Marriages

115. Notification of Quaker marriages.

No person who is not a member of the Society of Friends (commonly called Quakers)¹ may be married according to the usages of that Society unless he or she is authorised to be so married under or in pursuance of a general rule of the Society in England².

A marriage solemnised according to the usages of the Society of Friends may be solemnised on the authority of a certificate issued, on due notice of marriage being given, by a superintendent registrar³, notwithstanding that the building or place in which the marriage is to be solemnised is not within a registration district in which either of the persons to be married resides⁴. The provisions relating to notice of marriage, statement, declaration, forms and fees are the same as in other cases⁵, but a marriage solemnised according to the usages of the Society of Friends is not valid unless either:

- 113 (1) each person giving the notice of marriage declares, either verbally or, if so required, in writing, that each of the parties to the marriage is either a member of the Society of Friends or is in profession with or of the persuasion of that Society⁶; or
- 114 (2) there is produced to the superintendent registrar, at the time when notice of marriage is given, a certificate purporting to be signed by a registering officer of the Society of Friends⁷ in England to the effect that any party to the marriage who is not a member of the Society nor in profession with nor of the persuasion of that Society is authorised to be married according to the usages of the Society in pursuance of a general rule of the Society in England⁸.

1 As to the status of the Society of Friends generally see **ECCLESIASTICAL LAW** vol 14 PARAS 1419, 1420.

2 Marriage Act 1949 s 47(1).

3 See the Marriage Act 1949 s 26(1)(c); and PARA 54. As to the meaning of 'superintendent registrar' see PARA 22 note 1.

4 See the Marriage Act 1949 s 35(4); and PARA 100.

5 Marriage Act 1949 s 47(2)(a) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 25).

6 See PARA 53 et seq. As to the effect of a marriage without due notice see PARA 89; and *Nathan v Woolf* (1899) 15 TLR 250 (Jewish marriage).

7 It seems that 'registering officer of the Society of Friends' means a person whom the recording clerk of the Society certifies in writing to the Registrar General to be a registering officer in England of the Society: see the Marriage Act 1949 s 67 (which is, however, only expressed to apply to Pt IV (ss 53-66)); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 520.

8 Marriage Act 1949 s 47(2)(b) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 25). Any such certificate is for all purposes conclusive evidence that any person to whom it relates is authorised to be married according to the usages of the Society of Friends; and the entry of the marriage in a marriage register book under the Marriage Act 1949 Pt IV (see **REGISTRATION CONCERNING THE INDIVIDUAL**) or a duly certified copy of it under Pt IV (see PARA 108) is conclusive evidence of the due production of the certificate: s 47(3). A copy of any general rule of the Society of Friends purporting to be signed by the recording clerk for the time being of

the Society must be admitted as evidence of the general rule in all proceedings touching the validity of any marriage solemnised according to the usages of the Society of Friends: s 47(4). As to the time and manner of solemnisation of such a marriage see PARA 116.

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116. Solemnisation of Quaker marriages.

On production of the certificates of a superintendent registrar, a marriage may be solemnised according to the usages of the Society of Friends¹. It is not necessary that either party be a member of the Society, but each must have been authorised to be so married under or in pursuance of a general rule of the Society²; nor is it necessary that the building in which the marriage is solemnised should be registered³, nor that the building be situated within a district in which either of the parties resides⁴. The marriage may be solemnised at any hour⁵. The parties must, however, have capacity to marry⁶, and the marriage must be solemnised within the applicable period⁷.

The certificates must be delivered to the registering officer of the Society of Friends for the place where the marriage is solemnised⁸, whose duty it is to satisfy himself that the marriage is solemnised according to the usages of the Society⁹. As soon as conveniently may be after its solemnisation, the marriage must be registered by the registering officer of the Society appointed for that district, in the prescribed form and manner¹⁰.

Every registering officer of the Society of Friends by whom a marriage register book is kept¹¹ must allow searches to be made in it at all reasonable hours, and give a copy certified under his hand of any entry in the book, on payment of a fee¹².

Provision is made for the safe custody of marriage register books and filled marriage register books¹³ and for the correction of errors in entries in such books¹⁴.

Every registering officer must deliver quarterly to the superintendent registrar certified copies of all entries made in the marriage register book or a certificate on a form supplied by the Registrar General that no marriage has been registered¹⁵.

1 See the Marriage Act 1949 s 26(1)(c); and PARA 54. As to the notice of marriage see PARA 115.

2 See the Marriage Act 1949 s 47(1); and PARA 115.

3 See the Marriage Act 1949 s 26(1)(c); and PARA 54.

4 See the Marriage Act 1949 s 35(4); and PARA 100.

5 See the Marriage Act 1949 s 75(1)(a); and PARA 180. It seems that witnesses are not required by law (see ss 26(1)(c), 44(3)), but witnesses are in fact required where a meeting for worship is held for the solemnisation of marriage according to the usages of the Society of Friends.

6 As to the minimum age for marriage see PARA 41; and as to the prohibited degrees of consanguinity and affinity see PARAS 35-37. See also PARA 118 note 5.

7 See PARA 101.

8 See the Marriage Act 1949 s 50(1)(d); and PARA 98.

9 See the Marriage Act 1949 s 55(1) proviso (b); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 559.

10 See the Marriage Act 1949 ss 53(b), 55(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 558-559. For the prescribed form of registration see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 13 (amended by SI 2000/3164); and for the corresponding form in Welsh see

the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, reg 7(1), Sch 1, Form 9 (amended by SI 2000/3164).

11 As to the provision of marriage register books by the Registrar General see the Marriage Act 1949 s 54; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 504.

12 Marriage Act 1949 s 63(1). The fee for a certified copy of an entry is £3.50 where application is made at the time of registering, and £7 in any other case: Registration of Births, Deaths and Marriages (Fees) Order 2002, SI 2002/3076, art 3, Schedule.

13 See the Marriage Act 1949 ss 59, 60; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 520-521.

14 See the Marriage Act 1949 s 61; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 519.

15 See the Marriage Act 1949 s 57(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 618.

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117. Notification of Jewish marriages.

Marriages between two persons professing the Jewish religion according to the usages of the Jews may be solemnised on the authority of a certificate issued, on due notice of marriage being given¹, by a superintendent registrar², notwithstanding that the building or place in which the marriage is to be solemnised is not within the registration district in which either of the persons to be married resides³.

1 As to the notice of marriage and the statement, declaration, forms and fees, which are the same as in other cases, see PARA 22 et seq. As to the effect of a marriage without due notice see PARA 89; and see *Nathan v Woolf* (1899) 15 TLR 250.

2 See the Marriage Act 1949 s 26(1)(d); and PARA 54. As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 See the Marriage Act 1949 s 35(4); and PARA 100. As to the time and manner of solemnisation of such a marriage see PARA 118.

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118. Solemnisation of Jewish marriages.

On production of the certificates of a superintendent registrar, a marriage may be solemnised between two persons professing the Jewish religion according to the usages of the Jews¹. The building in which the marriage is solemnised need not be registered², nor need it be situated within a district in which either of the parties resides³; and the marriage may be solemnised at any hour⁴. The parties must, however, have capacity to marry⁵, and the marriage must be solemnised within the applicable period⁶.

The certificates must be delivered to the officer of a synagogue by whom the marriage is registered⁷, whose duty it is to satisfy himself that the marriage is solemnised according to the usages of the Jews⁸. Immediately after its solemnisation, the marriage must be registered by the secretary of the synagogue of which the husband is a member, in the prescribed form and manner⁹.

Every secretary of a synagogue by whom a marriage register book is kept¹⁰ must allow searches to be made in it at all reasonable hours and give a copy certified under his hand of any entry in the book, on payment of a fee¹¹.

Provision is made for the safe custody of marriage register books and filled register books¹² and for the correction of errors in entries in such books¹³.

Every secretary of a synagogue must deliver quarterly to the superintendent registrar certified copies of all entries made in the marriage register book or a certificate on a form supplied by the Registrar General that no marriage has been registered¹⁴.

1 See the Marriage Act 1949 s 26(1)(d); and PARA 54. Cf *Ruding v Smith* (1821) 1 State Tr NS 1054. It appears that a written contract is necessary to constitute a valid marriage according to the usages of the Jews (see *R v Althausen* (1893) 17 Cox CC 630; *Horn v Noel* (1807) 1 Camp 61), but it is not necessary to produce the contract to prove the validity of the marriage (*R v Hammer* [1923] 2 KB 786, CCA). The marriage must be solemnised in the presence of witnesses who are not incompetent by reason of consanguinity to the parties: see *Goldsmid v Bromer* (1798) 1 Hag Con 324. A marriage purporting to be solemnised according to the usages of the Jews is void unless it complies with the Jewish law: *Goldsmid v Bromer*; *Lindo v Belisario* (1795) 1 Hag Con 216; affd (1796) 1 Hag Con App 7. As to notice of marriage in such cases see PARA 117.

2 See the Marriage Act 1949 s 26(1)(d); and PARA 54.

3 See the Marriage Act 1949 s 35(4); and PARA 100.

4 See the Marriage Act 1949 s 75(1)(a); and PARA 180.

5 As to the minimum age for marriage see PARA 41; and as to the prohibited degrees of consanguinity and affinity see PARAS 35-37. The various statutory exceptions in favour of Jews and Quakers relate only to questions of form and ceremony, and not to questions of capacity: *Re De Wilton*, *De Wilton v Montefiore* [1900] 2 Ch 481; and see PARA 35.

6 See PARA 101.

7 See the Marriage Act 1949 s 50(1)(e); and PARA 98.

8 See the Marriage Act 1949 s 55(1) proviso (b); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 559.

9 See the Marriage Act 1949 ss 53(b), 55(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 558-559. For the prescribed form of registration see the Registration of Marriages Regulations 1986, SI 1986/1442, reg 10(1), Sch 1, Form 13 (amended by SI 2000/3164); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, reg 7(1), Sch 1, Form 9 (amended by SI 2000/3164). As to proof of Jewish marriages see PARA 24.

10 As to the provision of marriage register books by the Registrar General see the Marriage Act 1949 s 54; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 504.

11 Marriage Act 1949 s 63(1). The fee for a certified copy of an entry is £3.50 where application is made at the time of registering, and £7 in any other case: Registration of Births, Deaths and Marriages (Fees) Order 2002, SI 2002/3076, art 3, Schedule.

12 See the Marriage Act 1949 ss 59, 60; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 520, 521.

13 See the Marriage Act 1949 s 61; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 519.

14 See the Marriage Act 1949 s 57(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 618.

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(4) MARRIAGES CONDUCTED ABROAD

119. Marriages under the Foreign Marriage Act 1892.

A marriage solemnised in the manner provided by the Foreign Marriage Act 1892¹ in any foreign country or place, by or before a marriage officer², between parties of whom at least one is a United Kingdom national³, is as valid as if it had been solemnised in the United Kingdom with a due observance of all forms required by law⁴, even though it may be invalid by the *lex loci celebrationis*⁵.

1 The Foreign Marriage Act 1892 has been amended by the Foreign Marriage Act 1947 and by the Foreign Marriage (Amendment) Act 1988. See the Foreign Marriage Order 1970, SI 1970/1539 (amended by SI 1990/598). See also the Foreign Marriage (Armed Forces) Order 1964, SI 1964/1000 (amended by SI 1965/137; SI 1990/2592); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 214.

The Acts do not apply to marriages of members of the royal family: Foreign Marriage Act 1892 s 23. Such marriages, wherever they take place, are governed by the Royal Marriages Act 1772: see *Sussex Peerage Case* (1844) 11 Cl & Fin 85, HL; and **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 36.

By the Marriage of British Subjects (Facilities) Act 1915 and the Marriage of British Subjects (Facilities) Amendment Act 1916, provision is made for facilitating marriages between holders of British nationality resident in the United Kingdom and holders of British nationality resident in other parts of Her Majesty's dominions or in British protectorates: see PARAS 17, 114. As to the meaning of 'Her Majesty's dominions' see **COMMONWEALTH** vol 13 (2009) PARA 707. Note that there are no longer any British protectorates: see **COMMONWEALTH** vol 13 (2009) PARA 708.

2 'Marriage officer' means a British ambassador (including a minister and a chargé d'affaires: Foreign Marriage Act 1892 s 24) residing in the country to whose government he is accredited, or any officer prescribed by marriage regulations as an officer for solemnising marriages in the official house of such an ambassador, or a British consul (ie a consul-general, consul, vice-consul, pro-consul and consular agent: s 24), governor, high commissioner, resident, consular or other officer, or any person appointed in pursuance of the marriage regulations to act in place of a high commissioner or resident, provided that he holds a marriage warrant signed by the Secretary of State, or any officer authorised by the marriage regulations to act as marriage officer without any marriage warrant: s 11(1), (2). As to the making of marriage regulations see s 21 (amended by the Foreign Marriage Act 1947 s 4; the Statute Law (Repeals) Act 1986; and the Foreign Marriage (Amendment) Act 1988 ss 1(3), 7(2), Schedule). No marriage regulations for this purpose were in force at the date at which this volume states the law, and accordingly a marriage warrant is in every case necessary.

If a marriage warrant refers to the office without designating the name of any particular person holding it, then, while the warrant is in force, the person for the time being holding or acting in that office is a marriage officer: Foreign Marriage Act 1892 s 11(3).

The Secretary of State may by warrant under his hand vary or revoke any marriage warrant previously issued under the Foreign Marriage Act 1892: s 11(4).

3 For these purposes, 'United Kingdom national' means a person who is:

- 1 (1) a British citizen, a British overseas territories citizen, a British overseas citizen or a British national (overseas) (Foreign Marriage Act 1892 ss 1(2)(a), 24 (s 1(2) added by the Foreign Marriage (Amendment) Act 1988 s 1(2); Foreign Marriage Act 1892 s 1(2)(a) amended by the British Overseas Territories Act 2002 s 2(3); and the Foreign Marriage Act 1892 s 24 amended by the Foreign Marriage (Amendment) Act 1988 s 1(4)); or
- 2 (2) a British subject under the British Nationality Act 1981 (Foreign Marriage Act 1892 s 1(2) (b)); or

- 3 (3) a British protected person within the meaning of the British Nationality Act 1981 (Foreign Marriage Act 1892 s 1(2)(c)).

As to categories of citizenship see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 23 et seq.

- 4 Foreign Marriage Act 1892 s 1(1) (amended by the Foreign Marriage (Amendment) Act 1988 s 1). The marriage is thus formally valid, although not necessarily valid in other respects: Foreign Marriage Act 1892 s 23.

5 *Hay v Northcote* [1900] 2 Ch 262, where a marriage celebrated in accordance with the Consular Marriage Act 1849 (repealed and virtually re-enacted by the Foreign Marriage Act 1892) was held to be valid although it had been annulled by the court of the parties' domicile. The foreign nullity decree might now be recognised in the United Kingdom: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 254 et seq. See also *Merker v Merker* [1963] P 283, [1962] 3 All ER 928. As to the *lex loci celebrationis* see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 208.

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120. Notice of intended marriage.

Where a marriage is intended to be solemnised under the Foreign Marriage Act 1892¹, one of the parties must sign a notice stating the name, surname, profession, condition and residence of each of the parties and whether each is or is not a minor, and give it to the marriage officer² within whose district³ both parties have resided for not less than one week immediately preceding the notice, stating in the notice that they have so resided⁴. The marriage officer must file the notice in his registry, and, on payment of the proper fee⁵, enter it in his book of notices, and keep a true copy of the notice posted up in some conspicuous place in his office⁶ for 14 consecutive days before the marriage is solemnised⁷. If the marriage is not solemnised within three months of the date on which notice for it has been given to and entered by the marriage officer⁸ the notice is void, and the marriage cannot be solemnised under it⁹.

In special cases, where the Secretary of State is satisfied that for some good cause the requirements of the Act as to residence and notice cannot be complied with, and he is satisfied that the intended marriage is not clandestine and that adequate public notice has been given in the place or places where each of the parties resided not less than 15 days immediately preceding the giving of the notice, he may authorise the marriage officer to dispense with those requirements¹⁰.

1 See PARA 119.

2 As to the meaning of 'marriage officer' see PARA 119 note 2.

3 The area within which the duties of his office are exercisable, or any such lesser area as is assigned by the marriage warrant or any other warrant of a Secretary of State, or is fixed by the marriage regulations: Foreign Marriage Act 1892 s 11(1). As to marriage warrants see PARA 119 note 2. As to the making of marriage regulations see s 21 (amended by the Foreign Marriage Act 1947 s 4; the Statute Law (Repeals) Act 1986; and the Foreign Marriage (Amendment Act) 1988 ss 1(3), 7(2), Schedule). No marriage regulations for this purpose were in force at the date at which this volume states the law.

4 Foreign Marriage Act 1892 s 2. For a form of notice of marriage see the Foreign Marriage Order 1970, SI 1970/1539, Schedule Form 1.

5 The proper fee is such as is fixed under the Consular Fees Act 1980; and the fee so fixed as respects a consul is the fee which may be taken by any marriage officer. The provisions of the Consular Fees Act 1980 relating to the levying, application and remission of and accounting for fees are the same when the marriage officer taking the fee is not a consul: Foreign Marriage Act 1892 s 20 (amended by the Consular Fees Act 1980 s 1(5)). As to the levying, application and remission of, and accounting for, fees see the Consular Fees Act 1980 s 1(3); the Consular Fees Regulations 1981, SI 1981/476; the Consular Fees Order 2008, SI 2008/676; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 30.

6 As to the office of a marriage officer see further PARA 125 note 5.

7 Foreign Marriage Act 1892 s 3(1). The book of notices and copy of the notice posted up must be open at all reasonable times, without fee, to the inspection of any person: s 3(2).

8 Foreign Marriage Act 1892 s 6(a). If, on a caveat being entered (see PARA 123), a statement has been transmitted to a Secretary of State, or if an appeal has been made to a Secretary of State (see PARA 122), the three months run from the date of the receipt from the Secretary of State of a decision directing the marriage to be solemnised: s 6(b).

9 Foreign Marriage Act 1892 s 6.

10 Foreign Marriage Order 1970, SI 1970/1539, art 4(1). As to the oath before marriage in such circumstances see PARA 124 note 5.

UPDATE

120 Notice of intended marriage

NOTE 5--SI 2008/676 replaced: Consular Fees Order 2009, SI 2009/700.

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121. Consents.

The same consents are required, under the Foreign Marriage Act 1892¹, to a marriage of a party domiciled in England or in a country outside the United Kingdom as would be required in respect of that party to a marriage solemnised in England on the authority of a superintendent registrar's certificate². The same consents are required, under the Act, to the marriage of a party domiciled in Northern Ireland as would be required in respect of that party to a marriage solemnised there³.

Where by reason of the absence, inaccessibility or disability of a person whose consent is required that consent cannot be obtained, the requirement of obtaining the consent may be dispensed with by the Secretary of State or, in such cases as may be prescribed by marriage regulations⁴, the Registrar General for England and Wales⁵.

A person whose consent is required may forbid the marriage by an entry to this effect in the marriage officer's book of notices of marriage⁶. The effect of such an entry is to render the notice void, and the marriage cannot be solemnised under it⁷.

1 See PARA 119.

2 Foreign Marriage Act 1892 s 4(1) (s 4 substituted by the Foreign Marriage (Amendment) Act 1988 s 2(1)). As to the consents required by English domestic law see PARA 41 et seq. The certificate referred to in the text is a certificate issued by a superintendent registrar under the Marriage Act 1949 Pt III (ss 26-52): see PARA 54 et seq.

3 Foreign Marriage Act 1892 s 4(2). Note, however, that consent may be dispensed with by order under Northern Ireland legislation, on application to a county court in Northern Ireland: see s 4(5).

4 As to the making of marriage regulations see Foreign Marriage Act 1892 s 21 (amended by the Foreign Marriage Act 1947 s 4; the Statute Law (Repeals) Act 1986; and the Foreign Marriage (Amendment Act) 1988 ss 1(3), 7(2), Schedule). No marriage regulations for this purpose were in force at the date at which this volume states the law.

5 Foreign Marriage Act 1892 s 4(4). As to the office of Registrar General for England and Wales see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605 et seq.

6 See the Foreign Marriage Act 1892 s 4(6). He must write the word 'forbidden' against the entry of the intended marriage in the book of notices and add his name and address and a statement of the capacity by virtue of which his consent is required: s 4(6)(a), (b).

7 Foreign Marriage Act 1892 s 4(6).

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122. Refusal of solemnisation of marriage.

Before a marriage is solemnised in a foreign country under the Foreign Marriage Act 1892¹, the marriage officer² must be satisfied that:

- 115 (1) at least one of the parties is a United Kingdom national³;
- 116 (2) the authorities of the foreign country will not object to the solemnisation of the marriage⁴;
- 117 (3) insufficient facilities exist for the marriage of the parties under the law of that country⁵; and
- 118 (4) the parties will be regarded as validly married by the law of the country in which each party is domiciled⁶.

The marriage officer is not required to solemnise a marriage, or to allow it to be solemnised in his presence, if in his opinion its solemnisation would be inconsistent with international law or the comity of nations⁷.

If the marriage officer refuses to solemnise the marriage of any person requiring it to be solemnised, or to allow it to be solemnised in his presence, by reason of any of the provisions described above, that person has a right of appeal to a Secretary of State, who must give the marriage officer his decision on the appeal⁸. The marriage officer must forthwith inform the parties of, and conform to, the Secretary of State's decision⁹.

1 See PARA 119.

2 As to the meaning of 'marriage officer' see PARA 119 note 2.

3 Foreign Marriage Order 1970, SI 1970/1539, art 3(1)(a) (amended by SI 1990/598). As to the meaning of 'United Kingdom national' see PARA 119 note 3.

4 Foreign Marriage Order 1970, SI 1970/1539, art 3(1)(b).

5 Foreign Marriage Order 1970, SI 1970/1539, art 3(1)(c).

6 Foreign Marriage Order 1970, SI 1970/1539, art 3(1)(d) (amended by SI 1990/598).

7 Foreign Marriage Act 1892 s 19.

8 Foreign Marriage Act 1892 ss 5(3), 19 proviso; Foreign Marriage Order 1970, SI 1970/1539, art 3(2).

9 Foreign Marriage Act 1892 s 5(4) (amended by the Foreign Marriage (Amendment) Act 1988 s 3(2)).

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123. Objections.

On payment of the proper fee¹ any person may enter with the marriage officer² a caveat, signed by him or on his behalf and stating his residence and the ground of his objection against the solemnisation of the marriage of any named person, and thereupon the marriage cannot be solemnised until either the marriage officer has examined the matter and is satisfied that the caveat ought not to obstruct solemnisation of the marriage, or the caveat has been withdrawn by the person entering it³. In a case of doubt the marriage officer may transmit a copy of the caveat with such statement respecting it as he thinks fit to the Secretary of State, who must refer it to the Registrar General for whichever part of the United Kingdom he considers appropriate⁴; and the Registrar General must give his decision in writing to the Secretary of State, who must communicate it to the marriage officer⁵. The marriage officer must forthwith inform the parties of, and conform to, the decision of the Registrar General⁶.

1 As to the proper fee see PARA 120 note 5.

2 As to the meaning of 'marriage officer' see PARA 119 note 2.

3 Foreign Marriage Act 1892 s 5(1).

4 As to the Registrar General for England and Wales, the Registrar General of Births, Deaths and Marriages for Scotland or the Registrar General in Northern Ireland: Foreign Marriage Act 1892 s 5(2) (amended by the Foreign Marriage (Amendment) Act 1988 s 3(1)). As to the office of Registrar General for England and Wales see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605 et seq.

5 Foreign Marriage Act 1892 s 5(2).

6 Foreign Marriage Act 1892 s 5(4) (amended by the Foreign Marriage (Amendment) Act 1988 s 3(2)).

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124. Oath before marriage.

Before a marriage is solemnised under the Foreign Marriage Act 1892¹, each of the parties must appear before the marriage officer² and make and subscribe an oath in a book kept by the officer for the purpose³:

- 119 (1) that he or she believes that there is no impediment to the marriage by reason of kindred or alliance or otherwise⁴;
- 120 (2) that they have both for the immediately preceding three weeks had their usual residence within the marriage officer's district⁵; and
- 121 (3) where either party is under the age of 18 and domiciled in a country other than Scotland:

5

- 7. (a) that any necessary consent has been obtained⁶; or
- 8. (b) that the necessity of obtaining consent has been dispensed with⁷; or
- 9. (c) if the party is domiciled in England or a country outside the United Kingdom, either that he or she is a widow or widower or that there is no person having authority to give such consent⁸.

6

1 See PARA 119.

2 As to the meaning of 'marriage officer' see PARA 119 note 2.

3 Foreign Marriage Act 1892 s 7.

4 Foreign Marriage Act 1892 s 7(a).

5 Foreign Marriage Act 1892 s 7(b). This part of the oath must be omitted in cases where, under the Foreign Marriage Order 1970, SI 1970/1539, art 4(1), the Secretary of State has authorised the marriage officer to dispense with the requirements of the Foreign Marriage Act 1892 as to residence and notice (see PARA 120 text and note 10): Foreign Marriage Order 1970, SI 1970/1539, art 4(2).

6 Foreign Marriage Act 1892 s 7(c)(i) (s 7(c) substituted by the Foreign Marriage (Amendment) Act 1988 s 2(2)). For a form of oath see the Foreign Marriage Order 1970, SI 1970/1539, Schedule Form 2. As to consents see PARA 121.

7 Foreign Marriage Act 1892 s 7(c)(ii) (as substituted: see note 6).

8 Foreign Marriage Act 1892 s 7(c)(iii) (as substituted: see note 6).

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125. Solemnisation of marriage.

After the expiration of 14 days after notice of an intended marriage has been entered¹, if no lawful impediment to the marriage is shown to the satisfaction of the marriage officer² and the marriage has not been forbidden³, it may be solemnised under the Foreign Marriage Act 1892⁴. It must be solemnised at the official house of the marriage officer⁵, with open doors, between the hours of 8 am and 6 pm in the presence of two or more witnesses, either by the marriage officer or, if the parties so desire, by some other person in his presence, according to such form and ceremony as the parties see fit to adopt⁶. If a corresponding declaration is not otherwise included in the form adopted by the parties, each party must, in some part of the ceremony and in the presence of the marriage officer, declare that he or she knows of no lawful impediment to the marriage⁷ and that he or she takes the other as lawful wedded wife or husband⁸.

1 See PARA 120.

2 See PARA 124. As to the meaning of 'marriage officer' see PARA 119 note 2.

3 See PARA 121.

4 Foreign Marriage Act 1892 s 8(1). The marriage officer is entitled to a proper fee: s 9(1). As to the proper fee see also PARA 120 note 5.

5 'Official house of the marriage officer' means the office at which the officer's business is transacted, and the official house of residence of that officer, and, in the case of any officer who is an officer for solemnising marriages in the official house of an ambassador, the ambassador's official house: Foreign Marriage Act 1892 s 24. Every place within the curtilage or precincts of the building which is for the time being used for the purpose of the marriage officer's office is part of his official house, and every place to which the public have ordinary access in that official house is deemed to be part of the office: Foreign Marriage Order 1970, SI 1970/1539, art 5. The certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul is conclusive: Foreign Marriage Act 1892 s 16(2).

6 Foreign Marriage Act 1892 s 8(2) (substituted by the Foreign Marriage (Amendment) Act 1988 s 4).

7 See the Foreign Marriage Act 1892 s 8(3) (substituted by the Foreign Marriage (Amendment) Act 1988 s 4).

8 See the Foreign Marriage Act 1892 s 8(4) (added by the Foreign Marriage (Amendment) Act 1988 s 4).

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126. Registration and proof of marriage.

The marriage officer¹ must forthwith register in duplicate a marriage solemnised under the Foreign Marriage Act 1892² in two marriage register books³, according to the form provided by law for the registration of marriages in England, or as near to that form as the difference of circumstances permits⁴. In January of each year the marriage officer must forward to a Secretary of State, for transmission to the Registrar General for England and Wales, a certified copy of all the entries of marriage made in the register book during the preceding year, or if there has been no entry during that year, a certificate of that fact⁵.

The marriage is proved by production of the official certificate of marriage⁶. After a marriage has been solemnised it is not necessary, in support of the marriage, to give any proof of the requisite residence of either of the parties prior to the marriage, or of the consent of any person whose consent was required by law, and evidence to the contrary may not be given in any legal proceeding touching the validity of the marriage⁷. Where a marriage purports to have been solemnised and registered under the Act in the official house of a British ambassador or consul⁸, it is not necessary in support of the marriage to give any proof of the authority of the marriage officer by or before whom the marriage was solemnised and registered, and evidence of his want of authority⁹ may not be given in any such proceeding¹⁰.

1 As to the meaning of 'marriage officer' see PARA 119 note 2.

2 See PARA 119.

3 The register books must be furnished to him from time to time by the Registrar General for England and Wales, through the Secretary of State: Foreign Marriage Act 1892 s 9(2) (amended by the Foreign Marriage (Amendment) Act 1988 s 5(1)). As to the office of Registrar General for England and Wales see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605 et seq.

4 Foreign Marriage Act 1892 s 9(2). Every entry must be signed by the marriage officer (or by the person solemnising the marriage if other than that officer), by both parties and by two witnesses: s 9(3). Entries must be in regular order from the beginning to the end of the book, and the number of the entry in each duplicate must be the same: s 9(4). The marriage officer may ask the parties for the required particulars: s 9(5).

5 Foreign Marriage Act 1892 s 10(1) (amended by the Foreign Marriage (Amendment) Act 1988 s 5(1)). Every copy must be certified, and certificate given, under the marriage officer's hand and official seal: Foreign Marriage Act 1892 s 10(1). For a form of certificate see the Foreign Marriage Order 1970, SI 1970/1539, art 8, Schedule, Form 3. If either party is shown in a copy of a certificate received by the Registrar General for England and Wales to be from Scotland or Northern Ireland, that Registrar General must send a copy entry to the appropriate Registrar General in Scotland or Northern Ireland: art 6(1) (so numbered by SI 1990/598). The marriage officer must keep the duplicate books until they are filled, and then send one to the Secretary of State for transmission to the Registrar General for England and Wales: Foreign Marriage Act 1892 s 10(2) (amended by the Foreign Marriage (Amendment) Act 1988 s 5(1)).

Where a marriage officer has no seal of office, reference to the official seal must be construed as reference to any seal ordinarily used by him, if authenticated by his signature with his official name and description: Foreign Marriage Act 1892 s 11(5).

6 The provisions and penalties of the Marriage Registration Acts relating to any registrar or register of marriages, or certified copies, extend to marriage officers and their registers and certified copies, so far as applicable: Foreign Marriage Act 1892 s 17. 'Marriage Registration Acts' means enactments for the time being in force in England relating to the registration of marriages: s 17 (definition added by the Foreign Marriage (Amendment) Act 1988 s 5(2)). Any books, notices or documents directed to be kept by a marriage officer are documents of such a public nature as to be admissible in evidence on mere production from his custody: Foreign Marriage Act 1892 s 16(1). See further **REGISTRATION CONCERNING THE INDIVIDUAL**.

7 Foreign Marriage Act 1892 s 13(1). As to the requirements of residence see PARAS 120, 124. As to the necessary consents see PARA 121.

8 For these purposes, 'ambassador' includes a minister and a chargé d'affaires; and 'consul' means a consul-general, consul, vice-consul, pro-consul, or consular agent: Foreign Marriage Act 1892 s 24.

9 Ie whether by reason of his not being duly authorised, or of any prohibitions or restrictions under the marriage regulations or otherwise: Foreign Marriage Act 1892 s 13(2).

10 Foreign Marriage Act 1892 s 13(2) (amended by the Foreign Marriage Act 1947 s 4). Cf *Watts (otherwise Carey) v Watts* (1922) 38 TLR 430.

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127. Effect of non-compliance with the statutory requirements.

The requirements of the Foreign Marriage Act 1892 as to notices¹, consents², the oath before marriage³ and registration of the marriage⁴ are directory only and not mandatory, so that a marriage solemnised under the Act may be valid even if these requirements have not been complied with⁵. On the other hand, the requirements of the Act as to the solemnisation of the marriage⁶ are crucial, and they must be complied with in order for the marriage to be valid⁷.

1 See PARA 120.

2 See PARA 121.

3 See PARA 124.

4 See PARA 126.

5 *Collett v Collett* [1968] P 482, [1967] 2 All ER 426.

6 See PARA 125.

7 *Collett v Collett* [1968] P 482, [1967] 2 All ER 426.

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128. Certificate of no impediment to marriage.

A holder of British nationality¹ who desires to be married in a foreign country to a foreigner according to the law of that country may, if it is desired for the purpose of complying with the law of the foreign country to obtain a certificate that after proper notices have been given no legal impediment to the marriage has been shown to exist, give notice of the marriage:

- 122 (1) if he is resident in any part of the United Kingdom other than Scotland, to a superintendent registrar of marriages²; or
- 123 (2) if he is resident abroad, to the marriage officer³,

and apply to the registrar or marriage officer for such certificate⁴. After certain conditions⁵ have been complied with, the registrar or marriage officer must give the certificate unless it is forbidden⁶ or a caveat is in operation⁷, or some legal impediment to the marriage is shown to exist⁸.

Where arrangements have been made to the satisfaction of Her Majesty with any foreign country for the issue by the proper officers of that country, in the case of persons subject to the marriage law of that country proposing to marry holders of British nationality in any part of the United Kingdom except Scotland, of certificates that, after proper notices have been given, no legal impediment has been shown to exist to the marriage, regulations may be made by Order in Council:

- 124 (a) requiring such a person to give notice of the fact that he is subject to the marriage law of that country to the person by whom or in whose presence the marriage is to be solemnised; and
- 125 (b) forbidding any person to whom such notice is given to solemnise the marriage or to allow it to be solemnised until such a certificate is produced to him⁹.

Her Majesty may by Order in Council make general regulations prescribing forms to be used for these purposes and making such other provisions as seem necessary or expedient, and may by Order in Council revoke, alter or add to any previous such Order in Council¹⁰.

¹ The Marriage with Foreigners Act 1906 refers to 'British subjects' but by virtue of the British Nationality Act 1981 s 51(1) such references should now be taken to be references to 'Commonwealth citizens': see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 9, 11, 66.

² Marriage with Foreigners Act 1906 s 1(1) (amended by the Marriage (Scotland) Act 1977 ss 28(1), 29(3), Sch 2). See also the Marriage with Foreigners Act 1906 s 4.

³ Marriage with Foreigners Act 1906 s 1(1) (as amended: see note 2). A 'marriage officer' for these purposes is a marriage officer for the time being under the Foreign Marriage Act 1892, including a person empowered under s 18 to register a foreign marriage celebrated under local law: Marriage with Foreigners Act 1906 s 4. See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 215, 224.

⁴ Marriage with Foreigners Act 1906 s 1(1) (as amended: see note 2). Fees may be charged as fixed under the Consular Fees Act 1980: Marriage with Foreigners Act 1906 s 1(4) (amended by the Consular Fees Act 1980 s 1(5)). As to the levying, application and remission of, and accounting for, fees see the Consular Fees Act 1980.

s 1(3); the Consular Fees Regulations 1981, SI 1981/476; the Consular Fees Order 2008, SI 2008/676; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 30.

5 The conditions are as follows:

- 4 (1) the applicant must sign a notice stating the name, surname, profession, condition, nationality and residence of each of the parties to the marriage, and whether each party is or is not a minor (Marriage with Foreigners Act 1906 Schedule para 1);
- 5 (2) the applicant must at the time of giving the notice make and subscribe, in a book to be kept by the registrar or marriage officer for the purpose, an oath:
 1. (a) that he believes there to be no impediment to the marriage by reason of kindred or alliance or otherwise (Schedule para 2(a));
1
 2. (b) that he has for three weeks immediately preceding had his usual residence within the district of the registrar or officer (Schedule para 2(b)); and
2
 3. (c) if the applicant (not being a widow or widower) is under 18, that the consent of persons whose consent is required by law has been obtained (see note 8), or that there is no person having authority to give such consent, as the case may be (Schedule para 2(c));
3
- 6 (3) the registrar or officer must file every such notice and keep it with the archives of his office, and must forthwith enter in a book of notices kept for the purpose, and post up in some conspicuous place in his office, a copy of every such notice, and must keep it so posted for at least 21 days (Schedule para 3); and
- 7 (4) the book in which the notice is so entered, and the copy which is so posted, must be open at all reasonable times without fee to the inspection of any person (Schedule para 4).

6 Any person whose consent is required by law to marriages solemnised in England may forbid the certificate by writing the word 'forbidden' opposite the entry of the application in the book of notices, and by subscribing his name and residence and the character by reason of which he is authorised to forbid the certificate: Marriage with Foreigners Act 1906 Schedule para 5.

7 Any person may enter with the registrar or officer a caveat against the granting of the certificate, signed by him or on his behalf, and stating his residence and the grounds of his objection: Marriage with Foreigners Act 1906 Schedule para 6(a). The registrar or officer must examine into the matter of the caveat and decide whether it ought to obstruct the giving of the certificate or not, but he may if he thinks fit refer the matter to the Registrar General; if he decides the question himself, and decides that the caveat ought to obstruct the giving of the certificate, the applicant for the certificate may appeal to the Registrar General in manner provided by regulations: Schedule para 6(b). The caveat ceases to operate if it is withdrawn by the persons entering it or if it is decided by the registrar, the marriage officer or the Registrar General that it ought not to obstruct the giving of the certificate: Schedule para 6(c). As to the office of Registrar General for England and Wales see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605 et seq.

If a person enters a caveat on grounds which the registrar, the marriage officer or the Registrar General on appeal declares to be frivolous, that person is liable to pay as a debt to the applicant such sum as the registrar, the officer or the Registrar General considers to be proper compensation for the damage caused to the applicant by the entering of the caveat: s 1(3).

8 Marriage with Foreigners Act 1906 s 1(1) (as amended: see note 2).

9 Marriage with Foreigners Act 1906 s 2(1) (amended by the Marriage (Scotland) Act 1977 ss 28(1), 29(3), Sch 2). At the date at which this volume states the law, no Order in Council making such regulations had been made. If a person knowingly acts in contravention of, or fails to comply with, any such regulations, he is guilty of an offence and liable on conviction on indictment to a fine or imprisonment for up to one year: Marriage with Foreigners Act 1906 s 2(2) (amended by virtue of the Criminal Law Act 1977 s 32(1)); Courts Act 1971 s 1(2), (3).

Nothing in the Marriage with Foreigners Act 1906 s 2 relates to a marriage between two persons professing the Jewish religion solemnised according to Jewish usage in the presence of the secretary of a synagogue authorised by what is now the Marriage Act 1949 s 53(c) or the Marriages (Ireland) Act 1844 to register such a marriage, or a deputy appointed in writing under the hand of the secretary, and approved by the president for the time being of the London committee of deputies of the British Jews by writing under his hand: Marriage with Foreigners Act 1906 s 2(3).

10 Marriage with Foreigners Act 1906 s 3. At the date at which this volume states the law, no such Order in Council had been made.

UPDATE

128 Certificate of no impediment to marriage

NOTE 4--SI 2008/676 replaced: Consular Fees Order 2009, SI 2009/700.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/2. FORMS AND CEREMONIES/(5) NAVAL, MILITARY AND AIR FORCE MARRIAGES/129. Licensing of chapels for banns and marriages.

(5) NAVAL, MILITARY AND AIR FORCE MARRIAGES

129. Licensing of chapels for banns and marriages.

The use of any chapel which is certified by the Admiralty to be a naval chapel or a chapel which is certified by a Secretary of State to be a military or air force chapel for the publication therein of banns of any marriage between parties of whom one at least is a qualified person¹, and for the solemnisation therein, whether according to the rites of the Church of England² or otherwise, of such a marriage may be authorised in accordance with the relevant statutory provisions³. Any such chapel may be licensed for marriage according to the rites of the Church of England⁴.

With respect to marriages otherwise than according to the rites of the Church of England, the Registrar General⁵ must, on the application of the Admiralty, in the case of a naval chapel, or of the Secretary of State, in the case of any other chapel, register any such chapel for the solemnisation therein of marriages between parties of whom one at least is a qualified person; and, while any chapel is so registered:

- 126 (1) any such marriages which could lawfully be solemnised in a registered building⁶ situated in the same registration district⁷ as the chapel may be solemnised in the chapel⁸; and
- 127 (2) the provisions of the Marriage Act 1949 relating to marriages otherwise than according to the rites of the Church of England and to the registration of such marriages apply⁹ in relation to the chapel, and in relation to marriages solemnised or intended to be solemnised therein otherwise than according to those rites, as if the chapel were a registered building¹⁰.

The Registrar General must, on the application of the Admiralty or a Secretary of State, as the case may be, cancel the registration of any chapel so registered by him¹¹.

Immediately after so registering, or so cancelling the registration of, any chapel, the Registrar General must cause notice of that fact to be published in the London Gazette and in some other newspaper circulating in the registration district in which the chapel is situated and to be given to the superintendent registrar¹² of that district, who must record the registration or cancellation in such manner as may be prescribed by the Registrar General¹³.

Whilst any such licence in respect of the chapel is in force, any such banns or marriages which could lawfully be published¹⁴ or solemnised¹⁵ in the parish church of the parish¹⁶ in which the chapel is situated may be published or solemnised in the chapel¹⁷; and the statutory provisions¹⁸ relating to marriages according to the rites of the Church of England apply, with certain exceptions¹⁹ and subject to certain modifications²⁰, in relation to the chapel and the publication of banns there and marriages solemnised or intended to be solemnised there according to those rites, as if the chapel were a parish church²¹.

Where a licence has been issued in respect of a chapel the diocesan bishop may at any time revoke the licence, and must do so if the Admiralty or, as the case may be, a Secretary of State applies for its revocation²².

1 For these purposes, 'qualified person' means a person who, at the relevant date: (1) is serving in any of the regular armed forces of the Crown; (2) has served in any force included in head (1) otherwise than with a commission granted or under an engagement entered into only for the purpose of a war or other national emergency; (3) is, as a member of a reserve of officers, a reserve force, the Territorial Army or the Auxiliary Air Force, called out on actual or permanent service or embodied; or (4) is a daughter, son, step-daughter or step-son of a person qualified under any of heads (1)-(3): Marriage Act 1949 s 68(2)(a)-(c), (e) (amended by the Armed Forces Act 1981 ss 20(1), 28(2), Sch 3 para 8, Sch 5 Pt I; and the Armed Forces Act 2001 Sch 6, Pt 6 para 31(a)). The reference to 'a person serving in any of the regular armed forces of the Crown' includes a reference to a member of a visiting force or a military member of a headquarters: Visiting Forces and International Headquarters (Application of Law) Order 1999, SI 1999/1736, art 12(2), Sch 6.

'Relevant date' means: (a) in a case where notice is given under the Marriage Act 1949 s 8 (see PARA 68) before the publication of banns, the date of the notice; (b) in a case where banns are published without such notice, the date of the first publication of banns; (c) in a case where an oath is taken under s 16 (see PARA 77) for the purpose of obtaining a common licence, the date of taking the oath; and (d) in any other case, the date when notice of marriage is given to the superintendent registrar under s 27 (see PARA 87); and the expression 'daughter' does not include a stepdaughter: s 68(3) (amended by the Children Act 1975 s 108(1)(b), Sch 4 Pt I). As to banns see PARAS 58, 68; and as to common licences see PARAS 58, 76 et seq. The Marriage Act 1949 s 68(3) is further amended from such day as the Secretary of State may by order appoint by the deletion of the words 'and the expression "daughter" does not include a stepdaughter': see the Armed Forces Act 2001 ss 35(1), 38, 39(2), (4)-(6), Sch 7. At the date at which this volume states the law no such order had been made.

By virtue of the Civil Partnership Act 2004 s 246(1):

- 8 a person's stepchild includes the child of that person's civil partner;
- 9 a person's step-parent includes the civil partner of that person's parent;
- 10 a person's stepdaughter includes the daughter of that person's civil partner;
- 11 a person's stepson includes the son of that person's civil partner;
- 12 a person's stepfather includes the civil partner of that person's father;
- 13 a person's stepmother includes the civil partner of that person's mother;
- 14 a person's stepbrother includes the son of the civil partner of that person's parent; and
- 15 a person's stepsister includes a person who is the daughter of the civil partner of A's parent.

By virtue of s 246(2):

- 16 'brother-in-law' includes civil partner's brother;
- 17 'daughter-in-law' includes daughter's civil partner;
- 18 'father-in-law' includes father's civil partner;
- 19 'mother-in-law' includes mother's civil partner;
- 20 'parent-in-law' includes civil partner's parent;
- 21 'sister-in-law' includes civil partner's sister; and
- 22 'son-in-law' includes son's civil partner.

Such references apply in relation to (i) the Workmen's Compensation Act 1925 s 4(3) (member of a family); (ii) the Marriage Act 1949 s 68(2)(e) (solemnisation of marriages of stepchildren of servicemen in naval, military and air force chapels etc); (iii) the Leasehold Reform Act 1967 s 7(7) (rights of members of family succeeding to tenancy on death: member of another's family) (see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1441), s 18(3) (residential rights and exclusion of enfranchisement or extension: adult member of another's family) (see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1488); (iv) the Employers' Liability (Compulsory Insurance) Act 1969 s 2(2) (employees to be covered) (see **EMPLOYMENT** vol 39 (2009) PARA 42); (v) the Parliamentary and other Pensions Act 1972 s 27(5) (pensions for dependants of Prime Minister or Speaker) (see **PARLIAMENT** vol 34 (Reissue) PARA 927); (vi) the Consumer Credit Act 1974 s 184(5) (associates) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 92); (vii) the Fatal Accidents Act 1976 s 1(5) (right of action for wrongful act causing death) (see **DAMAGES** vol 12(1) (Reissue) PARA 932); (viii) the Credit Unions Act 1979 s 31(1) (interpretation, etc); (ix) the Estate Agents Act 1979 s 32(3) ('associate': meaning of relative) (see **AGENCY** vol 1 (2008) PARA 242); (x) the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 3(4) ('child' and 'relative':

establishment of relationship) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 169); (xi) the Administration of Justice Act 1982 s 13(1) (deduction of relationships); (xii) the Mental Health Act 1983 s 12(5) (general provisions as to medical recommendations: persons who may not give recommendations) (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 483), s 25C(10) (supervision applications: meaning of 'close relative') (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 529); (xiii) the Mobile Homes Act 1983 s 5(3) (interpretation: member of another's family) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1273); (xiv) the Inheritance Tax Act 1984 s 11(6) (dispositions for maintenance of family) (see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 425), s 22(2) (gifts in consideration of marriage) (see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 519), s 71(8) (accumulation and maintenance trusts) (see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 608); (xv) the Companies Act 1985 s 153(4) (transactions not prohibited by s 151) (see **COMPANIES** vol 15 (2009) PARA 1228), s 203(1) (notification of family and corporate interests: person interested in shares) (see **COMPANIES** vol 14 (2009) PARA 439), s 327(2) (extension of s 323 to spouses and children), s 328(8) (extension of s 324 to spouses and children), s 346(2) ('connected persons') (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2433), s 430E(8) (associates) (see **COMPANIES** vol 15 (2009) PARA 1512), s 742A(6) (meaning of 'offer to the public') (see **COMPANIES** vol 15 (2009) PARA 1066), s 743(b) ('employees' share scheme') (see **COMPANIES** vol 14 (2009) PARA 169); (xvi) the Housing Act 1985 s 113(2) (members of a person's family) (**LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1319), s 186(2) (members of a person's family) (see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1827); (xvii) the Airports Act 1986 s 20(6) (powers of investment and disposal in relation to public airport companies) (see **AIR LAW** vol 2 (2008) PARA 185); (xviii) the Insolvency Act 1986 s 435(8) (meaning of 'associate') (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 5); (xix) the Building Societies Act 1986 s 70(2)(a), (c), (3)(a), (4) (interpretation) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1961); (xx) the Landlord and Tenant Act 1987 s 4(6) (relevant disposals) (see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1750); (xxi) the Income and Corporation Taxes Act 1988 Sch 14 para 2(5) (life assurance premiums payable to friendly societies and industrial assurance companies) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1021); (xxii) the Companies Act 1989 s 52(2)(a) (meaning of 'associate') (see **COMPANIES** vol 15 (2009) PARA 971); (xxiii) the Children Act 1989 s 105(1) (interpretation) (see **CHILDREN** vol 5(3) (2008 Reissue) PARA 3); (xxiv) the Broadcasting Act 1990 Sch 2 para 1(2) (restrictions on the holding of licences) (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) PARA 345); (xxv) the Taxation of Chargeable Gains Act 1992 Sch 5 paras 2(7), 2A(10), 9(11) (attribution of gains to settlors with interest in non-resident or dual resident settlement) (see **CAPITAL GAINS TAXATION** vol 5(1) (2004 reissue) PARAS 143, 145); (xxvi) the Friendly Societies Act 1992 s 77(3)(c) (information on appointed actuary to be annexed to balance sheet) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2347), s 119A(2) (meaning of 'associate'); (xxvii) the Charities Act 1993 Sch 5 para 2(1) (meaning of 'connected person' for purposes of s 36(2)) (see **CHARITIES** vol 8 (2010) PARA 395); (xxviii) the Leasehold Reform, Housing and Urban Development Act 1993 s 10(5) (premises with a resident landlord: adult member of another's family) (see **LANDLORD AND TENANT** vol 27(3) PARA 1454); (xxix) the Employment Rights Act 1996 s 16(1) (domestic servants) (see **EMPLOYMENT** vol 39 (2009) PARA 232); (xxx) the Family Law Act 1996 s 63(1) (interpretation of Pt 4); (xxxi) the Housing Act 1996 s 62(2) (members of a person's family: Pt 1) (see **HOUSING** vol 22 (2006 Reissue) PARA 113), s 140(2) (members of a person's family: Chapter 1) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1290), s 143P(3) (members of a person's family: Chapter 1A) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1378), s 178(3) (meaning of 'associated person') (see **HOUSING** vol 22 (2006 Reissue) PARA 278); (xxxii) the Financial Services and Markets Act 2000 s 422(4)(b) (controller) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 591), Sch 11 (offers of securities) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 694); (xxxiii) the Care Standards Act 2000 s 80(4A) (basic definitions); (xxxiv) the Commonhold and Leasehold Reform Act 2002 Sch 6 para 3(8) (premises excluded from right to manage) (see **LANDLORD AND TENANT** vol 27(1) PARA 369); (xxxv) the Enterprise Act 2002 s 127(6) (associated persons) (see **COMPETITION** vol 18 (2009) PARA 176); (xxxvi) the Income Tax (Earnings and Pensions) Act 2003 s 242(2) (works transport services) (see **INCOME TAXATION**), s 270A(3)(a) (limited exemption for qualifying childcare vouchers) (see **INCOME TAXATION**), s 318(3) (childcare: exemption for employer-provided care) (see **INCOME TAXATION**), s 318A(3) (childcare: limited exemption for other care) (see **INCOME TAXATION**), s 318C(8) (childcare: meaning of 'qualifying child care') (see **INCOME TAXATION**), s 371(7) (travel costs and expenses where duties performed abroad: visiting spouse's or child's travel) (see **INCOME TAXATION**), s 374(9) (non-domiciled employee's spouse's or child's travel costs and expenses where duties performed in United Kingdom) (see **INCOME TAXATION**); and (xxxvii) the Sexual Offences Act 2003 s 27(3)(a)-(c) (family relationships) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 192), s 54(9) (general interpretation) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 217); Civil Partnership Act 2004 Sch 21.

For the purposes of any such provisions: (A) 'brother' includes civil partner's brother; (B) 'daughter-in-law' includes daughter's civil partner; (C) 'father-in-law' includes civil partner's father; (D) 'mother-in-law' includes civil partner's mother; (E) 'parent-in-law' includes civil partner's parent; (F) 'sister-in-law' includes civil partner's sister; and (G) 'son-in-law' includes son's civil partner: Civil Partnership Act 2004 s 246(2).

2 As to the meaning of references to the Church of England see PARA 53 note 6.

3 Marriage Act 1949 s 68(1), (2). The relevant statutory provisions are those contained in Pt V (ss 68-71: see PARA 23): s 68(1). Nothing in Pt V is to be taken to confer on any person a right to be married in a chapel to which Pt V applies: s 68(6). As to proof of marriages in naval, military and air force chapels see PARA 23.

- 4 See the Marriage Act 1949 s 69; and PARA 130. As to the provisions of the Marriage Act 1949 which are excluded or modified in relation to marriages in naval, military and air force chapels according to the rites of the Church of England see s 69(1), Sch 4 Pts I, II. On the issue or revocation of such a licence the register of the diocese must register that fact and give notice thereof in writing to the Admiralty or a Secretary of State, as the case may be, who will cause a copy of the notice to be published in the London Gazette and in some newspaper circulating in the diocese and to be sent to the Registrar General: s 69(3).
- 5 As to the meaning of 'Registrar General' see PARA 46 note 5.
- 6 As to the meaning of 'registered building' see PARA 54 note 3.
- 7 As to the meaning of 'registration district' see PARA 87 note 4.
- 8 Marriage Act 1949 s 70(1)(a).
- 9 Ie excluding the provisions specified in the Marriage Act 1949 s 70(1)(b), Sch 4 Pt III. The provisions so excluded are s 17 proviso (see PARA 54), s 41 (see PARA 187), s 42 (see PARA 188), s 43(1) proviso (see PARA 107), s 44(1) proviso (see PARA 104); Sch 4 Pt III (amended by the Marriage Acts Amendment Act 1958 s 1(2); the Immigration and Asylum Act 1949 Sch 14 paras 3, 32, Sch 16).
- 10 Marriage Act 1949 s 70(1)(b). The provisions of the Marriage Act 1949 specified in Sch 4 Pt IV, ie s 27(3) (see PARA 87 note 9) and ss 43, 44, 54 (see PARAS 107-108) apply subject to the modifications therein specified: s 70(1) proviso.
- 11 Marriage Act 1949 s 70(2).
- 12 As to the meaning of 'superintendent registrar' see PARA 22 note 1.
- 13 Marriage Act 1949 s 70(3). At the date at which this volume states the law no such manner had been prescribed.
- 14 As to the place of publication of banns see Marriage Act 1949 s 6; and PARA 59 et seq. For the exclusion or modification of certain provisions of s 6 in relation to naval, military and air force chapels, see notes 9, 10; PARA 65 note 3; and PARA 66 note 4.
- 15 For the places in which marriages can be solemnised, see Marriage Act 1949 s 12 (after publication of banns), s 15 (by common licence), and s 17 (under superintendent registrar's certificate); and see PARAS 59, 76, 80.
- 16 As to the meanings of 'parish church' and 'parish' see PARA 59 note 8.
- 17 Marriage Act 1949 s 69(1)(a).
- 18 See PARA 59 et seq.
- 19 The provisions excluded are set out in the Marriage Act 1949 Sch 4 Pt I. They are s 6(4) (see PARA 66), s 15(1)(b) (see PARA 59), s 17 proviso (see PARA 54), s 18 (see PARA 61), s 20 (see PARA 62), s 35(3) (see PARA 80), s 44(1) proviso (see PARA 104), and ss 53-57, 59, 60, so far as they relate to the registration of marriages by clergymen and to the duties of incumbents in relation to marriage register books (see PARAS 84-86).
- 20 The provisions modified are set out in Marriage Act 1949 Sch 4 Pt II. They are s 6(1) (see PARA 65), s 7(3) (see PARA 75), s 8 (see PARA 68), s 15(1)(a) (see PARA 59), s 16(1) (see PARA 77), s 27(3), which relates to notices of marriage to the superintendent registrar, and s 50 (see PARA 98).
- 21 Marriage Act 1949 s 69(1)(b).
- 22 Marriage Act 1949 s 69(2). See also note 3.

UPDATE

129 Licensing of chapels for banns and marriages

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement

and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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130. Marriages in chapels.

The Admiralty or any person authorised by it, in the case of a naval chapel, and the Secretary of State or any person authorised by him, in the case of any other licensed chapel¹, must appoint one or more clergymen for the purpose of registering marriages solemnised in the chapel according to the rites of the Church of England². No marriage may be solemnised in the chapel according to those rites except in the presence of a clergyman so appointed³.

The provisions of the Marriage Act 1949 and of any regulations made under it⁴ relating to the registration of marriages by authorised persons apply in relation to marriages solemnised according to the rites of the Church of England in such a chapel as they apply in relation to marriages solemnised in a registered building without the presence of a registrar⁵.

1 As to the licensing of chapels see PARA 129.

2 Marriage Act 1949 s 69(4).

3 Marriage Act 1949 s 69(4). It is not necessary in support of such a marriage to prove that it was solemnised in the presence of a clergyman duly appointed under s 69(4), and no evidence may be given to prove the contrary in any proceedings touching the validity of any such marriage: s 71 (see PARA 23).

4 The regulations made under Marriage Act 1949 s 74: see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 8(3) (Reissue) PARA 606.

5 Marriage Act 1949 s 69(5). However, for any reference in those provisions to an authorised person there must be substituted a reference to a clergyman appointed under s 69(4), and for any reference in them to the trustees or governing body of a registered building there must be substituted a reference to the Admiralty or any person authorised by it in the case of a naval chapel or a Secretary of State or any person authorised by him in the case of any other chapel: s 69(5).

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131. Issue of certificates on board Her Majesty's ships.

Where a marriage is intended to be solemnised in England on the authority of certificates of a superintendent registrar¹ between parties of whom one is residing in England and the other is an officer, seaman or marine borne on the books of one of Her Majesty's ships at sea, the officer, seaman or marine may give notice of his intention to the captain or other officer commanding the ship, together with the name and address of the other party to the marriage and such other information as may be necessary to enable the officer commanding to fill up a certificate². At the time of giving the notice, the officer, seaman or marine must make and sign such a declaration as is required to accompany notice of marriage given to a superintendent registrar³, and the captain or other officer may attest the declaration and thereupon issue a certificate⁴.

The certificate must be in such form as may be prescribed by the Admiralty, and has the like force and effect as a superintendent registrar's certificate⁵. All provisions of the Marriage Act 1949⁶, including penal provisions, relating to notices and declarations for obtaining certificates from superintendent registrars, and to such certificates, apply in the case of certificates issued on board Her Majesty's ships, subject to such adaptations as may be made by Her Majesty by Order in Council⁷. Where a naval officer's certificate has been issued, the superintendent registrar of the district in England in which the other party resides may accept notice of marriage given by that party as if both parties were residing in different registration districts⁸ in England⁹.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Marriage Act 1949 s 39(1) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 21).

3 As to declarations to accompany notice of marriage see PARA 90.

4 Marriage Act 1949 s 39(1).

5 Marriage Act 1949 s 39(2) (amended by the Marriage Act 1983 Sch 1 paras 1, 10(a); the Marriage (Prohibited Degrees of Relationship) Act 1986 s 1(4), Sch 1 para 6(a)).

6 Ie other than the Marriage Act 1949 s 27A (see PARA 172) and s 27B (see PARA 93).

7 Marriage Act 1949 s 39(2). At the date at which this volume states the law no Orders in Council had been so made but, by virtue of the Marriage Act 1949 s 79(2), the Order in Council dated 21 December 1908, SR & O 1908/1316, has effect as if so made.

8 As to the meaning of 'registration district' see PARA 87 note 4.

9 Marriage Act 1949 s 39(3) (amended by the Marriage Act 1983 Sch 1 paras 1, 10(b); the Marriage (Prohibited Degrees of Relationship) Act 1986 Sch 1 para 6(b)). The statutory provisions relating to notices of marriage and the issue of certificates (see PARA 87 et seq) apply: Marriage Act 1949 s 39(3).

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(6) CIVIL PARTNERSHIPS

(i) In general

132. The standard and special procedure.

Provision is made for two types of civil partnership¹ registration: the standard procedure² and the special procedure³, which provides for a civil partnership registration to take place quickly and applies where one of the proposed civil partners is seriously ill and not expected to recover.

1 As to the meaning of 'civil partnership' see PARA 2 note 1.

2 As to the standard procedure see PARA 133 et seq.

3 As to the special procedure see PARA 140 et seq.

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(ii) The Standard Procedure

133. Notice of proposed civil partnership and declaration.

For two people to register as civil partners¹ of each other under the standard procedure, a notice of proposed civil partnership must be given:

- 128 (1) where the proposed civil partners have resided in the area of the same registration authority² for the period of seven days immediately before the giving of the notice, by each of them to that registration authority³; or
- 129 (2) where the proposed civil partners have not resided in the area of the same registration authority for that period, by each of them to the registration authority in whose area he or she has resided for that period⁴.

The notice must include the necessary declaration⁵, made and signed by the person giving the notice at the time when the notice is given and in the presence of an authorised person⁶, and the authorised person must attest the declaration by adding his name, description and place of residence⁷.

The registration authority must ensure that the fact that the notice has been given, the information in it, and the fact that the authorised person has attested the declaration are recorded in the register⁸ as soon as possible⁹. A notice of proposed civil partnership is recorded once this has been done¹⁰.

Special provision is made in connection with civil partnerships involving persons subject to immigration control¹¹.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 'Registration authority' means a county council, the council of any district comprised in an area for which there is no county council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly: Civil Partnership Act 2004 s 28(a). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 30, 35-39, 59 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

3 Civil Partnership Act 2004 s 8(1)(a) (s 8(1) substituted by SI 2005/2000). A notice of proposed civil partnership must contain such information as may be prescribed by regulations: s 8(3) (see the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176). As to the information to be contained in, and the forms of, notice of proposed civil partnerships see the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, reg 3, Forms 1, 1(w), 2, 2(w), 3, 3(w), 4, 4(w), 5, 5(w).

4 Civil Partnership Act 2004 s 8(1)(b) (as substituted: see note 3).

5 'Necessary declaration' means a solemn declaration in writing:

23 (1) that the proposed civil partner believes that there is no impediment of kindred or affinity or other lawful hindrance to the formation of the civil partnership (Civil Partnership Act 2004 s 8(4)(a)); and

- 24 (2) that the proposed civil partners have for the period of seven days immediately before the giving of the notice had their usual places of residence in the area of the registration authority, or in the areas of the registration authorities, to which notice is given or, in relation to proposed civil partnerships involving a person who is subject to immigration control, that the notice of proposed civil partnership is given in compliance with the Civil Partnership Act 2004 Sch 23 para 4(1) (see PARA 179); Civil Partnership Act 2004 s 8(4)(b), Sch 23 para 7(2)(a) (amended by SI 2005/2000).

If one of the proposed civil partners is a child and is not a surviving civil partner, the necessary declaration must also:

- 25 (a) state in relation to each appropriate person that that person's consent has been obtained, that the need to obtain that person's consent has been dispensed with (see PARAS 46, 47), or that the court has given consent (see PARA 47) (Civil Partnership Act 2004 Sch 2 para 5); or
- 26 (b) state that no person exists whose consent is required to a civil partnership between the child and another person (Sch 2 para 5).

The fee for the attestation by an authorised person of the necessary declaration is £30 to be paid to the registration authority to which the notice is given: Registration of Civil Partnerships (Fees) Order 2005, SI 2005/1996, Schedule.

6 'Authorised person' means an employee or officer or other person provided by a registration authority who is authorised by that authority to attest notices of proposed civil partnership: Civil Partnership Act 2004 s 8(6).

7 Civil Partnership Act 2004 s 8(3).

8 'Register' means the system the Registrar General must provide for keeping any records that relate to civil partnerships and are required by the Civil Partnership Act 2004 Chapter 1 (ss 1-36) to be made: see s 30(2), (4). The system may, in particular, enable those records to be kept together with other records kept by the Registrar General: s 30(3).

9 Civil Partnership Act 2004 s 8(5).

10 Civil Partnership Act 2004 s 8(7).

11 See the Civil Partnership Act 2004 Sch 23 para 7(1); and PARAS 178, 179.

UPDATE

133 Notice of proposed civil partnership and declaration

NOTE 5--SI 2005/1996 amended: SI 2010/440.

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134. Registration authority's power to require evidence.

A registration authority¹ to which a notice of proposed civil partnership is given² may require the person giving the notice to provide it with specified evidence³:

- 130 (1) relating to that person⁴; or
- 131 (2) if the registration authority considers that the circumstances are exceptional, relating not only to that person but also to that person's proposed civil partner⁵.

Such a requirement may be imposed at any time before the registration authority issues the civil partnership schedule⁶.

1 As to the meaning of 'registration authority' see PARA 133 note 2.

2 See under the Civil Partnership Act 2004 s 8(1): see PARA 133.

3 'Specified evidence' means, in relation to a person, such evidence as may be specified in guidance issued by the Registrar General:

27 (1) of the person's name and surname (Civil Partnership Act 2004 s 9(3)(a));

28 (2) of the person's age (s 9(3)(b));

29 (3) as to whether the person has previously formed a civil partnership or a marriage and, if so, as to the ending of the civil partnership or marriage (s 9(3)(c) (amended by SI 2005/2000)); and

30 (4) of the person's nationality (s 9(3)(d)).

4 Civil Partnership Act 2004 s 9(1)(a).

5 Civil Partnership Act 2004 s 9(1)(b).

6 Civil Partnership Act 2004 s 9(2). The text refers to the issue of a civil partnership schedule under s 14: see PARA 138.

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135. Civil partnership within the qualified prohibition.

Where two people in certain circumstances are prohibited from entering into a civil partnership¹ but intend to register as civil partners² of each other by signing a civil partnership schedule³ the fact that a notice of proposed civil partnership⁴ has been given must not be recorded in the register⁵ unless the registration authority⁶:

- 132 (1) is satisfied by the production of evidence that both the proposed civil partners have reached 21⁷; and
- 133 (2) has received a declaration made by each of the proposed civil partners specifying their affinal relationship, and declaring that the younger of them has not at any time before reaching 18 been a child of the family in relation to the other⁸.

Either of the proposed civil partners may apply to the High Court for a declaration that, given that both of them have reached 21, and the younger of those persons has not at any time before reaching 18 been a child of the family⁹ in relation to the other, there is no impediment of affinity to the formation of the civil partnership¹⁰.

If a registration authority receives from a person who is not one of the proposed civil partners a written statement signed by that person which alleges that a declaration¹¹ is false in a material particular, and the register shows that such a statement has been received¹², the registration authority in whose area it is proposed that the registration take place must not issue a civil partnership schedule unless a High Court declaration is obtained¹³.

1 As to conditionally prohibited civil partnerships see PARA 39.

2 As to the meaning of 'civil partners' see PARA 2 note 1.

3 As to the meaning of 'civil partnership schedule' see PARA 138.

4 As to notices of proposed civil partnership see PARA 133.

5 As to the meaning of 'register' see PARA 133 note 7.

6 As to the meaning of 'registration authority' see PARA 133 note 2.

7 Civil Partnership Act 2004 Sch 1 para 5(1)(a). This does not apply if a declaration is obtained under Sch 1 para 7 (see the text and note 10): Sch 1 para 5(2).

8 Civil Partnership Act 2004 Sch 1 para 5(1)(b). This does not apply if a declaration is obtained under Sch 1 para 7 (see the text and note 10): Sch 1 para 5(2). A declaration under Sch 1 para 5(1)(b) must contain such information and must be signed and attested in such manner as prescribed under the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176: see the Civil Partnership Act 2004 Sch 1 para 5(3). The fact that a declaration has been received must be recorded in the register: Sch 1 para 5(4). A declaration must be filed and kept by the registration authority: Sch 1 para 5(5).

9 As to the meaning of 'child of the family' see PARA 39 note 2.

10 Civil Partnership Act 2004 Sch 1 para 7(1). Such an application may be made whether or not any statement has been received by the registration authority under Sch 1 para 6 (see the text and notes 12-13): Sch 1 para 7(2).

- 11 le a declaration under the Civil Partnership Act 2004 Sch 1 para 5 (see the text and note 8).
- 12 Civil Partnership Act 2004 Sch 1 para 6(1).
- 13 Civil Partnership Act 2004 Sch 1 para 6(2). The text refers to obtaining a declaration under Sch 1 para 7 (see the text and note 10).

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136. Publication of notice.

Where a notice of proposed civil partnership¹ has been given to a registration authority², it must keep the relevant information³ on public display during the waiting period⁴. All information that a registration authority is required for the time being to keep on public display must be kept on display by it at one register office provided for a district within its area⁵.

For these purposes, 'waiting period', in relation to a notice of proposed civil partnership, means the period beginning the day after the notice is recorded and ending at the end of the period of 15 days beginning with that day⁶.

If, on an application being made to the Registrar General⁷, he is satisfied that there are compelling reasons for shortening the period of 15 days because of the exceptional circumstances of the case, he may shorten it to such period as he considers appropriate⁸. The applicant must complete the prescribed form⁹ and pass it to the registration authority in whose area notice of proposed civil partnership has been given¹⁰. The registration authority must immediately forward the completed application and the prescribed fee¹¹ to the Registrar General¹². If the Registrar General requires further information, he may request that the registration authority obtain the information required from the applicant and forward it to the Registrar General, or request the information from the applicant directly¹³. After the Registrar General has considered the application he must as soon as practicable notify the applicant and the registration authority which forwarded the completed application form of his decision¹⁴.

1 As to notices of proposed civil partnership see PARA 133.

2 As to the meaning of 'registration authority' see PARA 133 note 2.

3 'Relevant information' means:

31 (1) the name of the person giving the notice (Civil Partnership Act 2004 s 10(2)(a));

32 (2) the name of that person's proposed civil partner (s 10(2)(b)); and

33 (3) such other information included in the notice of proposed civil partnership as may be prescribed (s 10(2)(c) (amended by SI 2005/2000)). At the date at which this volume states the law no regulations prescribing any such information had been made.

4 Civil Partnership Act 2004 s 10(1) (amended by SI 2005/2000).

5 Civil Partnership Act 2004 s 10(3) (added by SI 2005/2000).

6 Civil Partnership Act 2004 s 11.

7 As to the Registrar General see PARA 46 note 5.

8 Civil Partnership Act 2004 s 12(1). Regulations may make provision with respect to the making, and granting, of applications under s 12(1), and may provide for: (1) the power conferred to be exercised by a registration authority on behalf of the Registrar General in such classes of case as are prescribed by the regulations; and (2) the making of an appeal to the Registrar General against a decision taken by a registration authority in accordance with such regulations: s 12(2), (3). A registration authority may shorten the waiting period on behalf of the Registrar General if there has been an unavoidable delay in recording the notice of proposed civil partnership in accordance with s 8(5) (see PARA 133) and, in consequence of that delay, the proposed civil partners will be unable to form a civil partnership on the date which had been agreed with the authorised person when the notice of proposed civil partnership was attested: Civil Partnership (Registration

Provisions) Regulations 2005, SI 2005/3176, reg 8. As to the meaning of 'authorised person' see PARA 133 note 6.

9 As to the prescribed forms see the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, reg 7(2).

10 Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, reg 7(1), (3).

11 The prescribed fee is £28: Registration of Civil Partnerships (Fees) Order 2005, SI 2005/1996, reg 2, Schedule.

12 Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, reg 7(1), (4).

13 Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, reg 7(1), (5).

14 Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, reg 7(1), (6).

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137. Forbidding the issue of a civil partnership schedule.

Where it has been recorded in the register¹ that a notice of proposed civil partnership² between a child³ and another person has been given, any person whose consent is required to a child and another person registering as civil partners⁴ of each other⁵ may forbid the issue of a civil partnership schedule⁶ by giving any registration authority⁷ written notice that he forbids it⁸. On receiving the notice, the registration authority must as soon as is practicable record in the register the fact that the issue of a civil partnership schedule has been forbidden⁹. If the issue of a civil partnership schedule has been forbidden under these provisions, the notice of proposed civil partnership and all proceedings on it are void¹⁰. However this is not the case where the court has given its consent¹¹ to the civil partnership¹².

1 As to the meaning of 'register' see PARA 133 note 7.

2 As to notices of proposed civil partnership see PARA 133.

3 As to the meaning of 'child' see PARA 38 note 1.

4 As to the meaning of 'civil partner' see PARA 2 note 1.

5 As to such consent see PARA 46.

6 As to civil partnership schedules see PARA 138.

7 As to the meaning of 'registration authority' see PARA 133 note 2.

8 Civil Partnership Act 2004 Sch 2 para 6(1), (2). Such a notice must specify:

34 (1) the name of the person giving it (Sch 2 para 6(3)(a));

35 (2) his place of residence (Sch 2 para 6(3)(b)); and

36 (3) the capacity, in relation to either of the proposed civil partners, in which he forbids the issue of the civil partnership schedule (Sch 2 para 6(3)(c)).

9 Civil Partnership Act 2004 Sch 2 para 6(4).

10 Civil Partnership Act 2004 Sch 2 para 6(5).

11 Ie by virtue of the Civil Partnership Act 2004 Sch 2 para 3 (see PARA 47).

12 Civil Partnership Act 2004 Sch 2 para 6(6).

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138. Issue of a civil partnership schedule.

As soon as the waiting period¹ in relation to each notice of proposed civil partnership² has expired, the registration authority³ in whose area it is proposed that the registration take place is under a duty, at the request of one or both of the proposed civil partners, to issue a document to be known as a 'civil partnership schedule'⁴, unless the registration authority is not satisfied that there is no lawful impediment to the formation of the civil partnership⁵.

Any person may object to the issue of a civil partnership schedule by giving any registration authority notice of his objection⁶. If such an objection is given:

- 134 (1) the registration authority must ensure that the fact that it has been given and the information in it are recorded in the register⁷ as soon as possible⁸; and
- 135 (2) no civil partnership schedule is to be issued until either the relevant registration authority⁹ has investigated the objection and is satisfied that the objection ought not to obstruct the issue of the civil partnership schedule or the objection has been withdrawn by the person who made it¹⁰.

If the registration authority refuses to issue a civil partnership schedule because an objection to its issue has been made or the registration authority is not satisfied that there is no lawful impediment to the formation of the civil partnership, either of the proposed civil partners may appeal to the Registrar General¹¹ who must either confirm the refusal or direct that a civil partnership schedule be issued¹². If the Registrar General declares that the grounds on which the objection is made are frivolous and ought not to obstruct the issue of the civil partnership schedule¹³, the person who made the objection is liable for the costs of the proceedings before the Registrar General and damages recoverable by the proposed civil partner to whom the objection relates¹⁴. This also applies if the registration authority refuses to issue a civil partnership schedule as a result of a representation made to it, and, on an appeal against the refusal, the Registrar General declares that the representation is frivolous and ought not to obstruct the issue of the civil partnership schedule¹⁵.

1 As to the waiting period see PARA 136.

2 As to notices of proposed civil partnership see PARA 133.

3 As to the meaning of 'registration authority' see PARA 133 note 2.

4 Civil Partnership Act 2004 s 14(1). As to the information contained in such a schedule see the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, Forms 9, 9(w).

5 Civil Partnership Act 2004 s 14(3). The duty does not apply if the issue of a civil partnership schedule has been forbidden under Sch 2 para 6 (see PARA 137): Sch 2 para 8. If a proposed civil partnership is between a child and another person, the civil partnership schedule must contain a statement that the issue of the civil partnership schedule has not been forbidden under Sch 2 para 6 (see PARA 137): Sch 2 para 9. If, for the purpose of obtaining a civil partnership schedule, a person declares that the consent of any person or persons whose consent is required under s 4 (see PARA 47) has been given, the registration authority may refuse to issue the civil partnership schedule unless satisfied by the production of written evidence that the consent of that person or those persons has in fact been given: Sch 2 para 7.

6 Civil Partnership Act 2004 s 13(1). Such a notice of objection must:

37 (1) state the objector's place of residence and the ground of objection (s 13(2)(a)); and

38 (2) be signed by or on behalf of the objector (s 13(2)(b)).

Section 13 does not apply in relation to a civil partnership where two people are conditionally prohibited from entering into a civil partnership, except so far as an objection to the issue of a civil partnership schedule is made on a ground other than the affinity between the proposed civil partners: Sch 1 para 8.

7 As to the meaning of 'register' see PARA 133 note 7.

8 Civil Partnership Act 2004 s 13(3).

9 For these purposes 'relevant registration authority' means the authority which first records that a notice of proposed civil partnership has been given by one of the proposed civil partners: Civil Partnership Act 2004 s 14(5).

10 Civil Partnership Act 2004 s 14(4).

11 Civil Partnership Act 2004 s 15(1). As to the meaning of 'Registrar General' see PARA 46 note 5.

12 Civil Partnership Act 2004 s 15(2).

13 See the Civil Partnership Act 2004 s 16(1); and PARA 138.

14 See the Civil Partnership Act 2004 s 16(3); and PARA 138. For the purpose of enabling any person to recover any such costs and damages, a copy of a declaration of the Registrar General purporting to be sealed with the seal of the General Register Office is evidence that the Registrar General has made the declaration: s 16(4).

15 See the Civil Partnership Act 2004 s 16(2); and PARA 138.

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139. Time for civil partnership registration.

The proposed civil partners may not register as civil partners¹ of each other on the production of the civil partnership schedule² until the waiting period³ in relation to each notice of proposed civil partnership⁴ has expired⁵. They may then register as civil partners by signing the civil partnership schedule on any day in the applicable period⁶ between 8 am and 6 pm⁷. If they do not register as civil partners by signing the civil partnership schedule before the end of the applicable period the notices of proposed civil partnership and the civil partnership schedule are void, and no civil partnership registrar⁸ may officiate at the signing of the civil partnership schedule by them⁹.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 As to civil partnership schedules see PARA 138.

3 As to the waiting period see PARA 136.

4 As to notices of proposed civil partnership see PARA 133.

5 Civil Partnership Act 2004 s 17(1).

6 'Applicable period' means, in relation to two people registering as civil partners of each other, the period of 12 months beginning with:

39 (1) the day on which the notices of proposed civil partnership are recorded (Civil Partnership Act 2004 s 17(4)(a)); or

40 (2) if the notices are not recorded on the same day, the earlier of those days (s 17(4)(b)).

7 Civil Partnership Act 2004 s 17(2).

8 'Civil partnership registrar' means an individual who is designated by a registration authority as a civil partnership registrar for its area: Civil Partnership Act 2004 s 29(1). As to the meaning of 'registration authority' see PARA 133 note 2. It is the duty of each registration authority to ensure that there is a sufficient number of civil partnership registrars for its area to carry out in that area the functions of civil partnership registrars: s 29(2). Each registration authority must inform the Registrar General as soon as is practicable of any designation it has made of a person as a civil partnership registrar, and of the ending of any such designation: s 29(3). As to the meaning of 'Registrar General' see PARA 46 note 5.

9 Civil Partnership Act 2004 s 17(3).

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(iii) Special Procedure for Civil Partnerships of Seriously Ill Persons

140. Notice of proposed civil partnership and declaration.

For two people to register as civil partners¹ of each other under the special procedure, one of them must give a notice of proposed civil partnership to the registration authority² for the area in which it is proposed that the registration take place and comply with any requirements made to produce evidence³.

The notice must include the necessary declaration⁴, made and signed by the person giving the notice at the time when the notice is given and in the presence of an authorised person⁵, and the authorised person must attest the declaration by adding his name, description and place of residence⁶.

The registration authority must ensure that the fact that the notice has been given, the information in it, and the fact that the authorised person has attested the declaration are recorded in the register⁷ as soon as possible⁸. A notice of proposed civil partnership is recorded once this has been done⁹.

On receiving a notice of proposed civil partnership and any evidence¹⁰, the registration authority must inform the Registrar General, and comply with any directions the Registrar General may give for verifying the evidence given¹¹.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 As to the meaning of 'registration authority' see PARA 133 note 2.

3 Civil Partnership Act 2004 s 21(1). The text refers to any requirements made under s 22 (see PARA 141). If a child and another person intend to register as civil partners of each other under the special procedure and the consent of any person to the child registering as the civil partner of that person is required, the person giving the notice of proposed civil partnership to the registration authority must produce to the authority such evidence as the Registrar General may require to satisfy him that the consent has in fact been given: Sch 2 para 13(1), (2). This is in addition to the power to require evidence under s 22 (see PARA 141): Sch 2 para 13(3).

4 As to the necessary declaration see PARA 133 note 4. If one of the proposed civil partners is a child and is not a surviving civil partner, the necessary declaration must also (1) state in relation to each appropriate person (a) that that person's consent has been obtained; (b) that the need to obtain that person's consent has been dispensed with (see PARA 47); or (c) that the court has given consent (see PARA 47); or (2) state that no person exists whose consent is required to a civil partnership between the child and another person: Civil Partnership Act 2004 Sch 2 para 11. The fee for the attestation by an authorised person of the necessary declaration to be paid to the registration authority to which the notice is given is £30: Registration of Civil Partnerships (Fees) Order 2005, SI 2005/1996, Schedule.

5 As to the meaning of 'authorised person' see PARA 133 note 6.

6 Civil Partnership Act 2004 ss 8(3), 21(3).

7 As to the meaning of 'register' see PARA 133 note 7.

8 Civil Partnership Act 2004 s 8(5).

9 Civil Partnership Act 2004 s 8(7).

10 Ie given under the Civil Partnership Act 2004 s 22 (see PARA 141).

11 Civil Partnership Act 2004 s 23.

UPDATE

140 Notice of proposed civil partnership and declaration

NOTE 4--Fee now £330⁵⁰: SI 2005/1996, Schedule (amended by SI 2010/440).

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141. Registrar General's power to require evidence.

The person giving a notice of proposed civil partnership¹ to a registration authority² under the special procedure must produce such evidence as the Registrar General³ may require to satisfy him:

- 136 (1) that there is no lawful impediment to the formation of the civil partnership⁴;
- 137 (2) that one of the proposed civil partners⁵:
 - 7 10. (a) is seriously ill and not expected to recover⁶;
 - 11. (b) cannot be moved to a place where they could be registered as civil partners of each other under the standard procedure⁷; and
 - 12. (c) understands the nature and purport of signing a Registrar General's licence⁸; and
- 8 138 (3) that there is sufficient reason why a licence should be granted⁹.

1 As to notices of proposed civil partnership see PARA 140.

2 As to the meaning of 'registration authority' see PARA 133 note 2.

3 As to the meaning of 'Registrar General' see PARA 46 note 5.

4 Civil Partnership Act 2004 s 22(1)(a).

5 Civil Partnership Act 2004 s 22(1)(b). The certificate of a registered medical practitioner is sufficient evidence of any or all of such matters: s 22(3).

6 Civil Partnership Act 2004 s 22(2)(a) (s 22(2) substituted by SI 2005/2000).

7 Civil Partnership Act 2004 s 22(2)(b) (as substituted see note 6).

8 Civil Partnership Act 2004 s 22(2)(c) (as substituted see note 6).

9 Civil Partnership Act 2004 s 22(1)(c).

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142. Forbidding the issue of a Registrar General's licence.

Where it has been recorded in the register¹ that a notice of proposed civil partnership² between a child³ and another person has been given, any person whose consent is required to a child and another person registering as civil partners⁴ of each other⁵ may forbid the Registrar General⁶ to give authority for the issue of his licence⁷, by giving any registration authority⁸ written notice that he forbids it⁹. On receiving the notice, the registration authority must as soon as is practicable record in the register the fact that such authorisation has been forbidden¹⁰. If authorisation has been forbidden under these provisions, the notice of proposed civil partnership and all proceedings on it are void¹¹. However, this is not the case where the court has given its consent¹² to the civil partnership¹³.

1 As to the meaning of 'register' see PARA 133 note 7.

2 As to notices of proposed civil partnership see PARA 140.

3 As to the meaning of 'child' see PARA 38 note 1.

4 As to the meaning of 'civil partner' see PARA 2 note 1.

5 As to such consent see PARA 46.

6 As to the meaning of 'Registrar General' see PARA 46 note 5.

7 As to such licences see PARA 143.

8 As to the meaning of 'registration authority' see PARA 133 note 2.

9 Civil Partnership Act 2004 Sch 2 paras 6(1), (2), 12(a). Such a notice must specify:

41 (1) the name of the person giving it (Sch 2 para 6(3)(a));

42 (2) his place of residence (Sch 2 para 6(3)(b)); and

43 (3) the capacity, in relation to either of the proposed civil partners, in which he forbids the issue of the civil partnership schedule (Sch 2 para 6(3)(c)).

10 Civil Partnership Act 2004 Sch 2 paras 6(4), 12(a).

11 Civil Partnership Act 2004 Sch 2 paras 6(5), 12(a).

12 Ie by virtue of the Civil Partnership Act 2004 Sch 2 para 10 (see PARA 47).

13 Civil Partnership Act 2004 Sch 2 paras 6(6), 12(b).

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143. Issue of a Registrar General's licence.

Where a notice of proposed civil partnership¹ is given to a registration authority², it may issue a Registrar General's³ licence if, and only if, given authority to do so by the Registrar General⁴. Such a licence must state that it is issued on the Registrar General's authority⁵. The Registrar General may not give his authority unless he is satisfied that one of the proposed civil partners is seriously ill and not expected to recover⁶; but, if so satisfied, he must give his authority unless a lawful impediment to the issue of his licence has been shown to his satisfaction to exist⁷.

Any person may object to the Registrar General giving authority for the issue of his licence by giving the Registrar General or any registration authority notice of his objection⁸. If a notice of objection is given to a registration authority, it must ensure that the fact that it has been given and the information in it are recorded in the register⁹ as soon as possible¹⁰. Where an objection has been made to the Registrar General giving authority for the issue of his licence, he is not to give that authority until:

- 139 (1) he has investigated the objection and decided whether it ought to obstruct the issue of his licence¹¹; or
- 140 (2) the objection has been withdrawn by the person who made it¹².

If the Registrar General declares that the grounds on which the objection is made are frivolous and ought not to obstruct the issue of his licence, the person who made the objection is liable for the costs of the proceedings before the Registrar General, and damages recoverable by the proposed civil partner to whom the objection relates¹³. For the purpose of enabling any person to recover any such costs and damages, a copy of a declaration of the Registrar General purporting to be sealed with the seal of the General Register Office is evidence that the Registrar General has made the declaration¹⁴.

1 As to notices of proposed civil partnership see PARA 140.

2 Ie under the Civil Partnership Act 2004 s 21 (see PARA 140): s 25(1). As to the meaning of 'registration authority' see PARA 133 note 2.

3 As to the meaning of 'Registrar General' see PARA 46 note 5.

4 Civil Partnership Act 2004 s 25(2).

5 Civil Partnership Act 2004 s 25(4). As to the contents of such a licence see the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176.

6 Civil Partnership Act 2004 s 25(3)(a).

7 Civil Partnership Act 2004 s 25(3)(b). The duty of the Registrar General to give authority for the issue of his licence does not apply if he has been forbidden to do so under Sch 2 para 12 (see PARA 142): Sch 2 para 14.

8 Civil Partnership Act 2004 s 24(1). A notice of objection must: (1) state the objector's place of residence and the ground of objection; and (2) be signed by or on behalf of the objector: s 24(2).

9 As to the meaning of 'register' see PARA 133 note 7.

- 10 Civil Partnership Act 2004 s 24(3).
- 11 Civil Partnership Act 2004 s 25(6)(a). Any such decision is final: s 25(7).
- 12 Civil Partnership Act 2004 s 25(6)(b).
- 13 Civil Partnership Act 2004 s 26(1), (2).
- 14 Civil Partnership Act 2004 s 26(3).

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144. Time for civil partnership registration.

Where a Registrar General's licence¹ has been issued, the proposed civil partners² may register as civil partners by signing it at any time within one month from the day on which the notice of proposed civil partnership was given³. If they do not register as civil partners by signing the licence within the one month period the notice of proposed civil partnership and the licence are void, and no civil partnership registrar⁴ may officiate at the signing of the licence by them⁵.

1 As to a Registrar General's licence see PARA 22. As to the meaning of 'Registrar General' see PARA 46 note 5.

2 As to proposed civil partners see PARA 133. As to the meaning of 'civil partner' see PARA 2 note 1.

3 Civil Partnership Act 2004 s 27(1). As to notices of proposed civil partnership see PARA 133 et seq.

4 As to the meaning of 'civil partnership registrar' see PARA 139 note 8.

5 Civil Partnership Act 2004 s 27(2).

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(iv) Registration of Civil Partnerships Abroad

A. REGISTRATION GENERALLY

145. Registration of civil partnerships abroad.

Her Majesty may, by Order in Council, make provision for two people to register as civil partners¹ of each other in prescribed countries or territories outside the United Kingdom, and in the presence of a prescribed officer of Her Majesty's diplomatic service in cases where the officer is satisfied that:

- 141 (1) at least one of the proposed civil partners is a United Kingdom national²;
- 142 (2) the proposed civil partners would have been eligible to register as civil partners of each other in such part of the United Kingdom as is determined in accordance with the order³;
- 143 (3) the authorities of the country or territory in which it is proposed that they register as civil partners will not object to the registration⁴; and
- 144 (4) insufficient facilities exist for them to enter into an overseas relationship⁵ under the law of that country or territory⁶.

An officer is not required to allow two people to register as civil partners of each other if in his opinion the formation of a civil partnership between them would be inconsistent with international law or the comity of nations⁷.

1 As to the meaning of 'civil partners' see PARA 2 note 1.

2 Civil Partnership Act 2004 s 210(1), (2)(a). Such an Order may make provision for appeals against a refusal to allow two people to register as civil partners of each other: s 210(4). 'United Kingdom National' means a person who is: (1) a British citizen, a British overseas territories citizen, a British Overseas citizen or a British National (Overseas); (2) a British subject under the British Nationality Act 1981; or (3) a British protected person, within the meaning of the British Nationality Act 1981: Civil Partnership Act 2004 s 245(1). As to British citizens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 23-43. As to British overseas territories citizens and citizenship (formerly known as British dependent territories citizens and citizenship) see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 44-57. As to British national (overseas) status see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 63-65. As to British overseas citizens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 8, 58-62. As to British subjects see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 9, 66-71. As to British protected persons see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 10, 72-76.

3 Civil Partnership Act 2004 s 210(2)(b).

4 Civil Partnership Act 2004 s 210(2)(c).

5 As to the meaning of 'overseas relationship' see PARA 2 note 4.

6 Civil Partnership Act 2004 s 210(2)(d).

7 Civil Partnership Act 2004 s 210(3).

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146. Notice of proposed civil partnership.

A person may give signed notice to a civil partnership officer¹ of his and another person's intention to register as civil partners² of each other if both persons have been resident within the consular district of the civil partnership officer for a period of seven days immediately preceding the giving of the notice³. Two people may not register as civil partners of each other unless one of them has given signed notice to the civil partnership officer at least 14 days previously⁴.

The signed notice must contain the following information for both people who intend to register the civil partnership:

- 145 (1) name⁵;
- 146 (2) surname⁶;
- 147 (3) nationality⁷;
- 148 (4) age⁸;
- 149 (5) residence⁹; and
- 150 (6) the part of the United Kingdom which¹⁰ the proposed civil partners have jointly elected will be the relevant part for the civil partnership registration¹¹.

A notice of proposed civil partnership must also include a solemn declaration, made and signed by the person giving the notice at the time when the notice is given, and in the presence of a civil partnership officer, and the civil partnership officer must attest the declaration by signature¹².

The civil partnership officer may demand evidence of any of the information contained in the signed notice before posting that notice¹³.

1 As to the meaning of 'civil partnership officer' see PARA 18 note 1.

2 As to the meaning of 'civil partner' see PARA 2 note 1.

3 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(1). The civil partnership officer may demand evidence of any of the information contained in the signed notice before posting that notice: art 5(6). A civil partnership will not be formed if notice has not been given within the preceding three months: art 9(1). Where an investigation has been made into an objection under art 8(2) (see PARA 148), the notice will be valid until three months after the person concerned was informed that the civil partnership could be registered, after which period the civil partnership must not be formed: art 9(2).

4 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(2).

5 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(3)(a).

6 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(3)(b).

7 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(3)(c).

8 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(3)(d).

9 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(3)(e).

10 le for the purposes of the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7(1) (see PARA 149).

11 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(3)(f).

12 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(4). The solemn declaration must include the following information: (1) whether he has throughout the past seven days been resident within the district of the civil partnership officer; and (2) whether there is any impediment of kindred or affinity, or other lawful hindrance to the formation of the civil partnership: art 5(5).

13 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(6).

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147. Publication of notice.

The civil partnership officer¹ must display the relevant information² from a notice of proposed civil partnership³ in a conspicuous place within his office and continue to display it for a period of 14 consecutive days before the civil partnership to which it refers may be formed⁴.

The civil partnership officer must file every notice of proposed civil partnership received and keep it within the archives of his office⁵.

1 As to the meaning of 'civil partnership officer' see PARA 18 note 1.

2 'Relevant information' means: (1) the name of the person giving the notice (Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 6(3)(a)); (2) the name of that person's proposed civil partner (art 6(3)(b)); (3) the nationality of those persons (art 6(3)(c)); (4) the age of those persons (art 6(3)(d)); and (5) the date on which notice was given (art 6(3)(e)).

3 As to a notice of proposed civil partnership see PARA 146.

4 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 6(2).

5 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 6(1).

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148. Objection.

Any person may enter an objection with the civil partnership officer¹, signed by the person or on his behalf, stating his name, residence and the ground of objection against the registration of a civil partnership² by the person named therein³. Where such an objection has been lodged, the person named therein may not form a civil partnership until either the objection has been withdrawn by the person who entered it, or the civil partnership officer is satisfied that the objection ought not to obstruct the person named from forming a civil partnership⁴.

1 As to the meaning of 'civil partnership officer' see PARA 18 note 1.

2 As to the registration of a civil partnership see PARA 56.

3 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 8(1).

4 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 8(2).

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149. Consent.

Where either proposed civil partner¹ is under the age of 18, and the proposed civil partners have elected² that the part of the United Kingdom which will be the relevant part for the civil partnership registration³ is England and Wales, then, save in the case of an election in respect of England and Wales where the proposed civil partner under the age of 18 is a surviving civil partner or a widow or widower, the written consent of the appropriate persons⁴ is required to be given to the civil partnership officer⁵ before a person under the age of 18 and another person may register as civil partners of each other⁶.

Where the consent of appropriate persons is required, the necessary declaration⁷ must also state in relation to each appropriate person that that person's consent has been obtained or state that no person exists whose consent is required to a civil partnership between the proposed civil partner under 18 and another person⁸.

The Secretary of State may dispense with the requirement to obtain consent if he is satisfied that it cannot be obtained because of the absence, inaccessibility or disability of the person whose consent is so required⁹.

On request by personal attendance of any person whose consent is required, the civil partnership officer must produce the notice and such person may forbid the formation of the civil partnership referred to in the notice at any time before the proposed civil partners have registered as civil partners of each other by writing the word 'forbidden' on the notice, together with his name and address and a statement of his capacity so to forbid¹⁰.

These provisions do not affect any need to obtain the consent of the High Court before a ward of court¹¹ and another person may register as civil partners of each other¹².

1 As to the meaning of 'proposed civil partner' see PARA 146.

2 I.e. under the Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 5(3)(f) (see PARA 146).

3 As to civil partnership registration see PARA 56.

4 As to the appropriate persons see, by virtue of Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7(1); the Civil Partnership Act 2004 s 4, Sch 2; and PARA 149.

5 As to the meaning of 'civil partnership officer' see PARA 18 note 1.

6 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7(1).

7 As to the necessary declaration see PARA 146.

8 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7(2).

9 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7(3).

10 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7(4). If forbidden, the notice and all proceedings on it are void: art 7(4).

11 As to wards of the court see PARA 46.

- 12 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 7(5).

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150. Time for civil partnership.

Two people may register as civil partners¹ of each other once the 14 day period² has elapsed and while the notice which they have given has not expired³. They may then register as civil partners in the presence of the civil partnership officer⁴ at his official house⁵ in the presence of two witnesses, at a time to be set by the civil partnership officer between the hours of 8 am and 6 pm, local time⁶.

The civil partnership document must be signed by the two persons registering as civil partners of each other, the two witnesses and the civil partnership officer⁷. The civil partnership document must contain the following information:

- 151 (1) date and place of registration⁸;
- 152 (2) for each of the two persons registering as civil partners of each other:⁹
 - 13. (a) name⁹;
 - 14. (b) nationality¹⁰;
 - 15. (c) residence¹¹;
 - 16. (d) date of birth¹²; and
 - 17. (e) place of birth¹³;
- 153 (3) for each of the two witnesses:¹¹
 - 18. (i) name¹⁴; and
 - 19. (ii) residence¹⁵; and
- 154 (4) for the civil partnership officer: name¹⁶.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 As to the 14 day period see PARA 146.

3 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(1). As to the expiry of a notice see PARA 146 note 3.

4 As to the meaning of 'civil partnership officer' see PARA 18 note 1.

5 Every place within the curtilage or precincts of the building which is for the time being used as the office of the civil partnership officer will be part of his official house and every place to which the public have ordinary access in such official house will be deemed to be part of the office of the civil partnership officer: Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(5). A certificate of the Secretary of State as to any house or other place being, or being part of, the official house of a civil partnership officer will be conclusive: art 10(6).

6 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(2).

7 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(3).

8 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(a).

9 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(b)(i).

- 10 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(b)(ii).
- 11 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(b)(iii).
- 12 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(b)(iv).
- 13 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(b)(v).
- 14 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(c)(i).
- 15 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(c)(ii).
- 16 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 10(4)(d)(i).

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151. Proof of civil partnership.

After two people have registered as civil partners¹ of each other it will not be necessary to prove:

- 155 (1) that the civil partners fulfilled any requirement of residence² that may have been on them³;
- 156 (2) that any necessary consent⁴ was obtained⁵;
- 157 (3) that the civil partnership officer⁶ had authority to register the civil partners⁷;
or
- 158 (4) that registration took place within the official house⁸ of the civil partnership officer⁹,

and no evidence to prove the contrary will be given in any legal proceeding touching the validity of the civil partnership¹⁰.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 As to the requirement of residence see PARA 145.

3 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 12(a).

4 As to consent see PARA 41 et seq.

5 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 12(b).

6 As to the meaning of 'civil partnership officer' see PARA 18 note 1.

7 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 12(c).

8 As to the official house of the civil partnership officer see PARA 150 note 5.

9 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 12(d).

10 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 12.

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152. Certificate of no impediment to civil partnership.

A United Kingdom national¹ who wishes to register an overseas relationship² with a person who is not a United Kingdom national or a Commonwealth citizen³, may apply to the registration authority⁴, or to the civil partnership officer⁵ responsible for the area in which he resides, or to the civil partnership officer responsible for the consular district in which the overseas relationship is to be registered, for a certificate that no impediment to the civil partnership being registered has been shown to the Registrar General⁶ or civil partnership officer to exist⁷.

Where the person making the application is resident within the United Kingdom, he must, before the certificate may be issued, first give notice to the registration authority, together with payment of the appropriate fee⁸, stating that he has been resident in the United Kingdom throughout the previous 21 days, following which giving of notice the certificate may be issued after a further period of 21 days has elapsed⁹.

Where the person making the application is resident outside the United Kingdom, he must, before the certificate may be issued, first give notice to the appropriate civil partnership officer stating that he has been resident in the area where he resides throughout the previous 21 days, following which giving of notice the certificate may be issued after a further period of 21 days has elapsed¹⁰.

The registration authority or civil partnership officer must not issue the certificate if he is aware of any reason why such a certificate should not be issued¹¹ and may request from the applicant any information which he considers relevant to the decision whether or not to issue the certificate¹².

1 As to the meaning of 'United Kingdom national' see PARA 145 note 2.

2 As to the meaning of 'overseas relationship' see PARA 19 note 1.

3 I.e. a citizen of a country listed in the British Nationality Act 1981 Sch 3 (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 11): Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 17(1). Article 17 is made pursuant to the Civil Partnership Act 2004 s 240, which provides that Her Majesty may by Order in Council make provision for the issue of certificates of no impediment to:

44 (1) United Kingdom nationals (s 240(1)(a)); and

45 (2) such other persons if under any enactment for the time being in force in any country mentioned in the British Nationality Act 1981 Sch 3 (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 11) that person is a citizen of that country, as may be prescribed (Civil Partnership Act 2004 s 240(1)(b), (2)),

who wish to enter into overseas relationships in prescribed countries or territories outside the United Kingdom with persons who are not United Kingdom nationals and who do not fall under head (2): s 240(1), (2). A certificate of no impediment is a certificate that, after proper notices have been given, no legal impediment to the recipient entering into the overseas relationship has been shown to the person issuing the certificate to exist: s 240(3).

4 As to the meaning of 'registration authority' see PARA 133 note 2.

5 As to the meaning of 'civil partnership officer' see PARA 18 note 1.

- 6 As to the meaning of 'Registrar General' see PARA 46 note 5.
- 7 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 17(1).
- 8 The appropriate fee is £30.00: Registration of Civil Partnerships (Fees) (No 2) Order 2005, SI 2005/3167, Schedule.
- 9 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 17(2).
- 10 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 17(3).
- 11 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 17(4).
- 12 Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 17(5).

UPDATE

152 Certificate of no impediment to civil partnership

NOTE 8--Fee now £33.50: SI 2005/3167, Schedule (amended by SI 2010/440).

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B. REGISTRATION BY ARMED FORCES PERSONNEL

153. Registration by armed forces personnel.

Her Majesty may by Order in Council¹ make provision for two people to register as civil partners² of each other in prescribed countries or territories outside the United Kingdom³, and in the presence of an officer⁴ in cases where the officer is satisfied that:

- 159 (1) at least one of the proposed civil partners:
- 13
20. (a) is a member of a part of Her Majesty's forces serving in the country or territory⁵;
21. (b) is employed in the country or territory in such other capacity as may be prescribed⁶; or
22. (c) is a child⁷ of a person falling under head (a) or (b) and has his home with that person in that country or territory⁸;
- 14
- 160 (2) the proposed civil partners would have been eligible to register as civil partners of each other in such part of the United Kingdom as is determined in accordance with the order⁹; and
- 161 (3) such other requirements as may be prescribed are complied with¹⁰.

1 See the Civil Partnership (Armed Forces) Order 2005, SI 2005/3188; and PARA 154 et seq.

2 As to the meaning of 'civil partner' see PARA 2 note 1.

3 'Prescribed countries or territories' means Australia, Canada, Falkland Islands, Germany, Gibraltar, Nepal, the United States of America and the Sovereign Base Areas of Akrotiri and Dhekelia: Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 2. 'Country or territory outside the United Kingdom' includes references to ships which are for the time being in the waters of a country or territory outside the United Kingdom, to forces serving in any such ship and to persons employed in any such ship: Civil Partnership Act 2004 s 211(5) (a). If it appears to Her Majesty that any law in force in Canada, the Commonwealth of Australia or New Zealand, or in a territory of either of the former two countries, makes, in relation to forces raised there, provision similar to that made by s 211, Her Majesty may by Order in Council make provision for securing that the law in question has effect as part of the law of the United Kingdom: s 242.

4 As to the registering officer see PARA 154 note 3.

5 Civil Partnership Act 2004 s 211(1), (2)(a)(i). Reference to forces serving in a country or territory include references to ships which are for the time being in the waters of a country or territory outside the United Kingdom, to forces serving in any such ship and to persons employed in any such ship: s 211(5)(b).

6 Civil Partnership Act 2004 s 211(2)(a)(ii). References to persons employed in a country or territory include references to ships which are for the time being in the waters of a country or territory outside the United Kingdom, to forces serving in any such ship and to persons employed in any such ship: s 211(5)(c). The employment and capacities arise when: (1) a person is serving Her Majesty or is otherwise employed being a person to whom either the provisions of the Naval Discipline Act 1957 are applied by s 118(2) (see **ARMED FORCES** vol 2(2) (Reissue) PARA 311), to whom the provisions of the Army Act 1955 Pt 2 (ss 24-143) are applied by s 209(2) (see **ARMED FORCES** vol 2(2) (Reissue) PARA 311) or to whom the provision of the Air Force Act 1955 Pt 2 (ss 24-143) are applied by s 209(2) (see **ARMED FORCES** vol 2(2) (Reissue) PARA 311); and (2) that person is involved in the performance of any of the following functions, namely, administrative, executive, judicial, clerical, typing, duplicating, machine operating, paper keeping, managerial, professional, instructional,

scientific, experimental, technical, industrial or labouring functions: Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, arts 3, 4.

7 In determining for this purpose whether one person is the child of another, a person who is or was treated by another as a child of the family in relation to a marriage to which the other is or was a party, or a civil partnership in which the other is or was a civil partner, is to be regarded as the other's child: Civil Partnership Act 2004 s 211(3).

8 Civil Partnership Act 2004 s 211(2)(a)(iii).

9 Civil Partnership Act 2004 s 211(2)(b). In relation to two people proposing to become civil partners, the part of the United Kingdom will be such part as the proposed civil partners jointly elect in accordance with the Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(g) (see PARA 154 text and note 11) will apply to the civil partnership registration: art 5.

10 Civil Partnership Act 2004 s 211(2)(c). For these purposes, it is a requirement that where either civil partner is under the age of 18, and the proposed civil partners have elected that for the purposes of the Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, arts 5, 6(2)(g), the part of the United Kingdom which is to be the relevant part for the civil partnership registration is either England and Wales or Northern Ireland then, save in the case of an election in respect of England and Wales where the proposed civil partner under the age of 18 is a surviving civil partner or widow or widower, the written consent of appropriate persons is required: art 7(1). The written consent must be given to the registering officer before a person under the age of 18 and another person may register as civil partners of each other, and determination of appropriate persons must be decided in accordance with the Civil Partnership Act 2004 s 4, Sch 2 (see PARA 46): Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 7(1). Where the consent of appropriate persons is required under this article, the necessary declaration under art 6(3) (see PARA 154) must also state in relation to each appropriate person that that person's consent has been obtained or state that no person exists whose consent is required to a civil partnership between the proposed civil partner under 18 and another person: art 7(2). On request by personal attendance of any person whose consent is required, the registering officer must produce the notice given under art 6(1) (see PARA 154) and such person may forbid the formation of the civil partnership referred to in the notice at any time before the proposed civil partners have registered as civil partners by writing 'forbidden' on the notice, together with his name and address and a statement of his capacity to so forbid: art 7(3). If forbidden, the notice and all proceedings are void: art 7(3).

UPDATE

153 Registration by armed forces personnel

NOTE 6--The employment and capacities specified now arise when a civilian is serving or employed under Her Majesty's government in the United Kingdom in a capacity connected with Her Majesty's forces (within the meaning of the Armed Forces Act 2006): SI 2005/3188 art 4 (substituted by SI 2009/2054).

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154. Notice and declaration of proposed civil partnership.

Two people who wish to register as civil partners¹ where one of the parties is a member of the armed forces² must give a notice of proposed civil partnership to a registering officer³. The notice of proposed civil partnership must contain the following information for both persons who intend to register the civil partnership:

- 162 (1) name⁴;
- 163 (2) surname⁵;
- 164 (3) occupation⁶;
- 165 (4) age⁷;
- 166 (5) address⁸;
- 167 (6) whether he or she is or has been a civil partner or married⁹; and
- 168 (7) the part of the United Kingdom which the proposed civil partners have jointly elected¹⁰ will be the relevant part of the United Kingdom for the civil partnership registration¹¹.

A notice of proposed civil partnership must also include the necessary declaration, made and signed by the person giving the notice at the time when the notice is given, and in the presence of a registering officer and the registering officer must attest the declaration by adding his name, description and place of residence¹².

Where a notice of proposed civil partnership is given to a registering officer he must ensure that the following information is recorded as soon as possible:

- 169 (a) the fact that the notice has been given and the information in it¹³; and
- 170 (b) the fact that the registering officer has attested the declaration¹⁴.

1 As to the meaning of 'civil partners' see PARA 2 note 1.

2 See PARA 153.

3 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(1). 'Registering officer' means an officer appointed by virtue of the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957: Civil Partnership Act 2004 s 211(1)(b); Civil Partnership (Registration Abroad and Certificates) Order 2005, SI 2005/2761, art 1(2).

4 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(a).

5 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(b).

6 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(c).

7 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(d).

8 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(e).

9 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(f).

10 le for the purposes of the Civil Partnership Act 2004 s 211(2)(b) (see PARA 153).

- 11 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(2)(g).
- 12 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(3). The 'necessary declaration' is a solemn declaration in writing that the proposed civil partner believes that the proposed civil partners are eligible to form a civil partnership with each other in such part of the United Kingdom as they have jointly elected will be the relevant part for the civil partnership registration and that he knows of no other lawful impediment to the formation of the civil partnership: art 6(4).
- 13 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(5)(a).
- 14 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 6(5)(b).

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155. Evidence.

The registering officer¹ to whom a notice of proposed civil partnership² is given may require the person giving the notice to provide him with evidence³ relating to that person, or if the registering officer considers that the circumstances are exceptional, relating not only to that person but also to that person's proposed civil partner⁴.

1 As to the meaning of 'registering officer' see PARA 154 note 3.

2 As to a notice of proposed civil partnership see PARA 154.

3 'Evidence', in relation to a person, means evidence:

46 (1) of the person's name and surname (Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 8(2)(a));

47 (2) of the person's age (art 8(2)(b)); and

48 (3) as to whether the person has previously formed a civil partnership or a marriage and, if so, as to the ending of the civil partnership or marriage (art 8(2)(c)).

4 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 8(1).

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156. Objection to an intended registration of a proposed civil partnership.

Any person may object to an intended registration of a proposed civil partnership¹ giving any registering officer² notice of his objection³. A notice of objection must:

- 171 (1) state the objector's place of residence and the ground of objection⁴; and
- 172 (2) be signed by or on behalf of the objector⁵.

If a notice is given to a registering officer, he must ensure that the fact that it has been given and the information in it are recorded as soon as possible⁶. Where an objection has been lodged, the person named therein may not form a civil partnership until either the objection has been withdrawn by the person who entered it, or the registering officer is satisfied that the objection ought not to obstruct the person named from forming a civil partnership⁷.

- 1 As to a proposed civil partnership see PARA 154.
- 2 As to the meaning of 'registering officer' see PARA 154 note 3.
- 3 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 10(1).
- 4 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 10(2)(a).
- 5 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 10(2)(b).
- 6 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 10(3).
- 7 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 10(4).

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157. Publicising of proposed civil partnership.

Where a notice of proposed civil partnership¹ has been given to a registering officer², he must keep the relevant information³ on public display within a conspicuous place in his office during the waiting period⁴.

1 As to a proposed civil partnership see PARA 154.

2 As to the meaning of 'registering officer' see PARA 154 note 3.

3 For these purposes 'relevant information' means:

49 (1) the name of the person giving the notice (Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 9(2)(a)); and

50 (2) the name of that person's proposed civil partner (art 9(2)(b)).

4 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 9(1). For these purposes, 'waiting period' means the period beginning the day after the notice is recorded and ending at the end of the period of 15 days beginning with that day: art 9(3).

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158. Formation of civil partnership by registration.

Two people are to be regarded as having registered as civil partners¹ of each other once each of them has signed the civil partnership register²:

- 173 (1) at the invitation of, and in the presence of, a registering officer³; and
- 174 (2) in the presence of each other and two witnesses⁴.

After the civil partnership register has been signed it must also be signed in the presence of the civil partners and each other, by each of the two witnesses, and the registering officer⁵.

No religious service is to be used while the registering officer is officiating at the signing of a civil partnership register⁶.

1 As to the meaning of civil partner see PARA 2 note 1.

2 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 12(1). This applies regardless of whether art 12(3) (see the text and note 5) has been complied with: art 12(2). 'Civil partnership register' means a register supplied to the registering officer by the Registrar General for England and Wales: art 1(2). As to the meaning of 'register' see PARA 133 note 7. As to the meaning of 'registering officer' see PARA 154 note 3. As to the meaning of 'Registrar General' see PARA 46 note 5.

3 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 12(1)(a).

4 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 12(1)(b).

5 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 12(3).

6 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 12(4).

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159. Time for civil partnership.

The proposed civil partners¹ may not register as civil partners of each other until the waiting period² in relation to each notice of proposed civil partnership³ has expired⁴. They may register as civil partners of each other by signing the civil partnership register⁵ before a registering officer⁶ at his office on any day in the applicable period⁷ at a time to be set by him⁸. If they do not register as civil partners before the end of the applicable period the notices of proposed civil partnership are void, and no registering officer may officiate at the signing of the civil partnership register by them⁹.

1 As to the meaning of 'civil partners' see PARA 2 note 1.

2 As to the meaning of 'waiting period' see PARA 157 note 4.

3 As to notices of proposed civil partnership see PARA 154.

4 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 11(1).

5 As to the meaning of 'civil partnership register' see PARA 158 note 2.

6 As to the meaning of 'registering officer' see PARA 154 note 3.

7 'Applicable period' means in relation to two people registering as civil partners of each other, the period of 12 months beginning with the day on which the notices of proposed civil partnerships are recorded or, if the notices are not recorded on the same day, the earlier of those days: Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 11(4).

8 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 11(2).

9 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 11(3).

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160. Commanding officer's certificate of no impediment to civil partnership.

Where two people wish to register as civil partners¹ of each other in England and Wales and one of them, the applicant, is an officer, seaman or marine borne on the books of one of Her Majesty's ships at sea and the other is resident in England and Wales, the applicant must give signed notice of his intention to form the civil partnership with the other person in England and Wales to the officer² containing the following information³:

- 175 (1) name⁴;
- 176 (2) surname⁵;
- 177 (3) whether he or she is or has been a civil partner or married⁶; and
- 178 (4) the name and surname of the proposed civil partner⁷.

The notice must include a declaration signed by the applicant in the presence of the officer declaring that he believes that there is no impediment of kindred or affinity⁸ or other lawful hindrance to the formation of the civil partnership and the officer must attest the declaration by adding his name, description and place of residence⁹. The officer having been given the notice and having attested the declaration may issue a certificate that no legal impediment to the formation of the civil partnership has been shown to the officer to exist¹⁰.

The officer may demand evidence of any of the information contained in the signed notice¹¹ and must file every such notice given within the archives of his ship¹².

1 As to the meaning of 'civil partners' see PARA 2 note 1.

2 'Officer' means the captain or other officer in command of the ship: Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 14(2). Article 14 is made pursuant to the Civil Partnership Act 2004 s 239 (amended by SI 2005/2000), which provides that Her Majesty may by Order in Council make provision in relation to cases where two people wish to register as civil partners of each other in England and Wales under the Civil Partnership Act 2004 Pt 2 Chapter 1 (ss 2-35), and one of them is an officer, seaman or marine borne on the books of one of Her Majesty's ships at sea and the other is resident in England and Wales for the issue to the officer by the captain or other officer in command of the ship, of a certificate of no impediment (s 239(1) (amended by SI 2005/2000)). The Order may provide for the issue of the certificate to be subject to the giving of such notice and the making of such declarations as may be prescribed: Civil Partnership Act 2004 s 239(2). A certificate of no impediment is a certificate that no legal impediment to the formation of the civil partnership has been shown to the officer issuing the certificate to exist: s 239(3) (amended by SI 2005/2000).

3 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 14(1), (2).

4 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 14(2)(a).

5 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 14(2)(b).

6 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 14(2)(c).

7 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 14(2)(d).

8 As to degrees of affinity see PARA 37.

9 Civil Partnership (Armed Forces) Order 2005, SI 2005/3188, art 14(3).

- 10 Civil Partnership Armed Forces) Order 2005, SI 2005/3188, art 14(6).
- 11 Civil Partnership Armed Forces) Order 2005, SI 2005/3188, art 14(4).
- 12 Civil Partnership Armed Forces) Order 2005, SI 2005/3188, art 14(5).

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(7) MARRIAGE OF SERIOUSLY ILL PERSONS BY REGISTRAR GENERAL'S LICENCE

161. Marriages of seriously ill persons.

The Registrar General¹ may issue a licence for the solemnisation of marriage if he is satisfied that one of the persons to be married is seriously ill, is not expected to recover and cannot be moved to a place at which the marriage could² be solemnised³.

Any marriage which may be solemnised on the authority of certificates of a superintendent registrar⁴ may be solemnised on the authority of the Registrar General's licence⁵ elsewhere than at a registered building⁶, the office of a superintendent registrar or approved premises⁷; but any such marriage must not be solemnised according to the rites of the Church of England or the Church in Wales⁸.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 Ie under the provisions of the Marriage Act 1949: see PARA 54.

3 Marriage (Registrar General's Licence) Act 1970 s 1(2) (amended by the Marriage Act 1983 s 2(3)). For these purposes, the provisions of the Marriage Act 1949 relating to marriages in pursuance of s 26(1)(dd) (see PARA 54) are to be disregarded: Marriage (Registrar General's Licence) Act 1970 s 1(2).

4 As to the meaning of 'superintendent registrar' see PARA 22 note 1. As to the marriages which may be so solemnised see PARA 54; and as to the grant of certificates see PARA 95 et seq.

5 As to the grant of such a licence see PARA 165.

6 As to the meaning of 'registered building' see PARA 54 note 3.

7 Marriage (Registrar General's Licence) Act 1970 s 1(1) (amended by the Marriage Act 1994 Schedule para 9; the Immigration and Asylum Act 1999 Sch 14 paras 38, 39). As to the meaning of 'approved premises' see PARA 54 note 6.

8 Marriage (Registrar General's Licence) Act 1970 s 1(1) proviso. Nothing in the Marriage (Registrar General's Licence) Act 1970 affects the right of the Archbishop of Canterbury or of any other person by virtue of the Ecclesiastical Licences Act 1533 (see PARA 76) to grant special licences to marry at any convenient time or place, or affects the validity of any marriage solemnised on the authority of such a licence: Marriage (Registrar General's Licence) Act 1970 s 19. As to special licences see PARAS 58, 76.

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162. Notice of marriage.

Where a marriage is intended to be solemnised on the authority of the Registrar General's¹ licence², notice must be given in the prescribed form³, by either of the persons to be married, to the superintendent registrar⁴ of the registration district⁵ in which it is intended that the marriage is to be solemnised; and the notice must state by or before whom it is intended that the marriage is to be solemnised⁶.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 As to the grant of such a licence see PARA 165.

3 As to the prescribed form of notice see the Registration of Marriage Regulations 1986, SI 1986/1442, Sch 1, Form 3 (amended by SI 2000/3164; SI 2005/3177). The Registrar General, with the approval of the Secretary of State, may by statutory instrument make regulations prescribing anything which is required in the Marriage (Registrar General's Licence) Act 1970 to be prescribed: s 18(1) (amended by SI 1996/273; SI 2008/678). Any power to make regulations includes power to vary or revoke those regulations: Marriage (Registrar General's Licence) Act 1970 s 18(2). In exercise of the power so conferred the Registrar General made the Registration of Marriage Regulations 1986, SI 1986/1442 (amended by SI 1987/2088; SI 1995/744; SI 1997/2204; SI 2000/3164; SI 2005/155; SI 2005/3177; SI 2007/2164).

4 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

5 As to the meaning of 'registration district' see PARA 87 note 4.

6 Marriage (Registrar General's Licence) Act 1970 s 2(1). The provisions of the Marriage Act 1949 s 27(4) (entries in the marriage notice book: see PARA 92) apply to notices of marriage on the authority of the Registrar General's licence: Marriage (Registrar General's Licence) Act 1970 ss 1(2), 2(2). The provisions of the Marriage Act 1949 s 28 (declaration to accompany notice of marriage: see PARA 90) apply to the giving of notice under the Marriage (Registrar General's Licence) Act 1970 with the exception of the Marriage Act 1949 s 28(1)(b) and with the modification that in s 28(2) references to the registrar of births and deaths or of marriages and deputy registrar are to be omitted: Marriage (Registrar General's Licence) Act 1970 ss 1(2), 2(3). A fee of £3 is payable by the Registrar General to the superintendent registrar for the entry of the notice of marriage: s 17(2).

UPDATE

162 Notice of marriage

NOTE 3--SI 1986/1442 Sch 1 Form 3 substituted: SI 2009/2806. As to the prescribed form in Wales see the Registration of Marriage (Welsh Language) Regulations 1999, SI 1999/1621 Sch 1 Form 1D (added by SI 2009/2806).

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163. Evidence of capacity, consent etc to be produced.

The person giving notice of marriage by Registrar General's licence¹ must produce to the superintendent registrar² such evidence as the Registrar General may require to satisfy him:

- 179 (1) that there is no lawful impediment to the marriage³;
- 180 (2) that the consent of any person whose consent to the marriage is required⁴ has been duly given⁵;
- 181 (3) that there is sufficient reason why a licence should be granted⁶; and
- 182 (4) that one of the persons to be married is seriously ill, is not expected to recover and cannot be moved to a place at which the marriage could normally be solemnised⁷, and that the sick person is able to, and does, understand the nature and purport of the marriage ceremony⁸.

On receipt of the notice of marriage and the evidence so required, the superintendent registrar must inform the Registrar General and must comply with any directions he may give for verifying the evidence given⁹.

1 Ie under the Marriage (Registrar General's Licence) Act 1970 s 2: see PARA 162. As to the meaning of 'Registrar General' see PARA 46 note 5.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 Marriage (Registrar General's Licence) Act 1970 s 3(a). If a person gives false information by way of evidence, he is guilty of an offence: see PARA 183.

4 Ie under the Marriage Act 1949 s 3: see PARAS 46-48. The provisions of s 3 apply for the purposes of the Marriage (Registrar General's Licence) Act 1970 to a marriage intended to be solemnised by Registrar General's licence as they apply to a marriage intended to be solemnised on the authority of certificates of a superintendent registrar under the Marriage Act 1949 Pt III (ss 26-52) (see PARA 54 et seq) with the modification that, if the consent of any person whose consent is required cannot be obtained by reason of absence or inaccessibility or by reason of his being under any disability, the superintendent registrar is not required to dispense with the necessity for that person's consent and the Registrar General may dispense with the necessity of obtaining that person's consent, whether or not there is any other person whose consent is also required: Marriage (Registrar General's Licence) Act 1970 ss 1(2), 6 (amended by the Immigration and Asylum Act 1999 Sch 14 paras 38, 41).

5 Marriage (Registrar General's Licence) Act 1970 ss 1(2), 3(b) (amended by the Children Act 1989 Sch 15). See also note 3. Proof of such a matter is not necessary to the validity of the marriage, once solemnised: see the Marriage Act 1949 s 48(1)(b) (applied by the Marriage (Registrar General's Licence) Act 1970 s 12); and PARA 22.

6 Marriage (Registrar General's Licence) Act 1970 s 3(c). See also note 3.

7 Ie the conditions contained in the Marriage (Registrar General's Licence) Act 1970 s 1(2) must be satisfied: see PARA 161.

8 Marriage (Registrar General's Licence) Act 1970 s 3(d). See also note 3. The certificate of a registered medical practitioner is sufficient evidence of any or all of the matters referred to in s 3(d): s 3 proviso. 'Registered medical practitioner' means a fully registered person within the meaning of the Medical Act 1983 (see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARAS 3-4): Interpretation Act 1978 Sch 1 (amended by the Medical Act 1983 Sch 5 para 18).

9 Marriage (Registrar General's Licence) Act 1970 s 4.

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164. Caveat.

A caveat may be entered against the issue of the Registrar General's¹ licence in the same way as a caveat against the issue of a superintendent registrar's² certificate³; but a caveat in respect of the Registrar General's licence may be entered with either the superintendent registrar or the Registrar General, and in either case it is for the Registrar General to examine into the matter of the caveat and to decide whether or not the licence should be granted, and his decision is final⁴.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 The provisions of the Marriage Act 1949 s 29 (see PARA 96) apply with modifications: see the text and note 4.

4 Marriage (Registrar General's Licence) Act 1970 ss 1(2), 5 (amended by the Immigration and Asylum Act 1999 Sch 14 paras 30, 40, Sch 16). The references to the superintendent registrar in the Marriage Act 1949 s 29 are to be taken to refer to the superintendent registrar of the registration district in which the marriage is intended to be solemnised: Marriage (Registrar General's Licence) Act 1970 s 5. As to the meaning of 'registration district' see PARA 87 note 4.

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165. Issue of licence by Registrar General; period of validity.

Where the marriage is intended to be solemnised on the authority of the Registrar General¹ and he is satisfied that sufficient grounds exist why a licence should be granted, he must issue a licence in the prescribed form² unless any lawful impediment to the issue of the licence has been shown to his satisfaction to exist or the issue of the licence has³ been forbidden⁴.

A marriage may be solemnised on the authority of the Registrar General's licence at any time within one month from the day on which the notice of marriage was entered in the marriage notice book⁵. If the marriage is not solemnised within that period, the notice of marriage and the licence are void, and no person may solemnise the marriage on the authority of them⁶.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 For the prescribed form of notice see the Registration of Marriage Regulations 1986, SI 1986/1442, Sch 1, Form 11 (amended by SI 2000/3164; SI 2005/3177). A fee of £15 is payable to the Registrar General in respect of the issue of his licence; and he has power to remit the fee, in whole or in part, in any case where it appears to him that the payment of that fee would cause hardship to the parties to the intended marriage: Marriage (Registrar General's Licence) Act 1970 s 17(1).

3 Ie under the Marriage Act 1949 s 30: see PARA 95.

4 Marriage (Registrar General's Licence) Act 1970 s 7.

5 Marriage (Registrar General's Licence) Act 1970 s 8(1). For these purposes, 'marriage notice book' has the same meaning as in the Marriage Act 1949 s 78(1) (see PARA 92): Marriage (Registrar General's Licence) Act 1970 s 20(2).

6 Marriage (Registrar General's Licence) Act 1970 s 8(2). If any person does so solemnise the marriage, he is guilty of an offence: see PARA 183.

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166. Place and manner of solemnisation.

A marriage on the authority of the Registrar General's¹ licence must be solemnised in the place stated in the notice of marriage².

Such a marriage must be solemnised at the wish of the persons to be married either:

- 183 (1) according to such form or ceremony, not being the rites or ceremonies of the Church of England or the Church in Wales, as the persons to be married see fit to adopt³; or
- 184 (2) by civil ceremony⁴.

Except where the marriage is solemnised according to the usages of the Society of Friends⁵ or is a marriage between two persons professing the Jewish religion according to the usages of the Jews⁶:

- 185 (a) it must be solemnised in the presence of a registrar⁷, save that, where the marriage is to be by civil ceremony, it must be solemnised in the presence of the superintendent registrar⁸ as well as the registrar⁹; and
- 186 (b) the persons to be married must in some part of the ceremony in the presence of two or more witnesses and the registrar, and, where appropriate, the superintendent registrar, make the prescribed declaration and say to one another the prescribed¹⁰ words¹¹.

If a marriage is solemnised in the presence of a registrar of marriages and before, during or immediately after solemnisation of the marriage the registrar has reasonable grounds for suspecting that the marriage will be, or is, a sham marriage¹², he must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations¹³.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 Marriage (Registrar General's Licence) Act 1970 s 9. As to where such marriage cannot be solemnised see PARA 161.

3 Marriage (Registrar General's Licence) Act 1970 s 10(1)(a). No person who is a clergyman within the meaning of the Marriage Act 1949 s 78(1) (see PARA 23 note 5) may solemnise any marriage which is solemnised on the authority of the Registrar General: Marriage (Registrar General's Licence) Act 1970 s 10(4).

4 Marriage (Registrar General's Licence) Act 1970 s 10(1)(b).

5 As to marriage according to the usages of the Society of Friends see PARA 116.

6 As to marriage between persons professing the Jewish religion according to the usages of the Jews see PARA 118.

7 For these purposes, 'registrar' has the same meaning as in the Marriage Act 1949 s 78(1) (see PARA 88 note 1): Marriage (Registrar General's Licence) Act 1970 s 20(2).

8 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

9 Marriage (Registrar General's Licence) Act 1970 s 10(2). A fee of £2 is payable by the Registrar General to a superintendent registrar, and also to a registrar, for attending a marriage by Registrar General's licence and these fees are to be retained by those officers: s 17(2). It is an offence to solemnise the marriage without the presence of a registrar, except in the case of a Quaker or Jewish marriage: see PARA 183.

10 Ie the declaration and words prescribed by the Marriage Act 1949 s 44(3) or s 44(3A): see PARA 105.

11 Marriage (Registrar General's Licence) Act 1970 s 10(3) (amended by the Marriage Ceremony (Prescribed Words) Act 1996 s 1(2)(b)).

12 As to sham marriages see PARA 11.

13 Immigration and Asylum Act 1999 s 24(2), (3). As to the prescribed form and manner see PARA 11 note 7.

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167. Civil marriage followed by religious ceremony.

If the parties to a marriage solemnised on the authority of the Registrar General's¹ licence before a superintendent registrar² desire to add the religious ceremony ordained or used by the church or persuasion of which they are members and have given notice of their desire to do so, a clergyman³ or minister of that church or persuasion may, if he sees fit, on the production of a certificate of their marriage before the superintendent registrar and on payment of the customary fees, if any, read or celebrate in the presence of the parties to the marriage the marriage service of the church or persuasion to which he belongs or nominate some other minister to do so⁴.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 For these purposes 'clergyman' has the same meaning as in the Marriage Act 1949 s 78(1) (see PARA 23 note 5): Marriage (Registrar General's Licence) Act 1970 s 20(2).

4 Marriage (Registrar General's Licence) Act 1970 s 11(1). The provisions of the Marriage Act 1949 s 46(2), (3) (see PARA 57) apply to such a reading or celebration as they apply to the reading or celebration of a marriage service following a marriage solemnised in the office of a superintendent registrar: Marriage (Registrar General's Licence) Act 1970 ss 1(2), 11(2).

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168. Documentary authority for marriage.

Where a marriage is to be solemnised on the authority of the Registrar General's¹ licence, a document issued by the superintendent registrar² stating that the Registrar General's licence has been granted and that authority for the marriage to be solemnised has been given must be delivered before the marriage:

- 187 (1) if the marriage is to be solemnised according to the usages of the Society of Friends³, to the registering officer of that Society for the place where the marriage is to be solemnised⁴;
- 188 (2) if the marriage is to be solemnised according to the usages of persons professing the Jewish religion⁵, to the officer of the synagogue by whom the marriage is required to be registered⁶; and
- 189 (3) in any other case, to the registrar⁷ in whose presence the marriage is⁸ to be solemnised⁹.

Such a marriage must be registered in accordance with the statutory provisions¹⁰ which apply to the registration of marriages solemnised in the presence of a registrar or according to the usages of the Society of Friends or of persons professing the Jewish religion¹¹.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 As to marriage according to the usages of the Society of Friends see PARA 116.

4 Marriage (Registrar General's Licence) Act 1970 s 14(a).

5 As to marriage according to the usages of persons professing the Jewish religion see PARA 118.

6 Marriage (Registrar General's Licence) Act 1970 s 14(b).

7 As to the meaning of 'registrar' see PARA 88 note 1.

8 I.e. under the Marriage Act 1949 Pt IV (ss 53-67): see **REGISTRATION CONCERNING THE INDIVIDUAL**.

9 Marriage (Registrar General's Licence) Act 1970 s 14(c).

10 I.e. the provisions of the Marriage Act 1949: see PARAS 115-118. As to offences in relation to the registration of marriages and a Registrar General's licence see PARAS 181, 183.

11 Marriage (Registrar General's Licence) Act 1970 ss 1(2), 15.

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(8) HOUSEBOUND OR DETAINED PERSONS

169. Housebound persons.

A person is 'housebound' if in relation to him a statement is made by a registered medical practitioner¹ that:

- 190 (1) because of illness or disability he ought not to move or be moved from the place where he is at the time when the statement is made²; and
- 191 (2) it is likely to be the case for at least the following three months that because of the illness or disability that person ought not to move or be moved from that place³,

and he is not a detained person⁴. In order for a person to qualify as 'housebound' for these purposes each notice of his or her marriage⁵ or proposed civil partnership⁶ must be accompanied by a statement to the above effect⁷.

1 As to registered medical practitioners see **MEDICAL PRACTITIONERS** vol 30(1) (Reissue) PARA 4.

2 Marriage Act 1949 ss 27A(7), 78(3) (ss 27A, 78(3) added by the Marriage Act 1983 Sch 1 paras 6, 21); Marriage Act 1983 s 1(2)(a)(i); Civil Partnership Act 2004 s 18(2)(a).

3 Marriage Act 1949 s 27A(7) (as added: see note 2); Marriage Act 1983 s 1(2)(a)(ii); Civil Partnership Act 2004 s 18(2)(b).

4 Marriage Act 1949 s 78(3)(b) (as added: see note 2); Marriage Act 1983 s 1(2)(b); Civil Partnership Act 2004 s 18(5). As to detained persons see PARA 170.

5 In accordance with the Marriage Act 1949 s 27 (see PARA 87).

6 As to giving notice of a proposed civil partnership see PARA 133.

7 See the Marriage Act 1949 ss 27A(3), 78(3); the Marriage Act 1983 s 1(2); the Civil Partnership Act 2004 s 18(3); and PARA 174.

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170. Detained persons.

A person is a 'detained person' if he or she is for the time being detained:

192 (1) as a patient in a hospital¹ otherwise than by virtue of a short-term detention² under the Mental Health Act 1983³;

193 (2) in a prison or other place to which the Prison Act 1952 applies⁴.

1 'Patient' and 'hospital' have the same meanings as in the Mental Health Act 1983 Pt II (ss 2-34) (see **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 435, 415 respectively); Marriage Act 1949 s 78(4) (added by the Marriage Act 1983 Sch 1 para 21); Marriage Act 1983 s 1(4); Civil Partnership Act 2004 s 19(7).

2 ie a detention under the Mental Health Act 1983 s 2, 4, 5, 35, 36 or 136 (see **MENTAL HEALTH**).

3 Marriage Act 1949 s 78(4)(a) (as added: see note 1); Marriage Act 1983 s 1(4)(a); Civil Partnership Act 2004 s 19(2)(a).

4 Marriage Act 1949 s 78(4)(b) (as added: see note 1); Marriage Act 1983 s 1(4)(b); Civil Partnership Act 2004 s 19(2)(b).

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171. Marriages of housebound and detained persons.

The marriage of a person who is housebound¹ or is a detained person² may be solemnised in England and Wales, on the authority of certificates of a superintendent registrar³, at the place where that person usually resides⁴.

Nothing in these provisions is to be taken to relate or have any reference to any marriage according to the uses of the Society of Friends⁵ or any marriage between two persons professing the Jewish religion⁶ according to the usages of the Jews⁷.

1 As to the meaning of 'housebound' see PARA 169.

2 As to the meaning of 'detained' see PARA 170.

3 I.e. a certificate issued under the Marriage Act 1949 Pt III (ss 26-52): see PARA 54 et seq. As to the meaning of 'superintendent registrar' see PARA 22 note 1.

4 Marriage Act 1949 s 26(1)(dd) (added by the Marriage Act 1983 Sch 1 para 4); Marriage Act 1983 s 1(1) (amended by the Immigration and Asylum Act 1999 Sch 14 para 77(a)). For these purposes, a person who is housebound or is a detained person is to be taken, if he or she would not otherwise be, to be usually resident at the place where he or she is for the time being: Marriage Act 1949 s 78(5) (added by the Marriage Act 1983 Sch 1 para 21); Marriage Act 1983 s 1(5).

5 As to marriages according to the uses of the Society of Friends see PARA 116.

6 As to marriages between two persons professing the Jewish religion according to the usages of the Jews see PARA 118.

7 Marriage Act 1983 s 1(6).

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172. Notice of marriage of housebound and detained persons to be solemnised at a person's residence or place of detention.

The following provisions apply in relation to any marriage¹ intended to be solemnised, otherwise than according to the usages of the Society of Friends or between persons professing the Jewish religion according to the usages of the Jews, at the residence of a person who is housebound² or is a detained person³ (the 'relevant person')⁴.

Where the relevant person is not a detained person, each notice of marriage⁵ must be accompanied by a medical statement⁶ relating to that person made not more than 14 days before the date on which the notice is given⁷.

Where the relevant person is a detained person, each notice of marriage⁸ must be accompanied by a statement made in the prescribed form⁹ by the responsible authority¹⁰ not more than 21 days before the date on which notice of the marriage is given:

- 194 (1) identifying the establishment where the person is detained¹¹; and
- 195 (2) stating that the responsible authority has no objection to that establishment being specified in the notice of marriage as the place where that marriage is to be solemnised¹².

Each person who gives notice of the marriage to the superintendent registrar must give the superintendent registrar the prescribed particulars, in the prescribed form¹³, of the person by or before whom the marriage is intended to be solemnised¹⁴.

The superintendent registrar must not enter the particulars given in the marriage notice book¹⁵ until he has received the required¹⁶ statement and particulars¹⁷.

The fact that a superintendent registrar has received a statement¹⁸ must be entered in the marriage notice book together with the particulars given in the notice of marriage; and any such statement together with the form received by the superintendent registrar¹⁹ must be filed and kept with the records of the office of the superintendent registrar or, where notice of marriage is required to be given to two superintendent registrars, of each of them²⁰.

1 le any marriage intended to be solemnised at a person's residence in pursuance of the Marriage Act 1949 s 26(1)(dd) (see PARA 171).

2 As to the meaning of 'housebound' see PARA 169.

3 As to the meaning of 'detained person' see PARA 170.

4 Marriage Act 1949 s 27A(1) (added by the Marriage Act 1983 Sch 1 para 6). The superintendent registrar is entitled to receive from any person intending to be married in pursuance of the Marriage Act 1949 s 26(1)(dd) on whom he attends at a place other than his office in order to be given notice of marriage the sum of £47: s 27(7) (added by the Marriage Act 1983, Sch 1 paras 1, 5; amended by SI 2002/3076; SI 2005/1997). As to the meaning of 'superintendent registrar' see PARA 22 note 1.

5 le the notice required by the Marriage Act 1949 s 27: see PARA 87.

6 'Medical statement' means a statement in the form prescribed by the Registration of Marriages Regulation 1986, SI 1986/1442, reg 5(a), Sch 1 Form 5 (amended by SI 2000/3164) by a registered medical practitioner that in his opinion at the time the statement is made the person in question is 'housebound' as described in PARA 169: Marriage Act 1949 s 27A(2) (added by the Marriage Act 1983 Sch 1 para 6).

7 Marriage Act 1949 s 27A(2) (added by the Marriage Act 1983 Sch 1 para 6; amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 9(a)); Marriage Act 1983 s 1(2)(a) (amended by the Immigration and Asylum Act 1999 Sch 14 para 77).

8 See note 5.

9 For the prescribed form of statement see the Registration of Marriages Regulations 1986, SI 1986/1442, Sch 1, Form 6 (amended by SI 2000/3164).

10 For these purposes, 'responsible authority' means: (1) if the person is detained in a hospital, within the meaning of the Mental Health Act 1983 Pt II (ss 2-34: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 417), the managers of that hospital, within the meaning of s 145(1) (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 439); or (2) if the person is detained in a prison or other place to which the Prison Act 1952 applies (see **PRISONS**), the governor or other officer for the time being in charge of that prison or other place: Marriage Act 1949 s 27A(7) (added by the Marriage Act 1983 Sch 1 para 6)).

11 Marriage Act 1949 s 27A(3)(a) (added by the Marriage Act 1983 Sch 1 para 6; amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 9).

12 Marriage Act 1949 s 27A(3)(b) (added by the Marriage Act 1983 Sch 1 para 6; amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 9(a)). Such an objection can relate only to the convenience and availability of the establishment in which the marriage can be performed and not to a consideration of public policy matters: *R (on the application of the Crown Prosecution Service) v Registrar for Births, Deaths and Marriages* [2002] EWCA Civ 1661, [2002] QB 1222, [2003] 1 All ER 540.

13 For the prescribed form of particulars see the Registration of Marriages Regulations 1986, SI 1986/1442 Sch 1, Form 7 (amended by SI 2000/3164); and for the corresponding form in Welsh see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621, Sch 1, Form 4 (amended by SI 2000/3164).

14 Marriage Act 1949 s 27A(4) (added by the Marriage Act 1983 Sch 1 para 6; amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 9(b)).

15 As to the meaning of 'marriage notice book' see PARA 92.

16 Ie the statement and particulars required by the Marriage Act 1949 s 27A(2), (3) or (4) (see the text and notes 1-14).

17 Marriage Act 1949 s 27A(5) (added by the Marriage Act 1983 Sch 1 para 6).

18 Ie under the Marriage Act 1949 s 27A(2) or, as the case may be, s 27A(3).

19 Ie the form received under Marriage Act 1949 s 27A(4).

20 Marriage Act 1949 s 27A(6) (added by the Marriage Act 1983 Sch 1 para 6; amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 9(c)).

UPDATE

172 Notice of marriage of housebound and detained persons to be solemnised at a person's residence or place of detention

TEXT AND NOTE 17--Marriage Act 1949 s 27A(5) amended: SI 2009/2821.

NOTE 20--Where the particulars given in the notice of marriage are to be entered in an approved electronic form, the duty imposed by the 1949 Act s 27A(6) to enter the statement in the marriage notice book is to be discharged by entering the statement in an approved electronic form: Marriage Act 1949 s 27A(6A) (added by SI 2009/2821).

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173. Solemnisation of marriage at place of residence.

The marriage of a person who is housebound¹ or is a detained person² at the place where he or she usually resides³ may be solemnised according to the rites of the Church of England⁴.

The marriage, otherwise than according to the rites of the Church of England, the usages of the Society of Friends or between two persons professing the Jewish religion according to the usages of the Jews, may be solemnised according to a relevant form, rite or ceremony⁵ in the presence of a registrar⁶ of the registration district⁷ in which the place where the marriage is solemnised is situated and of two witnesses; and each of the persons contracting the marriage must make the prescribed declaration and use the prescribed form of words⁸ as are required in the case of marriages in registered buildings⁹.

Where such a marriage is not so solemnised, it must be solemnised in the presence of the superintendent registrar¹⁰ and a registrar of the registration district in which the place where the marriage is solemnised is situated and in the presence of two witnesses; and the persons to be married must make the prescribed declaration¹¹ and use the prescribed form of words¹² as are required in the case of marriages in registered buildings¹³. No religious service may, however, be used at any marriage solemnised in the presence of a superintendent registrar¹⁴.

If a marriage is solemnised in the presence of a registrar of marriages and before, during or immediately after solemnisation of the marriage the registrar has reasonable grounds for suspecting that the marriage will be, or is, a sham marriage¹⁵, he must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations¹⁶.

A marriage solemnised at a person's residence in the presence of a registrar must be registered by that registrar¹⁷.

1 As to the meaning of 'housebound' see PARA 169.

2 As to the meaning of 'detained person' see PARA 170.

3 I.e. a marriage solemnised in pursuance of the Marriage Act 1949 s 26(1)(dd): see PARA 161.

4 See the Marriage Act 1949 s 17; and PARA 54.

5 For these purposes, 'relevant form, rite or ceremony' means a form, rite or ceremony of a body of persons who meet for religious worship in any registered building, being a form, rite or ceremony in accordance with which members of that body are married in any such registered building: Marriage Act 1949 s 45A(5) (added by the Marriage Act 1983 s 1(7), Sch 1 paras 1, 11). As to the meaning of 'registered building' see PARA 54 note 3.

6 As to the meaning of 'registrar' see PARA 88 note 1.

7 As to the meaning of 'registration district' see PARA 87 note 4.

8 I.e. the declaration and form of words set out in the Marriage Act 1949 s 44(3) or s 44(3A): see PARA 105.

9 Marriage Act 1949 s 45A(1), (2) (added by the Marriage Act 1983 Sch 1 paras 1, 11; amended by the Marriage Ceremony (Prescribed Words) Act 1996 s 1(2)).

10 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

11 See note 8.

12 See note 8.

13 Marriage Act 1949 s 45A(3) (added by the Marriage Act 1983 Sch 1 paras 1, 11; amended by the Marriage Ceremony (Prescribed Words) Act 1996 s 1(2)).

14 Marriage Act 1949 s 45A(4) (added by the Marriage Act 1983 Sch 1 paras 1, 11). A religious ceremony may, however, follow a marriage in the presence of a superintendent registrar (see the Marriage Act 1949 s 46; and PARA 57); but the religious ceremony may not be entered as a marriage in any marriage register book kept under the Marriage Act 1949 (see s 46(2); and PARA 57).

15 As to the meaning of 'sham marriage' see PARA 11.

16 Immigration and Asylum Act 1999 s 24(2), (3). As to the prescribed form and manner see PARA 11 note 7.

17 See the Marriage Act 1949 s 53(d) (amended by the Marriage Act 1983 Sch 1 paras 1, 16); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 558.

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174. Civil partnerships of housebound persons.

Where two people wish to register as civil partners¹ of each other at the place where one of them is housebound², the procedure under which they may register as civil partners of each other is the same as the standard procedure³ except that:

- 196 (1) each notice of proposed civil partnership⁴ must be accompanied by a medical statement⁵ which must have been made not more than 14 days before the day on which the notice is recorded⁶;
- 197 (2) the fact that the registration authority⁷ to whom the notice is given has received the medical statement must be recorded in the register⁸; and
- 198 (3) the applicable period⁹ is the period of three months beginning with:
15
 - 23. (a) the day on which the notices of proposed civil partnership are recorded¹⁰;
 - or
 - 24. (b) if the notices are not recorded on the same day, the earlier of those days¹¹.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 As to the meaning of 'housebound' see PARA 169.

3 As to the standard procedure see PARA 133 et seq.

4 As to notice of proposed civil partnership see PARA 133.

5 See a statement under the Civil Partnership Act 2004 s 18(2): see PARA 169 note 2. A medical statement must contain such information and must be made in such manner as may be prescribed by regulations: s 18(4). As to such information see the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3176, Forms 6, 6(w). A medical statement may not be made in relation to a person who is detained: Civil Partnership Act 2004 s 18(5).

6 Civil Partnership Act 2004 s 18(1), (3)(a).

7 As to the meaning of 'registration authority' see PARA 133 note 2.

8 Civil Partnership Act 2004 s 18(3)(b). As to the meaning of 'register' see PARA 133 note 7.

9 See for the purposes of the Civil Partnership Act 2004 s 17 (see PARA 139).

10 Civil Partnership Act 2004 s 18(3)(c)(i).

11 Civil Partnership Act 2004 s 18(3)(c)(ii).

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175. Civil partnerships of detained persons.

Where two people wish to register as civil partners¹ of each other at the place where one of them is detained², the procedure under which they may register as civil partners of each other is the same as the standard procedure³ except that:

- 199 (1) each notice of proposed civil partnership⁴ must be accompanied by a supporting statement⁵, which must have been made not more than 21 days before the day on which the notice is recorded⁶;
- 200 (2) the fact that the registration authority to whom the notice is given has received the supporting statement must be recorded in the register⁷; and
- 201 (3) the applicable period⁸ is the period of three months beginning with:
 - 17 25. (a) the day on which the notices of proposed civil partnership are recorded⁹; or
 - 26. (b) if the notices are not recorded on the same day, the earlier of those days¹⁰.
- 18

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 As to the meaning of 'detained' see PARA 170.

3 As to the standard procedure see PARA 133 et seq.

4 As to notice of proposed civil partnership see PARA 133.

5 'Supporting statement' means, in relation to a detained person, a statement made by the responsible authority which:

51 (1) identifies the establishment where the person is detained (Civil Partnership Act 2004 s 19(4)(a)); and

52 (2) states that the responsible authority has no objection to that establishment being specified in a notice of proposed civil partnership as the place at which the person is to register as a civil partner (s 19(4)(b)).

A supporting statement must contain such information and must be made in such manner as may be prescribed by regulations: s 19(5). As to such prescribed information see the Civil Partnership (Registration Provisions) Regulations 2005, SI 2005/3175, Forms 7, 7(w).

'Responsible authority' means:

53 (a) if the person is detained in a hospital, the hospital's managers (Civil Partnership Act 2004 s 19(6)(a));

54 (b) if the person is detained in a prison or other place to which the Prison Act 1952 (see **PRISONS**) applies, the governor or other officer for the time being in charge of that prison or other place (Civil Partnership Act 2004 s 19(6)(b)).

6 Civil Partnership Act 2004 s 19(1), (3)(a).

7 Civil Partnership Act 2004 s 19(3)(b). As to the meaning of 'register' see PARA 133 note 7.

8 le for the purposes of the Civil Partnership Act 2004 s 17 (see PARA 139).

- 9 Civil Partnership Act 2004 s 19(3)(c)(i).
- 10 Civil Partnership Act 2004 s 19(3)(c)(ii).

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(9) PERSONS SUBJECT TO IMMIGRATION CONTROL

176. Marriage where a party is subject to immigration control.

Where a marriage is to be solemnised on the authority of certificates issued by a superintendent registrar¹ and a party to the marriage is subject to immigration control², the superintendent registrar must not enter in the marriage notice book³ notice of a marriage unless satisfied, by the provision of specified evidence⁴, that the party subject to immigration control:

- 202 (1) has an entry clearance⁵ granted expressly for the purpose of enabling him to marry in the United Kingdom⁶;
- 203 (2) has the written permission of the Secretary of State to marry in the United Kingdom⁷; or
- 204 (3) falls within a class specified by the Secretary of State⁸.

1 le under the Marriage Act 1949 Pt III (ss 26-52) (see PARA 87 et seq).

2 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(1). 'Person subject to immigration control' means a person who is not an EEA national and requires leave to enter or remain in the United Kingdom, whether or not that leave has been given: s 19(4)(a). 'EEA national' means a national of a State which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)): s 19(4)(b).

3 As to the meaning of 'marriage notice book' see PARA 92.

4 'Specified evidence' means such evidence as may be specified in guidance issued by the Registrar General: Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(4)(d).

5 'Entry clearance' has the same meaning as given by the Immigration Act 1971 s 33(1) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 96): Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(4)(c).

6 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(3)(a).

7 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(3)(b). As to permissions see the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15, regs 7, 8, Sch 2.

8 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(3)(c). As to the specified classes of persons see the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15, reg 6.

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177. Special provision for the giving of notices.

Where a marriage is to be solemnised on the authority of certificates issued by a superintendent registrar¹ and a party to the marriage is subject to immigration control², the notices required to be given³:

- 205 (1) must be given to the superintendent registrar of a registration district specified for these purposes⁴;
- 206 (2) must be delivered to the superintendent registrar in person by the two parties to the marriage⁵;
- 207 (3) may be given only if each party to the marriage has been resident in a registration district for the period of seven days immediately before the giving of his or her notice (although the district need not be that in which the notice is given and the parties need not have resided in the same district)⁶; and
- 208 (4) must state, in relation to each party, the registration district by reference to which the above provision is satisfied⁷.

1 le under the Marriage Act 1949 Pt III (ss 26-52) (see PARA 87 et seq).

2 As to the meaning of 'person subject to immigration control' see PARA 176 note 2.

3 le under the Marriage Act 1949 s 27: see PARA 87 et seq.

4 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(1), (2)(a). As to the specified registration districts see the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15, reg 3, Sch 1.

5 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(2)(b).

6 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(2)(c).

7 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 19(2)(d).

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178. Civil partnership where a party is subject to immigration control.

Where a civil partnership¹ is to be formed in England and Wales by two persons of whom one is subject to immigration control², by signing a civil partnership schedule³:

- 209 (1) the necessary declaration⁴ must include a statement that the person subject to immigration control fulfils the qualifying condition⁵, and the reason why⁶; and
- 210 (2) the fact that a notice of proposed civil partnership⁷ has been given must not be recorded in the register⁸ unless the registration authority⁹ is satisfied by the production of specified evidence¹⁰ that the person fulfils the qualifying condition¹¹.

1 As to the meaning of 'civil partnership' see PARA 2 note 1.

2 See the Civil Partnership Act 2004 s 249. For these purposes, a person is subject to immigration control if: (1) he is not an EEA national; and (2) under the Immigration Act 1971 (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**) he requires leave to enter or remain in the United Kingdom, whether or not leave has been given: Civil Partnership Act 2004 Sch 23 para 1(2). 'EEA national' means a national of a State which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), as it has effect from time to time: Civil Partnership Act 2004 Sch 23 para 1(3).

3 As to the meaning of 'civil partnership schedule' see PARA 138.

4 ie the necessary declaration under the Civil Partnership Act 2004 s 8 (see PARA 133).

5 'Qualifying condition' means that the party subject to immigration control:

55 (1) has an entry clearance granted expressly for the purpose of enabling him to form a civil partnership in the United Kingdom (Civil Partnership Act 2004 Sch 23 para 2(1)(a));

56 (2) has the written permission of the Secretary of State to form a civil partnership in the United Kingdom (Sch 23 para 2(1)(b)); or

57 (3) falls within a class specified by the Secretary of State (Sch 23 para 2(1)(c)).

As to permissions see the Immigration (Procedure for Formation of Civil Partnerships) Regulation 2005, SI 2005/2917, reg 3, Sch 1; as to the specified classes see reg 4. 'Entry clearance' has the meaning given by the Immigration Act 1971 s 33(1) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 96): Civil Partnership Act 2004 Sch 23 para 2(2).

6 Civil Partnership Act 2004 Sch 23 para 5.

7 As to the meaning of 'proposed civil partnership' see PARA 133.

8 As to the meaning of 'register' see PARA 133 note 7.

9 As to the meaning of 'registration authority' see PARA 133 note 2.

10 'Specified evidence' means such evidence as may be specified by guidance issued by the Registrar General: Civil Partnership Act 2004 Sch 23 para 6(2).

11 Civil Partnership Act 2004 Sch 23 para 6(1).

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179. Special provision for the giving of notices.

Where a civil partnership¹ is to be formed in England and Wales by two persons one of whom is subject to immigration control² by signing a civil partnership schedule³, each notice of proposed civil partnership⁴;

- 211 (1) must be given to a registration authority specified for these purposes⁵;
- 212 (2) must be delivered to the relevant individual⁶ in person by the two proposed civil partners⁷;
- 213 (3) may be given only if each of the proposed civil partners has been resident in the area of a registration authority for the period of seven days immediately before the giving of his or her notice (although the area need not be that in which the notice is given and the proposed civil partners need not have resided in the area of the same registration authority)⁸; and
- 214 (4) must state, in relation to each of the proposed civil partners, the registration authority by reference to which the above provision is satisfied⁹.

1 Ie under the Marriage Act 1949 Pt III (ss 26-52) (see PARA 87 et seq).

2 As to the meaning of 'person subject to immigration control' see PARA 178 note 2.

3 As to the meaning of 'civil partnership schedule' see PARA 138.

4 Ie under the Civil Partnership Act 2004 Pt 2 Chapter 1 (ss 2-36): see PARA 133 et seq.

5 Civil Partnership Act 2004 Sch 23 paras 3, 4(1)(a). As to the specified registration authorities see the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15, reg 5(1), Sch 2.

6 'Relevant individual' means such employee or officer or other person provided by the specified registration authority as is determined in accordance with regulations made by the Secretary of State (Civil Partnership Act 2004 Sch 23 para 4(2)); see the Immigration (Procedure for Formation of Civil Partnerships) Regulations 2005, SI 2005/2917, reg 5(2).

7 Civil Partnership Act 2004 Sch 23 para 4(1)(b).

8 Civil Partnership Act 2004 Sch 23 para 4(1)(c) (Sch 23 para 4(1)(c), (d) added by SI 2005/2000).

9 Civil Partnership Act 2004 Sch 23 para 4(1)(d) (as added: see note 8).

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(10) OFFENCES

180. Offences relating to solemnisation of marriages.

If a person knowingly and wilfully:

- 215 (1) solemnises a marriage at any other time than between the hours of 8 am and 6 pm¹, not being a marriage by special licence², a marriage according to the usages of the Society of Friends³ or a marriage between two persons professing the Jewish religion⁴ according to the usages of the Jews⁵;
- 216 (2) solemnises a marriage according to the rites of the Church of England without banns of matrimony having been duly published⁶, not being a marriage solemnised on the authority of a special licence, a common licence⁷ or certificates of a superintendent registrar⁸;
- 217 (3) solemnises a marriage according to such rites, not being a marriage by special licence or a marriage of a person who is housebound or a detained person⁹, in any place other than a church or other building in which banns may be published¹⁰;
- 218 (4) solemnises a marriage according to such rites falsely pretending to be in holy orders¹¹,

he is guilty of an offence and liable on conviction to imprisonment for a term not exceeding 14 years¹².

If a person knowingly and wilfully:

- 219 (a) solemnises a marriage, not being a marriage by special licence, a marriage according to the usages of the Society of Friends or a marriage between two persons professing the Jewish religion according to the usages of the Jews, in any place other than a church or other building in which marriages may be solemnised according to the rites of the Church of England or the registered building¹³, office, approved premises¹⁴ or person's residence specified as the place where the marriage was to be solemnised in the required¹⁵ notices of marriage and certificates¹⁶;
- 220 (b) solemnises a marriage¹⁷ on premises which purport to be approved premises but are not approved premises¹⁸;
- 221 (c) solemnises a marriage in any such registered building, not being a marriage in the presence of an authorised person¹⁹, in the absence of a registrar²⁰ of the district²¹ in which the registered building is situated²²;
- 222 (d) solemnises a marriage of a person who is housebound or a detained person²³, otherwise than according to the rites of the Church of England, in the absence of a registrar of the registration district in which the place where the marriage is solemnised is situated²⁴;
- 223 (e) solemnises a marriage in the office of a superintendent registrar²⁵ in the absence of a registrar of the district in which the office is situated²⁶;
- 224 (f) solemnises a marriage on approved premises²⁷ in the absence of a registrar of the district in which the premises are situated²⁸;

- 225 (g) solemnises a marriage on the authority of certificates of a superintendent registrar before the expiry of the waiting period²⁹ in relation to each notice of marriage³⁰; or
- 226 (h) solemnises a marriage on the authority of certificates of a superintendent registrar after the expiration of the period which is³¹, in relation to the marriage, the applicable period³²,

he is guilty of an offence and liable on conviction to imprisonment for a term not exceeding five years³³.

If a superintendent registrar knowingly and wilfully:

- 227 (i) issues any certificate for marriage before the expiry of 15 days from the day on which the notice of marriage was entered in the marriage notice book³⁴;
- 228 (ii) issues any certificate for marriage after the expiration of the period which is³⁵, in relation to that marriage, the applicable period³⁶;
- 229 (iii) issues any certificate the issue of which has been forbidden³⁷ by any person entitled to forbid the issue of such a certificate³⁸; or
- 230 (iv) solemnises or permits to be solemnised in his office or, in the case of a marriage on approved premises³⁹ or in a person's residence⁴⁰, in any other place any marriage which is⁴¹ void⁴²,

he is guilty of an offence and liable on conviction to imprisonment for a term not exceeding five years⁴³.

No prosecution under the above provisions is to be commenced after the expiration of three years from the commission of the offence⁴⁴.

- 1 As to the hours between which a marriage must in general be solemnised see PARA 82.
- 2 As to special licences see PARAS 58, 76.
- 3 As to marriages according to the usages of the Society of Friends see PARA 116.
- 4 As to marriages between two persons professing the Jewish religion according to the usages of the Jews see PARA 118.
- 5 Marriage Act 1949 s 75(1)(a).
- 6 As to the publication of banns of matrimony see PARAS 58, 65 et seq.
- 7 As to common licences see PARAS 58, 76.
- 8 Marriage Act 1949 s 75(1)(b) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 30(1), (2)). As to the meaning of 'superintendent registrar' see PARA 22 note 1.
- 9 Is a marriage in pursuance of the Marriage Act 1949 s 26(1)(dd) (see PARA 171 et seq).
- 10 Marriage Act 1949 s 75(1)(c) (amended by the Marriage Act 1983 Sch 1 paras 1, 20).
- 11 Marriage Act 1949 s 75(1)(d).
- 12 Marriage Act 1949 s 75(1).
- 13 For these purposes, any reference to a registered building is to be construed as including a reference to any chapel registered under the Marriage Act 1949 s 70 (see PARA 129); s 75(5). As to the meaning of 'registered building' generally see PARA 54 note 3; as to the registration of buildings for marriages see PARAS 186-189.
- 14 As to the meaning of 'approved premises' see PARA 54 note 6.

- 15 le required by the Marriage Act 1949 Pt III (ss 26-52): see PARA 87 et seq.
- 16 Marriage Act 1949 s 75(2)(a) (amended by the Marriage Act 1983 Sch 1 paras 1, 20; the Marriage Act 1994 Schedule paras 1, 7; the Immigration and Asylum Act 1999 Sch 14 paras 3, 30(1), (3)(a)).
- 17 le a marriage purporting to be in pursuance of the Marriage Act 1949 s 26(1)(bb) (see PARA 54).
- 18 Marriage Act 1949 s 75(2)(aa) (added by the Marriage Act 1994 Schedule paras 1, 7). As to the approval of premises for marriage see PARAS 190-202.
- 19 As to the meaning of 'authorised person' see PARA 107.
- 20 As to the meaning of 'registrar' see PARA 88 note 1.
- 21 As to the meaning of 'registration district' see PARA 87 note 4.
- 22 Marriage Act 1949 s 75(2)(b).
- 23 See note 9.
- 24 Marriage Act 1949 s 75(2)(bb) (added by the Marriage Act 1983 Sch 1 para 20).
- 25 As to the meaning of 'superintendent registrar' see PARA 22 note 1.
- 26 Marriage Act 1949 s 75(2)(c).
- 27 le in pursuance of the Marriage Act 1949 s 26(1)(bb) (see PARA 54).
- 28 Marriage Act 1949 s 75(2)(cc) (added by the Marriage Act 1994 Schedule paras 1, 7).
- 29 For these purposes, 'waiting period' has the same meaning as in the Marriage Act 1949 s 31(4A) (see PARA 94): s 75(2A) (added by the Immigration and Asylum Act 1999 Sch 14 paras 3, 30(1), (4)).
- 30 Marriage Act 1949 s 75(2)(d) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 30(1), (3)(b)).
- 31 le for the purposes of the Marriage Act 1949 s 33 (see PARA 101).
- 32 Marriage Act 1949 s 75(2)(e) (amended by SI 1997/986; the Immigration and Asylum Act 1999 Sch 14 paras 3, 30(1), (3)(c)).
- 33 Marriage Act 1949 s 75(2).
- 34 Marriage Act 1949 s 75(3)(a) (substituted by the Immigration and Asylum Act 1999 Sch 14 paras 3, 30(1), (5)). As to the meaning of 'marriage notice book' see PARA 92.
- 35 See note 31.
- 36 Marriage Act 1949 s 75(3)(b) (amended by SI 1997/986; the Immigration and Asylum Act 1999 Sch 14 paras 3, 30(1), (6), Sch 16).
- 37 le under the Marriage Act 1949 s 30 (see PARA 95).
- 38 Marriage Act 1949 s 75(3)(c).
- 39 See note 27.
- 40 See note 9.
- 41 le by virtue of any of the provisions of the Marriage Act 1949 Pt III (ss 26-52).
- 42 Marriage Act 1949 s 75(3)(d) (amended by the Marriage Act 1983 Sch 1 para 20; the Marriage Act 1994 Schedule paras 1, 7).
- 43 Marriage Act 1949 s 75(3).
- 44 Marriage Act 1949 s 75(4).

UPDATE

180 Offences relating to solemnisation of marriages

TEXT AND NOTE 34--1949 Act s 75(3)(a) amended: SI 2009/2821.

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181. Offences relating to registration of marriages.

Any person who refuses or without reasonable cause omits to register any marriage which he is required by the Marriage Act 1949 to register, and any person having custody of a marriage register book or a certified copy of a marriage register book or part thereof who carelessly loses or injures such book or copy or carelessly allows such book or copy to be injured while in his keeping is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale¹.

Where any person who is required² to make and deliver to a superintendent registrar a certified copy of entries in the marriage register book kept by him, or a certificate that no entries have been made therein since the date of the last certified copy, refuses to deliver any such copy or certificate, or fails to deliver any such copy or certificate during any month in which he is required to do so, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale³.

Any registrar⁴ who knowingly and wilfully registers any marriage which is void⁵ is guilty of an offence and liable to imprisonment for a term not exceeding five years⁶; but no prosecution for such an offence may be commenced after the expiration of three years from the commission of the offence⁷.

1 Marriage Act 1949 s 76(1) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the meaning of 'standard scale' see PARA 84 note 3. The balance of any sum paid or recovered on account of a fine imposed under the Marriage Act 1949 s 76(1) or s 76(2) must be paid: (1) in the case of a fine imposed under s 76(1), into the Exchequer; and (2) in the case of a fine imposed under s 76(2), to the Registrar General or such other person as may be appointed by the Treasury, for the use of Her Majesty: s 76(4). Subject as may be prescribed, a superintendent registrar may prosecute any person guilty of an offence under s 76(1) or (2) committed within his district; and any costs incurred by the superintendent registrar in prosecuting any such person, being costs which are not otherwise provided for, must be defrayed out of moneys provided by Parliament: s 76(5). As to the meaning of 'Registrar General' see PARA 46 note 5; and as to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 Ie under the Marriage Act 1949 Pt IV (ss 53-67) (see **REGISTRATION CONCERNING THE INDIVIDUAL**).

3 Marriage Act 1949 s 76(2) (amended by the Criminal Justice Act 1982 ss 38, 46). See also note 1.

4 As to the meaning of 'registrar' see PARA 88 note 1.

5 Ie by virtue of any of the provisions of the Marriage Act 1949 Pt III (ss 26-52) (see PARA 87). As to void marriages see PARA 326.

6 Marriage Act 1949 s 76(3).

7 Marriage Act 1949 s 76(6).

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182. Offences by authorised persons.

Any authorised person¹ who refuses or fails to comply with the provisions of the Marriage Act 1949 or of any regulations made under it² is guilty of an offence and, unless the offence is one for which a specific penalty is provided under the provisions of that Act³, is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or on summary conviction to a fine not exceeding the prescribed sum, and on conviction ceases to be an authorised person⁴.

1 As to the meaning of 'authorised person' see PARA 107.

2 Ie under the Marriage Act 1949 s 74 (see PARAS 87 note 2, 107 note 6).

3 Ie under Marriage Act 1949 ss 72-76. See eg s 76(1), (2); PARA 181; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 527-530.

4 Marriage Act 1949 s 77 (amended by the Criminal Law Act 1977 s 32(1); the Magistrates' Courts Act 1980 s 32(2)). As to the meaning of 'prescribed sum' see PARA 77 note 16.

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183. Offences in relation to a Registrar General's licence.

It is an offence knowingly and wilfully:

- 231 (1) to solemnise a marriage by Registrar General's¹ licence in any place other than the place specified in the licence²;
- 232 (2) to solemnise a marriage by Registrar General's licence without the presence of a registrar³, except in the case of a marriage according to the usages of the Society of Friends⁴ or a marriage between two persons professing the Jewish religion⁵ according to the usages of the Jews⁶;
- 233 (3) to solemnise a marriage by Registrar General's licence after the expiration of one month from the date of entry of the notice of marriage in the marriage notice book⁷;
- 234 (4) to give false information by way of evidence required⁸ by the Registrar General⁹;
- 235 (5) to give a false medical certificate¹⁰,

and any person guilty of any of the above offences is liable on conviction on indictment to imprisonment for a term not exceeding three years or a fine, or to both, or on summary conviction to a fine not exceeding the prescribed sum¹¹.

A superintendent registrar who knowingly and wilfully solemnises or permits to be solemnised in his presence, or a registrar who knowingly and wilfully registers a marriage by Registrar General's licence which is void¹², is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding three years or a fine, or to both, or on summary conviction to a fine not exceeding the prescribed sum¹³.

No prosecution under the above provisions is to be commenced after the expiration of three years from the commission of the offence¹⁴.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 Marriage (Registrar General's Licence) Act 1970 s 16(1)(a).

3 As to the meaning of 'registrar' see PARA 88 note 1.

4 As to marriage according to the usages of the Society of Friends see PARA 116.

5 As to marriage between two persons professing the Jewish religion according to the usages of the Jews see PARA 118.

6 Marriage (Registrar General's Licence) Act 1970 s 16(1)(b).

7 Marriage (Registrar General's Licence) Act 1970 s 16(1)(c). As to the meaning of 'marriage notice book' see PARA 92.

8 As required by the Marriage (Registrar General's Licence) Act 1970 s 3 (see PARA 163).

9 Marriage (Registrar General's Licence) Act 1970 s 16(1)(d).

10 Marriage (Registrar General's Licence) Act 1970 s 16(1)(e). As to the giving of a medical certificate see s 3(d); and PARA 163.

11 Marriage (Registrar General's Licence) Act 1970 s 16(1) (amended by the Criminal Law Act 1977 s 32(1); the Magistrates' Courts Act 1980 s 32(2)). As to the meaning of 'prescribed sum' see PARA 77 note 16. The provisions of the Marriage Act 1949 s 75(1)(a), (2)(a) (offence of knowingly and wilfully solemnising a marriage out of hours or in an unauthorised place: see PARA 180) do not apply to a marriage solemnised on the authority of the Registrar General's licence: Marriage (Registrar General's Licence) Act 1970 s 16(4).

12 Ie by virtue of the Marriage Act 1949 Pt III (ss 26-52) (see PARA 87 et seq). As to void marriages see PARA 326.

13 Marriage (Registrar General's Licence) Act 1970 ss 1(2), 16(2) (amended by the Criminal Law Act 1977 s 32(1); the Magistrates' Courts Act 1980 s 32(2)).

14 Marriage (Registrar General's Licence) Act 1970 s 16(3).

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184. Making false statements etc with reference to marriage.

If any person:

- 236 (1) for the purpose of procuring a marriage, or a certificate or licence for marriage, knowingly and wilfully makes a false oath, or makes or signs a false declaration, notice or certificate required under any Act of Parliament for the time being in force relating to marriage¹;
- 237 (2) knowingly and wilfully makes, or knowingly and wilfully causes to be made, for the purpose of being inserted in any register of marriage, a false statement as to any particular required by law to be known and registered relating to marriage²;
- 238 (3) forbids the issue of any certificate or licence for marriage by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false³; or
- 239 (4) with respect to a declaration relating to a marriage within the prohibited degrees of affinity⁴, enters a caveat⁵ or makes a declaration⁶ which he knows to be false in a material particular⁷,

he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to a fine not exceeding the prescribed sum⁸.

No prosecution for knowingly and wilfully making a false declaration for the purpose of procuring a marriage out of the district in which the parties, or one of them, dwell may take place after the expiration of 18 months from the solemnisation of the marriage to which the declaration refers⁹.

1 Perjury Act 1911 s 3(1)(a).

2 Perjury Act 1911 s 3(1)(b). If a new surname has been acquired by repute, the use of such reputed name in a notice of marriage will not support an indictment: *R v Smith* (1865) 4 F & F 1099.

3 Perjury Act 1911 s 3(1)(c).

4 Ie a declaration made under the Marriage Act 1949 s 16(1A) (see PARA 77) or s 27B(2) (see PARA 93).

5 Ie under the Marriage Act 1949 s 16(2) (see PARA 78).

6 Ie mentioned in the Marriage Act 1949 s 27B(4) (see PARA 93).

7 Perjury Act 1911 s 3(1)(d) (added by the Marriage (Prohibited Degrees of Relationship) Act 1986 s 4).

8 Perjury Act 1911 s 3(1) (amended by the Criminal Justice Act 1925 s 28(1); the Criminal Justice Act 1967 s 92(1), Sch 3, Pt I). As to the meaning of 'prescribed sum' see PARA 77 note 16. If it appears to a registrar that an offence under the Perjury Act 1911 has been committed, he must report the matter to the Registrar General: see the Registration of Marriages Regulations 1986, SI 1986/1442, reg 20(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 527.

9 Perjury Act 1911 s 3(2).

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185. Making false statements etc with reference to civil partnerships.

A person commits an offence if:

- 240 (1) for the purpose of procuring the formation of a civil partnership¹, or certain documents relating to the formation of civil partnerships², he makes or signs a declaration³ or gives a notice or certificate so required knowing that the declaration, notice or certificate is false⁴;
- 241 (2) for the purpose of a record being made in any register relating to civil partnerships, he makes a statement as to any information which is required to be registered⁵, or causes such a statement to be made knowing that the statement is false⁶;
- 242 (3) he forbids the issue of a document mentioned in head (1) or head (2) by representing himself to be a person whose consent to a civil partnership between a child and another person is required⁷ knowing the representation to be false⁸; or
- 243 (4) with respect to a declaration⁹ he makes a statement¹⁰ which he knows to be false in a material particular¹¹.

A person guilty of such an offence is liable:

- 244 (a) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine or both¹²; or
- 245 (b) on summary conviction, to a fine not exceeding the statutory maximum¹³.

1 As to the meaning of 'civil partnership' see PARA 2 note 1.

2 Ie: (1) a civil partnership schedule (see PARA 138) or a Registrar General's licence (see PARA 143); (2) a document required by an Order in Council under the Civil Partnership Act 2004 s 210 (see PARA 145) or s 211 (see PARA 153) as an authority for two people to register as civil partners of each other; or (3) a certificate of no impediment under s 240 (see PARA 152): s 80(2).

3 Ie a declaration required under the Civil Partnership Act 2004 Pt 2 (ss 2-80) or Pt 5 (ss 210-245): s 80(1)(a).

4 Civil Partnership Act 2004 s 80(1)(a). The Perjury Act 1911 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 712 et seq) has effect as if the Civil Partnership Act 2004 s 80 were contained in it: s 80(4).

5 Ie under the Civil Partnership Act 2004 Pt 2 or Pt 5.

6 Civil Partnership Act 2004 s 80(1)(b).

7 Ie under the Civil Partnership Act 2004 Pt 2 or Pt 5.

8 Civil Partnership Act 2004 s 80(1)(c).

9 Ie under the Civil Partnership Act 2004 Sch 1 para 5(1) (see PARA 135).

10 Ie under the Civil Partnership Act 2004 Sch 1 para 6 (see PARAS 135, 137).

11 Civil Partnership Act 2004 s 80(1)(d).

12 Civil Partnership Act 2004 s 80(3)(a).

13 Civil Partnership Act 2004 s 80(3)(b). 'Statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. 'Prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

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3. REGISTRATION AND APPROVAL OF PREMISES

(1) REGISTRATION OF BUILDINGS FOR MARRIAGES

186. Application for registration of building.

Any proprietor or trustee of a building which has been certified as required by law as a place of religious worship¹ may apply to the superintendent registrar² of the registration district³ in which the building is situated for the building to be registered for the solemnisation of marriages⁴. A building may be so registered for the solemnisation of marriages whether it is a separate building or forms part of another building⁵.

Any person making such an application must deliver to the superintendent registrar a certificate, signed in duplicate by at least 20 householders and dated not earlier than one month before the making of the application, stating that the building is being used by them as their usual place of public religious worship, and that they desire that it should be registered; and both certificates must be countersigned by the proprietor or trustee by whom they are delivered⁶.

1 Places of religious worship may be certified, under the Places of Worship Registration Act 1855 s 2, to the Registrar General through the superintendent registrar of the district, but certification is not compulsory unless the place is to be used for marriages: see **ECCLESIASTICAL LAW** vol 14 PARA 1410 et seq. A list of certified places of religious worship is kept by the Registrar General and is open to public inspection: see **ECCLESIASTICAL LAW** vol 14 PARA 1410. Certification effected before 1 January 1950 continues in force by virtue of the Marriage Act 1949 s 79(2). Proof of certification of a building is not necessary to the validity of a marriage solemnised in it: see PARA 22.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 As to the meaning of 'registration district' see PARA 87 note 4.

4 Marriage Act 1949 s 41(1) (amended by the Marriage (Registration of Buildings) Act 1990 s 1(1)). The provisions of the Marriage Act 1949 relating to the registration of buildings apply in relation to the registration of a shared church building, with certain modifications: see the Sharing of Church Buildings Act 1969 s 6(1), Sch 1; and **ECCLESIASTICAL LAW** vol 14 PARA 1412.

5 Marriage Act 1949 s 41(7) (substituted by the Marriage (Registration of Buildings) Act 1990 s 1(1)).

6 Marriage Act 1949 s 41(2) (substituted by the Marriage Acts Amendment Act 1958 s 1(1)(a)).

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187. Registration of building.

On receipt of the certificates accompanying an application to register a building¹, the superintendent registrar² must send them both to the Registrar General³, who must register the building accordingly in a book kept for the purpose at the General Register Office⁴, and, having indorsed the date of registration on both certificates, must keep one with the records of the General Register Office, and return the other to the superintendent registrar to be kept with the records of his office⁵.

On the return of the certificate, the superintendent registrar must:

- 246 (1) enter the date of registration in a book provided for that purpose by the Registrar General⁶;
- 247 (2) give a certificate of registration signed by him, on durable materials, to the proprietor or trustee by whom the certificates accompanying the application were countersigned⁷; and
- 248 (3) give public notice of the registration of the building by advertisement in a newspaper circulating in the county in which the building is situated, and in the London Gazette⁸.

For every such entry, certificate and notice the superintendent registrar is entitled to receive a fee of £120 at the time of the delivery to him of the certificates in duplicate⁹.

1 As to these certificates see PARA 86.

2 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

3 As to the meaning of 'Registrar General' see PARA 46 note 5.

4 See the Marriage Act 1949 s 41(3). As to the General Register Office see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605.

5 Marriage Act 1949 s 41(4).

6 Marriage Act 1949 s 41(5)(a).

7 Marriage Act 1949 s 41(5)(b).

8 Marriage Act 1949 s 41(5)(c).

9 Marriage Act 1949 s 41(6) (amended by SI 2002/3076).

UPDATE

187 Registration of building

NOTE 4--Now, the duty imposed by the Marriage Act 1949 s 41(3) to register the building in a book may be discharged by registering the building in an approved electronic form: Marriage Act 1949 s 41(3A) (added by SI 2009/2821).

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188. Cancellation of registration.

Where, on an application made by or through the superintendent registrar¹ of the registration district² in which the building is situated, it is shown to the satisfaction of the Registrar General³ that a registered building⁴ is no longer used for the purpose of public religious worship by the congregation on whose behalf it was registered, he must cause the registration to be cancelled⁵.

Where the Registrar General so cancels the registration of any building, he must inform the superintendent registrar, who must enter that fact and the date in the books provided for the registration of buildings, and must certify and publish the cancellation in the same manner as in the case of the registration of a building⁶.

Where the registration of any building has been so cancelled, it is not lawful to solemnise any marriage in the disused building, unless the building has been registered⁷ again⁸.

1 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

2 As to the meaning of 'registration district' see PARA 87 note 4.

3 As to the meaning of 'Registrar General' see PARA 46 note 5.

4 As to the registration of buildings see PARAS 186-187.

5 Marriage Act 1949 s 42(1) (amended by the Marriage Acts Amendment Act 1958 s 1(1)). In such a case the certification under the Places of Worship Registration Act 1855 will be cancelled: see s 8; and **ECCLESIASTICAL LAW** vol 14 PARA 1410.

6 Marriage Act 1949 s 42(3) (amended by the Marriage Acts Amendment Act 1958 s 1(1)). As to the certifying and publishing of notice of registration see PARA 187.

7 In accordance with the Marriage Act 1949 Pt III (ss 26-52): see PARAS 186, 187.

8 Marriage Act 1949 s 42(5) (amended by the Marriage Acts Amendment Act 1958 s 1(1)). The solemnisation of marriage in an unauthorised place is an offence: see PARA 180.

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189. List of registered buildings.

The Registrar General¹ must in every year make out and cause to be printed a list of all chapels² and registered buildings³, stating in that list the county and registration district⁴ in which each chapel or building is situated, and the names and places of residence of the superintendent registrars⁵, registrars⁶, and deputy registrars of each district⁷; and a copy of every such list made by the Registrar General must be sent to each registrar and superintendent registrar⁸.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 The Registrar General compiles the list of chapels from returns made to him annually by registrars of dioceses: see the Marriage Act 1949 s 73(1); and PARA 64.

3 As to the meaning of 'registered building' see PARA 54 note 3.

4 As to the meaning of 'registration district' see PARA 87 note 4.

5 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

6 As to the meaning of 'registrar' see PARA 88 note 1.

7 Marriage Act 1949 s 73(2).

8 Marriage Act 1949 s 73(3).

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(2) APPROVALS OF PREMISES FOR MARRIAGES AND CIVIL PARTNERSHIPS

190. Powers of the Secretary of State.

The Secretary of State may by regulations make provision for and in connection with the approval by local authorities¹ of premises for the solemnisation of marriages² or the approval by registration authorities³ of premises for the registration of civil partnerships⁴ on approved premises⁵.

The matters dealt with by the regulations may include:

- 249 (1) the kinds of premises in respect of which approvals may be granted⁶;
- 250 (2) the procedure to be followed in relation to applications for approval⁷;
- 251 (3) the considerations to be taken into account by a local authority in determining whether to approve any premises⁸;
- 252 (4) the duration and renewal of approvals⁹;
- 253 (5) the conditions that must or may be imposed by a local authority or registration authority on granting or renewing an approval¹⁰;
- 254 (6) the determination and charging by local authorities or registration authorities of fees in respect of applications for the approval of premises and in respect of the renewal of approvals¹¹;
- 255 (7) the circumstances in which a local authority or registration authority must or may revoke an approval¹²;
- 256 (8) the review of any decision to refuse an approval or the renewal of an approval, to impose conditions on granting or renewing an approval or to revoke an approval¹³;
- 257 (9) the notification to the Registrar General¹⁴ of all approvals granted, renewed or revoked¹⁵;
- 258 (10) the keeping by local authorities or registration authorities of registers of approved premises¹⁶;
- 259 (11) the issue by the Registrar General of guidance supplementing the provisions made by the regulations¹⁷.

1 For these purposes, 'local authority' means a county council, metropolitan district council, London borough council or the Common Council of the City of London: Marriage Act 1949 s 46A(3) (added by the Marriage Act 1994 s 1(2); and amended by the City of London (Approved Premises for Marriage) Act 1996 s 3(2)).

2 Ie in pursuance of the Marriage Act 1949 s 26(1)(bb): see PARA 54.

3 As to the meaning of 'registration authority' see PARA 133 note 2.

4 Ie for the purposes of the Civil Partnership Act 2004 s 6(3A)(a): see PARA 56.

5 Marriage Act 1949 s 46A(1) (added by the Marriage Act 1994 s 1(2); amended by SI 2008/678); Civil Partnership Act 2004 s 6A(1) (s 6A added by SI 2005/2000; amended by SI 2008/678). In exercise of the power so conferred the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, were made: see PARA 191 et seq. As to the meaning of 'approved premises' see PARA 54 note 6. As to the solemnisation of marriages on approved premises see PARA 111. As to the registration of civil partnerships on approved premises see PARA 133 et seq.

- 6 Marriage Act 1949 s 46A(2)(a) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(a) (as added: see note 5).
- 7 Marriage Act 1949 s 46A(2)(b) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(b) (as added: see note 5).
- 8 Marriage Act 1949 s 46A(2)(c) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(c) (as added: see note 5).
- 9 Marriage Act 1949 s 46A(2)(d) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(d) (as added: see note 5).
- 10 Marriage Act 1949 s 46A(2)(e) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(e) (as added: see note 5).
- 11 Marriage Act 1949 s 46A(2)(f) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(f) (as added: see note 5).
- 12 Marriage Act 1949 s 46A(2)(g) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(g) (as added: see note 5).
- 13 Marriage Act 1949 s 46A(2)(h) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(h) (as added: see note 5).
- 14 As to the meaning of 'Registrar General' see PARA 46 note 5.
- 15 Marriage Act 1949 s 46A(2)(i) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(i) (as added: see note 5).
- 16 Marriage Act 1949 s 46A(2)(j) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(j) (as added: see note 5).
- 17 Marriage Act 1949 s 46A(2)(k) (as added: see note 5); Civil Partnership Act 2004 s 6A(2)(k) (as added: see note 5). Without prejudice to the width of the Marriage Act 1949 s 46A(2)(e) or the Civil Partnership Act 2004 s 6A(2)(e) (see text head (5)), the Secretary of State must exercise his power to provide for the imposition of conditions as there mentioned so as to secure that members of the public are permitted to attend any marriage solemnised on approved premises in pursuance of s 26(1)(bb) (see PARA 54) or when two people sign the civil partnership schedule on approved premises in accordance with s 6(3A)(a) (see PARA 56); s 46B(2) (added by the Marriage Act 1994 s 1(2); amended by SI 2008/678); Civil Partnership Act 2004 s 6A(3) (as so added; amended by SI 2008/678).

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191. Application for approval of premises.

Application for approval¹ may be made by a proprietor or a trustee of premises².

The applicant³ must deliver to the proper officer⁴ of the authority⁵:

- 260 (1) an application in writing, including the name and address of the applicant and such other information concerning the prescribed requirements⁶ as the authority may reasonably have required⁷;
- 261 (2) a plan of the premises which clearly identifies the room or rooms in which the proceedings will take place if approval is granted⁸; and
- 262 (3) if the authority so requires, a fee⁹, or an amount on account of that fee¹⁰.

The applicant must provide the authority with such additional information as it may reasonably require in order to determine the application¹¹.

As soon as practicable after receiving an application the authority must:

- 263 (a) arrange for the premises to be inspected¹²; and
- 264 (b) if the functions of the authority¹³ have not been delegated to the proper officer, seek and have regard to his recommendation in relation to the application¹⁴.

1 For these purposes, unless the context otherwise requires, 'approval' means approval of premises for the solemnisation of marriages in pursuance of the Marriage Act 1949 s 26(1)(bb) and as a place at which two people may register as civil partners of each other in pursuance of the Civil Partnership Act 2004 s 6(3A)(a) (see PARA 56 note 11); and 'approved premises' is to be construed accordingly: Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 2(1).

2 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 3(1). For these purposes, unless the context otherwise requires, 'premises' means a permanently immovable structure comprising at least a room, or any boat or other vessel which is permanently moored: reg 2(1).

3 For these purposes, unless the context otherwise requires, 'applicant' means an applicant for approval; and 'application' is to be construed accordingly: Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 2(1).

4 For these purposes, unless the context otherwise requires, 'proper officer' means the proper officer referred to in the Registration Service Act 1953 s 13(2)(h) (see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 625): Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 2(1).

5 For these purposes, unless the context otherwise requires, 'authority', in relation to any premises, means the body which is the local authority for the area in which those premises are situated, being one of the bodies specified as such by the Marriage Act 1949 s 46A(3) (see PARA 190 note 1) or the Civil Partnership Act 2004 s 28 (see PARA 47 note 1): Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 2(1).

6 Ie the requirements set out in the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 1: see PARA 193.

7 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 3(2)(a).

8 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 3(2)(b).
'Proceedings' means the solemnisation of marriages or the formation of civil partnerships: reg 2(1).

9 Such fee is to be determined in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12 (see PARA 200): reg 3(2)(c).

10 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 3(2)(c).

11 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 3(3).

12 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 3(4)(a).

13 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168: see PARA 192 et seq.

14 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 3(4)(b).

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192. Public consultation.

As soon as practicable after receiving an application¹ the authority² must:

- 265 (1) make the application and the plan accompanying it available to members of the public for inspection at all reasonable hours during the working day until such time as the application has been finally determined or withdrawn³; and
- 266 (2) ensure that public notice of the application is given by advertisement in a newspaper, which may be a newspaper distributed free of charge, which is in general circulation at intervals of not more than one week in the area in which the premises⁴ are situated⁵.

The notice referred to in head (2) above must:

- 267 (a) identify the premises and the applicant⁶;
- 268 (b) indicate the address at which the application and the plan accompanying it may be inspected in accordance with head (1) above⁷;
- 269 (c) state that any person may give notice in writing of an objection to the grant of approval, with reasons for the objection, within 21 days from the date on which the newspaper in which the advertisement appears is published⁸; and
- 270 (d) state the address of the offices of the authority to which such notice of objection should be given⁹.

Before reaching a decision on the application, the authority must consider any notice of objection given as mentioned in head (c) above¹⁰.

1 As to the meaning of 'application' see PARA 191 note 3.

2 As to the meaning of 'authority' see PARA 191 note 5.

3 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(1)(a).

4 As to the meaning of 'premises' see PARA 191 note 2.

5 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(1)(b).

6 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(2)(a). As to the meaning of 'applicant' see PARA 191 note 3.

7 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(2)(b).

8 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(2)(c).

9 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(2)(d).

10 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(3).

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193. Grant or refusal of approval.

The authority¹ may grant approval² only if it is satisfied:

- 271 (1) that the application³ has been duly made⁴;
- 272 (2) that the premises⁵ fulfil the prescribed requirements, that is to say:
 - 19 27. (a) having regard to their primary use, situation, construction and state of repair, the premises are, in the opinion of the authority, a seemly and dignified venue for the proceedings⁶;
 - 28. (b) the premises are regularly available to the public for use for the solemnisation of marriages or the formation of civil partnerships⁷;
 - 29. (c) the premises have the benefit of such fire precautions as may reasonably be required by the authority, having consulted with the fire and rescue authority (in England) or the fire authority (in Wales), and such other reasonable provision for the health and safety of persons employed in or visiting the premises as the authority considers appropriate⁸;
 - 30. (d) the premises must not be religious premises⁹ or a register office¹⁰;
 - 31. (e) the room or rooms in which the proceedings are to take place, if approval is granted, are identifiable by description as a distinct part of the premises¹¹; and
 - 20 273 (3) that the premises fulfil any other reasonable requirements which the authority considers appropriate to ensure that the facilities provided at the premises are suitable¹².

The authority may refuse to grant approval if, notwithstanding that it is satisfied as to the matters set out in heads (1) to (3) above, it considers, having regard to the number of other approved premises¹³ in its area, that the superintendent registrar and a registrar or a civil partnership registrar as the case may be, are unlikely to be available regularly to attend proceedings on the premises¹⁴.

The authority must as soon as practicable notify the applicant¹⁵ and any person who has given notice of objection¹⁶ in writing of its decision, including any conditions imposed¹⁷ by the authority¹⁸.

If approval is refused, or conditions other than the standard conditions¹⁹ are attached to the approval, or approval is granted after a person has given notice of objection²⁰, the authority must set out in any notification given by it²¹ its reasons for reaching that decision²².

If approval is refused or conditions other than the standard conditions²³ are attached to the approval, the authority must notify the applicant of the right to seek a review²⁴ of its decision²⁵.

1 As to the meaning of 'authority' see PARA 191 note 5.

2 As to the meaning of 'approval' see PARA 191 note 1.

3 As to the meaning of 'application' see PARA 191 note 3.

4 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(1)(a). The application must be duly made in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168: see PARAS 191-192; and PARA 194 et seq.

5 As to the meaning of 'premises' see PARA 191 note 2.

6 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 1 para 1. As to the meaning of 'proceedings' see PARA 191 note 8.

7 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 1 para 2.

8 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 1 para 3.

9 As to the meaning of 'religious premises' see the Civil Partnership Act 2004 s 6(2); and PARA 56 note 10.

10 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 1 para 4. However Sch 1 para 4 does not apply to premises in which a register officer is situated, provided that the room which is subject to approval is not the same room as the room which is the register office: Sch 1 para 4.

11 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 1 para 5.

12 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(1)(c).

13 As to the meaning of 'approved premises' see PARA 191 note 1.

14 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(2).

15 As to the meaning of 'applicant' see PARA 191 note 3.

16 Ie in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(2)(c): see PARA 192 head (c).

17 Ie under Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 6: see PARA 194.

18 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(3). As to the giving of notice see PARA 201.

19 Ie other than the conditions specified in Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 6(1)(a), Sch 2: see PARA 194 heads (1)-(14).

20 Ie in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 4(2)(c): see PARA 192 head (c).

21 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(3) (see text and note 18).

22 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(4).

23 Ie other than the conditions specified in Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 6(1)(a), Sch 2: see PARA 194 heads (1)-(14).

24 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9: see PARA 197.

25 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(5).

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194. Conditions attached to the approval.

On grant of an approval¹, the authority² must attach to the approval the following conditions (the 'standard conditions')³:

- 274 (1) the holder of the approval⁴ must ensure that there is at all times an individual with responsibility for ensuring compliance with these conditions (the 'responsible person') and that the responsible person's occupation, seniority, position of responsibility in relation to the premises, or other factors (his 'qualification'), indicate that he is in a position to ensure compliance with these conditions⁵;
- 275 (2) the responsible person or, in his absence, an appropriately qualified deputy appointed by him, must be available on the premises⁶ for a minimum of one hour prior to and throughout each of the proceedings⁷;
- 276 (3) the holder must notify the authority of his name and address immediately on his becoming the holder of an approval⁸ and of the name, address and qualification of the responsible person immediately on the appointment of a new responsible person⁹;
- 277 (4) the holder must notify the authority immediately of any change to any of the following:
 - 21 32. (a) the layout of the premises, as shown in the plan submitted with the approved application, or in the use of the premises¹⁰;
 33. (b) the name or full postal address of the approved premises¹¹;
 34. (c) the description of the room or rooms in which proceedings are to take place¹²;
 35. (d) the name or address of the holder of the approval¹³; and
 36. (e) the name, address or qualification of the responsible person¹⁴;
- 22 278 (5) the approved premises must be made available at all reasonable times for inspection by the authority¹⁵;
- 279 (6) a suitable notice stating that the premises have been duly approved for the proceedings and identifying and giving directions to the room in which the proceedings are to take place must be displayed at each public entrance to the premises for one hour prior to the ceremony and throughout the ceremony¹⁶;
- 280 (7) no food or drink may be sold or consumed in the room in which the proceedings take place for one hour prior to that ceremony or during those proceedings¹⁷;
- 281 (8) all proceedings must take place in a room which was identified as one to be used for that purpose on the plan submitted with the approved application¹⁸;
- 282 (9) the room in which the proceedings are conducted must be separate from any other activity on the premises at the time of the proceedings¹⁹;
- 283 (10) the arrangements for, and content of, the proceedings must meet with the prior approval of the superintendent registrar²⁰ of the district²¹ in which the approved premises are situated²²;
- 284 (11) any proceedings conducted on approved premises must not be religious in nature²³;

- 285 (12) public access to any proceedings in approved premises must be permitted without charge²⁴;
- 286 (13) any reference to the approval of premises on any sign or notice, or on any stationery or publication, or within any advertisement may state that the premises have been approved by the authority as a venue for marriage²⁵ and the formation of civil partnerships²⁶ but must not state or imply any recommendation of the premises or its facilities by the authority, the Registrar General²⁷ or any of the officers or employees of either of them²⁸;
- 287 (14) if a change of name to the premises occurs after the issue of the certificate for marriage or the civil partnership document but before the proceedings, the former name of the approved premises as recorded in the certificate for marriage or the civil partnership document must remain valid for its duration for the purpose of the proceedings²⁹.

In addition, on grant of an approval, the authority may attach to the approval such further conditions as it considers reasonable in order to ensure that the facilities provided at the premises are suitable and that the proceedings on the premises do not give rise to a nuisance of any kind³⁰.

Immediately after the grant of an approval the holder of that approval must notify to the proper officer³¹ the name, address and qualification of the responsible person³².

1 As to the meaning of 'approval' see PARA 191 note 1.

2 As to the meaning of 'authority' see PARA 191 note 5.

3 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 6(1)(a).

4 For these purposes, unless the context otherwise requires, 'holder of an approval' means the person on whose application the approval was granted or a person who is deemed to be the holder of an approval under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(2) (see PARA 195): reg 2(1).

5 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 1. As to the meaning of 'application' see PARA 191 note 3.

6 As to the meaning of 'premises' see PARA 191 note 2.

7 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 2. As to the meaning of 'proceedings' see PARA 191 note 8.

8 *Ie* under Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(2).

9 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 3.

10 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 4(a).

11 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 4(b). As to the meaning of 'approved premises' see PARA 191 note 1.

12 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 4(c).

13 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 4(d).

14 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 4(e).

15 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 5.

16 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 6.

17 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 7.

18 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 8.

19 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 9.

20 As to the meaning of 'superintendent registrar' see PARA 46 note 2.

21 As to the meaning of 'registration district' see PARA 87 note 4.

22 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 10.

23 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 11(1).
In particular the proceedings must not:

58 (1) include extracts from an authorised religious marriage service or from sacred religious texts (Sch 2 para 11(2)(a));

59 (2) be led by a minister of religion or other religious leader (Sch 2 para 11(2)(b));

60 (3) involve a religious ritual or series of rituals (Sch 2 para 11(2)(c));

61 (4) include hymns or other religious chants (Sch 2 para 11(2)(d)); or

62 (5) include any form of worship (Sch 2 para 11(2)(e)).

But the proceedings may include readings, songs or music that contains an incidental reference to a god or deity in an essentially non-religious context: Sch 2 para 11(3). For this purpose any material used by way of introduction to, in any interval between parts of, or by way of conclusion to the proceedings is treated as forming part of the proceedings: Sch 2 para 11(4).

24 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 12.

25 Ie in pursuance of the Marriage Act 1949 s 26(1)(bb): see PARA 54.

26 Ie under the Civil Partnership Act 2004 s 6(3A)(a): see PARA 56.

27 As to the meaning of 'Registrar General' see PARA 46 note 5.

28 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 13.

29 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 2 para 14.

30 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 6(1)(b).

31 As to the meaning of 'proper officer' see PARA 191 note 4.

32 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 6(2).

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195. Expiry and renewal of approval.

An approval¹ is valid² for a period of three years³; and it remains in force⁴ notwithstanding that the holder⁵ ceases to have a proprietary interest in the premises⁶ and the person to whom his interest is transferred is deemed to be the holder in his place⁷.

An application for renewal of an approval may be made by the holder of that approval not more than 12 months before it is due to expire⁸. If an application for renewal has been so made and that application has not been finally determined or withdrawn before the date on which the approval would otherwise expire, the approval continues in effect until such time as the application is finally determined or withdrawn⁹.

Where the holder fails to apply for the renewal of approval and the approval expires in consequence of this failure, an application for renewal may be made¹⁰ and within one month of the expiry must reinstate the approval and an approval so reinstated must continue in effect until such time as the application is finally determined or withdrawn¹¹.

1 As to the meaning of 'approval' see PARA 191 note 1.

2 Ie subject to the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(5), (6) and reg 8 (see PARA 196).

3 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(1).

4 Ie without prejudice to the provisions of the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, as to the duration of approval or revocation of approval (see PARA 196), or any condition as to notification of change of ownership (see PARA 194).

5 As to the meaning of 'holder of an approval' see PARA 194 note 4.

6 As to the meaning of 'premises' see PARA 191 note 2.

7 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(2).

8 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(3). Regulation 3(2)-(4) (see PARA 191), reg 4 (see PARA 192), reg 5 (see PARA 193) and reg 6 (see PARA 194) apply to an application to renew an approval as they apply to an application for approval and as though any reference in them to an applicant were to an application for renewal and to a grant of approval were to a renewal of approval: reg 7(4).

9 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(5).

10 Ie in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(4) (see note 8).

11 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 7(6).

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196. Revocation of approval.

An authority¹ which has granted an approval² may revoke it if it is satisfied that:

- 288 (1) the holder³ has failed to comply with one or more of the conditions attached to the approval⁴; or
- 289 (2) the use or structure of the premises⁵ has changed so that, having regard to the requirements for the grant of an approval⁶ and any requirements set by the authority⁷, the premises are no longer suitable for any proceedings⁸.

Before so revoking an approval, the authority must deliver to the holder of that approval a notice in writing specifying the ground or grounds on which it proposes to revoke the approval and inviting the holder to make written representations as to the proposed revocation within such period, being not less than 14 days, as is specified in the notice⁹. The authority must deliver a copy of such a notice to the superintendent registrar¹⁰ for the district¹¹ in which the premises are situated¹² and to the civil partnership registrars¹³ and person authorised¹⁴ for the area in which the premises are situated¹⁵.

Before reaching a final decision on the proposed revocation, the authority must take into account any representations made to it within the specified period¹⁶ by or on behalf of the holder of the approval¹⁷.

If the authority decides to revoke the approval, it must deliver a further notice in writing to the holder, stating the date on which the approval is to cease to have effect and the procedure whereby such decision may¹⁸ be subject to review¹⁹.

The Registrar General²⁰ may direct the authority to revoke any approval if, in his opinion, there have been breaches of the law relating to marriage on the approved premises²¹. Before directing any such revocation, the Registrar General must notify the holder of the grounds on which she proposes to direct that the approval be revoked and deliver a notice in writing to the holder inviting him to make representations in writing as to the proposed revocation within such period, being not less than 14 days, as she specifies²².

Before reaching a final decision on the proposed direction, the Registrar General must take into account any representations made to him within the specified period²³ by or on behalf of the holder of the approval²⁴.

The authority must forthwith revoke any approval with immediate effect if directed to do so in writing by the Registrar General²⁵ and deliver a notice of revocation in writing to the holder²⁶.

The authority must revoke any approval with immediate effect as soon as practicable after being requested to do so by the holder of that approval and deliver a notice of revocation in writing to the holder²⁷.

On receipt of notice of revocation under the above provisions²⁸, the holder of an approval must forthwith give notice of revocation to all parties who have made arrangements for any proceedings to take place in the premises which were approved but whose proceedings have not yet taken place there²⁹.

- 1 As to the meaning of 'authority' see PARA 191 note 5.
- 2 As to the meaning of 'approval' see PARA 191 note 1.
- 3 As to the meaning of 'holder of an approval' see PARA 194 note 4.
- 4 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(1)(a). The conditions attached to the approval mentioned in the text refer to conditions attached under reg 6(1): see PARA 194.
- 5 As to the meaning of 'premises' see PARA 191 note 2.
- 6 Ie the requirements set out in the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, Sch 1: see PARA 193.
- 7 Ie in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(1)(c): see PARA 193 head (3).
- 8 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(1)(b). As to the meaning of 'proceedings' see PARA 191 note 8.
- 9 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(2). As to the giving of notice see PARA 201.
- 10 As to the meaning of 'superintendent registrar' see PARA 46 note 2.
- 11 As to the meaning of 'registration district' see PARA 87 note 4.
- 12 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(3)(a).
- 13 As to the meaning of 'civil partnership registrar' see PARA 133 note 7.
- 14 Ie a person authorised under the Civil Partnership Act 2004 s 8(6): see PARA 866.
- 15 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(3)(b).
- 16 Ie the period referred to in Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(2).
- 17 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(4).
- 18 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9: see PARA 197.
- 19 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(5).
- 20 As to the meaning of 'Registrar General' see PARA 46 note 5.
- 21 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(6). As to the meaning of 'approved premises' see PARA 191 note 1.
- 22 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(7).
- 23 Ie the period referred to in the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(7).
- 24 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(8).
- 25 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(6).
- 26 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(9).
- 27 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(10).
- 28 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(5), (9) or (10).

29 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(11).

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197. Reviews.

An applicant¹ who is aggrieved in relation to a decision to refuse an approval² or to attach to an approval conditions other than the standard conditions³ may request a review of that decision⁴.

A holder of an approval⁵ who is aggrieved in relation to a decision:

- 290 (1) to refuse to renew that approval⁶; or
- 291 (2) to attach to the renewal of that approval conditions other than the standard conditions⁷; or
- 292 (3) to revoke that approval save in the specified circumstances⁸,

may request a review of that decision⁹.

A person requesting such a review¹⁰ must deliver his request to the proper officer¹¹ of the authority¹², accompanied if the authority so requires, except in the case of a request to review a decision to revoke an approval, by a fee¹³, or an amount on account of that fee¹⁴.

The proper officer must immediately arrange for review of the decision by the authority and neither an officer nor any member of a committee or sub-committee of the authority which made the decision on behalf of the authority is to take part in the decision on the review¹⁵.

On a review of a decision, the authority may¹⁶:

- 293 (a) confirm the original decision¹⁷;
- 294 (b) vary an original decision to grant or renew approval, in particular by removing conditions attached by the authority¹⁸ or by attaching new or different conditions¹⁹; or
- 295 (c) substitute a different decision, which may, where the original decision was to revoke an approval, be a decision that the approval should not be revoked but should be subject to new or different conditions than those which were previously attached to it²⁰.

The authority must give notice in writing to the applicant or holder of its decision on review, stating its reasons for that decision and, except where the original decision is confirmed, the date from which it takes effect²¹.

1 As to the meaning of 'applicant' see PARA 191 note 3.

2 As to the meaning of 'approval' see PARA 191 note 1.

3 As to the meaning of 'standard conditions' see PARA 194.

4 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(1).

5 As to the meaning of 'holder of an approval' see PARA 194 note 4.

6 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(2)(a).

7 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(2)(b).

8 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(2)(c). The specified circumstances mentioned in the text refer to the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 8(9) or (10): see PARA 196.

9 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(2).

10 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(1) or (2).

11 As to the meaning of 'proper officer' see PARA 191 note 4.

12 As to the meaning of 'authority' see PARA 191 note 5.

13 Such fee is to be determined in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12 (see PARA 200): reg 9(3).

14 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(3).

15 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(4).

16 Ie acting in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 5(1), (2): see PARA 193.

17 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(5)(a).

18 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 6(1)(b): see PARA 194.

19 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(5)(b).

20 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(5)(c).

21 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9(6). As to the giving of notices see PARA 201.

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198. Registers of approved premises.

Each authority¹ must keep a register of all premises² which are approved by the authority, containing:

- 296 (1) the name and full postal address of the approved premises³;
- 297 (2) the description of the room or rooms in which proceedings are to take place⁴;
- 298 (3) the name and address of the holder of the approval⁵;
- 299 (4) the date of grant of the approval⁶;
- 300 (5) the due date of expiry of that approval⁷;
- 301 (6) if the approval is renewed, the date of renewal⁸;
- 302 (7) if the approval is revoked, the date on which the revocation takes effect⁹; and
- 303 (8) the name, address and qualification¹⁰ of the responsible person¹¹.

The proper officer¹² must make the appropriate entries in the register immediately after the grant of an approval and must amend the register immediately after receiving notification that any of the details listed in heads (1) to (8) above have changed, or on renewal or revocation of an approval¹³.

Immediately after making or amending any entry in the register, the proper officer must deliver a copy of the entry or amendment to the Registrar General¹⁴ and to the superintendent registrar¹⁵ for the district¹⁶ in which the premises in question are situated¹⁷ and to the civil partnership registrars and persons authorised¹⁸ for the area in which the premises are situated¹⁹.

The register must be open to public inspection during normal working hours²⁰; and it must be kept in permanent form which may include its maintenance on a computer²¹.

1 As to the meaning of 'authority' see PARA 191 note 5.

2 As to the meaning of 'premises' see PARA 191 note 2.

3 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(a). As to the meaning of 'approved premises' see PARA 191 note 1.

4 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(b). As to the meaning of 'proceedings' see PARA 191 note 8.

5 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(c). As to the meaning of 'holder of an approval' see PARA 194 note 4.

6 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(d).

7 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(e).

8 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(f).

9 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(g).

10 As to the meaning of 'qualification' see PARA 194.

- 11 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1). As to the meaning of 'responsible person' see PARA 194.
- 12 As to the meaning of 'proper officer' see PARA 191 note 4.
- 13 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(2).
- 14 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(3)(a). As to the meaning of 'Registrar General' see PARA 46 note 5.
- 15 As to the meaning of 'superintendent registrar' see PARA 46 note 2.
- 16 As to the meaning of 'registration district' see PARA 87 note 4.
- 17 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(3)(b).
- 18 Is authorised under the Civil Partnership Act 2004 s 8(6): see PARA 133 note 6.
- 19 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(3)(c).
- 20 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(4).
- 21 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(5).

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199. Guidance concerning grants of approval and approved premises.

The Registrar General¹ may issue guidance supplementing the statutory provisions² relating to the approval of premises³.

1 As to the meaning of 'Registrar General' see PARA 46 note 5.

2 I.e. the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168: see PARA 191 et seq and PARAS 200, 201.

3 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 11.

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200. Fees.

An authority¹ may² determine a fee in respect of an application³ or the renewal of an approval, and may determine that fee either for that particular application or renewal or for applications or renewals generally or of any particular class⁴.

A fee determined for a particular application or renewal must not exceed the amount which reasonably represents the costs incurred or to be incurred by the authority in respect of that application or renewal⁵.

A fee determined for applications or renewals generally or of a particular class must not exceed the amount which reasonably represents the average costs incurred or likely to be incurred by the authority in respect of an application or renewal, or, as the case may be, in respect of an application or renewal of that class⁶.

A fee determined in respect of an application or renewal may not include an amount representing costs incurred in respect of any review or possible review⁷ unless and until such a review is requested in relation to that application or renewal; but, where such a review is requested, an authority may determine an additional fee in respect of that application or renewal⁸, taking into account only the additional costs arising from review⁹.

An authority may charge a fee in respect of an application or renewal, or an amount on account of such fee, even though it may not yet have incurred any cost in respect of that application or renewal¹⁰.

The superintendent registrar¹¹ in whose presence persons are married on approved premises¹² is entitled to receive from them a fee of an amount determined by the authority as reasonably representing all the costs to it of providing a registrar¹³ and superintendent registrar to attend at a solemnisation¹⁴; and the authority may set different fees for different cases or circumstances¹⁵.

Where a civil partnership registrar¹⁶ for any area attends when two people sign the civil partnership schedule on approved premises, the authority for the area must be entitled to receive from them a fee of an amount determined by it as reasonably representing all the costs to it of providing the civil partnership registrar to attend at the formation¹⁷; and the authority may set different fees for different cases or circumstances¹⁸.

¹ As to the meaning of 'authority' see PARA 191 note 5.

² Ie in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(2)-(4).

³ As to the meaning of 'application' see PARA 191 note 3.

⁴ Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(1).

⁵ Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(2).

⁶ Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(3).

⁷ Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 9: see PARA 197.

8 le in accordance with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(2) or (3).

9 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(4).

10 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(5).

11 As to the meaning of 'superintendent registrar' see PARA 46 note 2.

12 As to the meaning of 'approved premises' see PARA 191 note 1.

13 As to the meaning of 'registrar' see PARA 88 note 1.

14 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(6).

15 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(8).

16 As to the meaning of 'civil partnership registrar' see PARA 139 note 8.

17 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(7).

18 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 12(8).

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201. Notices.

If there is more than one holder of an approval¹, any notice which is required² to be delivered to the holder is validly delivered if it is delivered³ to any one of the holders of the approval at the address entered in the register⁴ in respect of that holder⁵.

1 As to the meaning of 'holder of an approval' see PARA 194 note 4.

2 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168: see PARA 191 et seq.

3 Ie in accordance with the other provisions of the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168: see PARA 191 et seq.

4 Ie under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 10(1)(c): see PARA 198 head (3).

5 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 13.

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202. Change of name of approved premises.

If a change of name of the approved premises¹ occurs after the issue of the certificate for marriage or the civil partnership but before the proceedings, that change does not affect the validity of the certificate for marriage or the civil partnership document².

1 As to the meaning of 'approved premises' see PARA 191 note 1.

2 Marriages and Civil Partnerships (Approved Premises) Regulations 2005, SI 2005/3168, reg 15.

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4. LEGAL INCIDENTS OF MARRIAGE AND CIVIL PARTNERSHIP

(1) STATUS OF MARRIED PERSONS AND CIVIL PARTNERS

203. Contractual basis and effect of marriage.

The best known description of marriage as a legal concept is that it is the fulfilment of a contract satisfied by the solemnisation of the marriage, but marriage, directly it exists, creates by law a relation between the parties and what is called a status of each¹. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community². That relation between the parties, and that status of each of them with regard to the community, which are constituted on marriage are not imposed or defined by contract or agreement but by law³.

1 *Niboyet v Niboyet* (1878) 4 PD 1 at 11, CA per Brett LJ. As to the domicile of married women see PARA 214; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 54.

2 See note 1.

3 See note 1.

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204. Position of married women in civil law.

The following provisions derive from enactments specifically referring to 'marriage' and 'married women' and for which no corresponding civil partnership provision has been made: however, it is submitted that these provisions must now also apply, to the extent that they have any continuing relevance, to the contractual rights of either party to a marriage and, presumably, to civil partners.

A married woman is capable of acquiring, holding and disposing of any property in all respects as if she were a feme sole¹. No restriction on anticipation or alienation attached, or purported to be attached, to the enjoyment of property by a woman is of any effect if it could not have been attached to the enjoyment of that property by a man².

A married woman may render herself liable in respect of any tort³ and is liable for all her debts and obligations howsoever incurred⁴: she may be sued in tort in all respects as if she were a feme sole⁵ and is subject to the law relating to bankruptcy and to the enforcement of judgments and orders in the same way⁶. A woman's husband is not, by reason only of his being her husband, liable in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage or in respect of any contract entered into, or debt or obligation incurred, by her after the marriage in respect of which he would not otherwise⁷ have been liable⁸. He is not liable to be sued or to be made a party to any legal proceedings brought in respect of any such tort, contract, debt or obligation⁹. A married couple is not, however, prevented from rendering themselves, or being rendered, jointly liable in respect of any tort, and of suing or being sued in tort as if they were not married¹⁰; moreover, where a tort is committed by a wife with her husband's express authority, or where she is in the position of his agent and the tort is committed in the ordinary course of the agency, the husband and the wife are liable jointly and severally and both or either of them may be sued as in any other case of principal and agent¹¹.

The execution by will of a general power of appointment makes the property appointed liable for the appointor's debts and obligations¹²; a married woman cannot be compelled to exercise such a power in favour of creditors¹³, but, under the bankruptcy laws, the property of a bankrupt includes the capacity to exercise all such powers in respect of property as might have been exercised by the bankrupt for his or her own benefit¹⁴.

1 Law Reform (Married Women and Tortfeasors) Act 1935 s 1(a). 'Feme sole' means an unmarried woman, including a widowed or divorced woman. All property which immediately before 22 August 1935 (ie the date on which the Law Reform (Married Women and Tortfeasors) Act 1935 received the Royal Assent) was the separate property of a married woman or was then held for her separate use in equity, and all property belonging, at the time of her marriage, to a woman married on or after that date, or acquired by or devolving on a married woman on or after that date, belongs to her in all respects as if she were a feme sole and may be disposed of accordingly: s 2(1). Nothing in Pt I (ss 1-5) prevents a husband and wife from acquiring, holding and disposing of any property jointly or as tenants in common: s 4(2)(c). As to the general right of a married woman to bring civil proceedings for the protection and security of her property see PARA 210; as to her right to bring criminal proceedings see PARA 208; as to the removal of the limitations on her right to sue her husband in tort see PARA 211; as to the summary decision of questions as to property between husband and wife see PARA 224 et seq; and as to the restraining or avoidance of transactions made with a view to defeating a spouse's claim for financial relief in matrimonial proceedings see PARAS 586-588.

2 Married Women (Restraint upon Anticipation) Act 1949 s 1(1). This provision has effect whatever is the date of the passing, execution or coming into operation of the Act or instrument containing the provision by

virtue of which the restriction was attached or purported to be attached: s 1(2). The power to impose a restraint on anticipation by an instrument executed on or after 1 January 1936 had already been abolished by the Law Reform (Married Women and Tortfeasors) Act 1935 s 2(2) (repealed), subject to certain special provisions as to when particular instruments were to be deemed to have been executed: s 2(3) (repealed).

3 Law Reform (Married Women and Tortfeasors) Act 1935 s 1(b).

4 Law Reform (Married Women and Tortfeasors) Act 1935 ss 1(b), (c), 2(1). As to the capacity of spouses to make independent contracts see PARA 205; as to contracts between spouses see PARA 206.

5 Law Reform (Married Women and Tortfeasors) Act 1935 s 1(c).

6 Law Reform (Married Women and Tortfeasors) Act 1935 s 1(d). As to the enforcement of judgments and orders see PARAS 210, 623 et seq.

7 Ie if the Law Reform (Married Women and Tortfeasors) Act 1935 had not been passed.

8 Law Reform (Married Women and Tortfeasors) Act 1935 ss 3(a), 4(2)(a); and see *Barber v Pidgen* [1937] 1 KB 664, [1937] 1 All ER 115, CA. Conversely, the husband is not exempt from liability in respect of any contract entered into, or debt or obligation (not being a debt or obligation arising out of the commission of a tort) incurred, by the wife after the marriage in respect of which he would have been liable if the Law Reform (Married Women and Tortfeasors) Act 1935 had not been passed: s 4(2)(b). As to liability to pay non-domestic rates see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 3 et seq; and as to liability to pay council tax see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 240.

9 Law Reform (Married Women and Tortfeasors) Act 1935 s 3(b). Where a man domiciled in England is married there to a woman who has contracted obligations abroad, the extent of his liability when sued in the English courts in respect of such obligations is governed by English law, and not by the law of the place where the obligations were contracted: *De Greuchy v Wills* (1879) 4 CPD 362.

10 Law Reform (Married Women and Tortfeasors) Act 1935 s 4(2)(c). A husband and wife may be jointly liable for the tort of conspiracy, even though they are the only parties to the conspiracy: *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529, [1981] 3 All ER 744, CA (there is no place in the modern law for the mediaeval fiction of unity between husband and wife and, except in so far as the doctrine of unity is retained by statute or judicial decision, a husband and wife are to be treated as separate and equal parties). A husband cannot, however, conspire with his wife alone to commit a criminal act: see PARA 208.

11 *Taylor v Green* (1837) 8 C & P 316 (fraudulent misrepresentations by wife to intending purchaser of business managed by her on behalf of husband; husband liable); *Miell v English* (1866) 15 LT 249 (husband liable for injuries to servant sustained while carrying out wife's directions); *Burdett v Horne* (1911) 28 TLR 83, CA (misrepresentations by wife with husband's knowledge, authority and acquiescence; husband and wife joint tortfeasors). As to the liability of one spouse who permits the other spouse to use his or her car see *Morgans v Launchbury* [1973] AC 127, [1972] 2 All ER 606, HL; and **AGENCY** vol 1 (2008) PARAS 14, 151. As to the statutory right of contribution between joint tortfeasors see the Civil Liability (Contribution) Act 1978 ss 1, 2; **DAMAGES** vol 12(1) (Reissue) PARA 837 et seq; and **TORT** vol 97 (2010) PARA 450 et seq. If either husband or wife is sued alone in respect of a tort jointly committed and judgment is obtained, the judgment recovered is no bar to an action against the other spouse: see ss 3, 6(1); **DAMAGES** vol 12(1) (Reissue) PARAS 348, 349; and **TORT** vol 97 (2010) PARAS 707, 709.

12 See the Administration of Estates Act 1925 s 32(1) (which applies generally to the exercise of general powers of appointment by deceased persons); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 387, 416. As to the exercise of powers of appointment by married women generally see PARA 232. As to the effect of marriage and civil partnership on wills and intestacy see PARA 209.

13 *Hulme v Tenant* (1778) 1 Bro CC 16.

14 See the Insolvency Act 1986 s 283(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216.

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205. Spouses' and civil partners' contracts.

The principle by which a person who executes a deed in his own name is personally liable on it, even though he is in fact an agent for another¹, and the principle by which a person who signs a bill of exchange, cheque or promissory note is personally liable unless he adds words indicating that he signs for or on behalf of a principal², apply in relation to spouses and civil partners.

In the case of a contract in writing other than a deed, a bill of exchange, a cheque or a promissory note the question whether a spouse or civil partner is to be taken to have contracted on his or her own behalf or as agent of his or her spouse or civil partner or a third party must, it seems, be determined in accordance with the general principle which applies in determining whether a person has contracted as principal or agent³, namely by reference to the intention of the parties ascertained from the terms of the written agreement when construed as a whole with reference to the surrounding circumstances, the construction of the contract being a matter of law⁴. If, on the construction of a written contract by an agent, the agent undertakes personal liability, extrinsic evidence of intention is not admissible to exonerate the agent from liability, although by way of equitable defence the agent may set up an express agreement with the other contracting party to that effect⁵.

Spouses and civil partners may contract jointly or jointly and severally with their spouses or civil partner or a third person⁶.

A spouse or civil partner living apart from their spouse or civil partner will be presumed to contract on their own behalf unless a contrary intention appears⁷.

1 See **AGENCY** vol 1 (2008) PARA 157.

2 See the Bills of Exchange Act 1882 s 26(1); **AGENCY** vol 1 (2008) PARA 157; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1473-1477.

3 See *Bowes v Shand* (1877) 2 App Cas 455, HL; *Young v Schuler* (1883) 11 QBD 651, CA; *Southwell v Bowditch* (1876) 1 CPD 374, CA. As to the construction of written instruments generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq.

4 See generally **AGENCY** vol 1 (2008) PARA 1. As to contracts between spouses and civil partners see PARA 206. It has been held that where a contract entered into by a married woman is not reduced to writing, the question whether she is to be deemed to have contracted on her own behalf or as agent for her husband is one of fact, and depends on the circumstances of the particular case: see *Bentley v Griffin* (1814) 5 Taunt 356; *Metcalfe v Shaw* (1811) 3 Camp 22. Although the mere fact that goods are invoiced in the name of the wife does not necessarily indicate that the tradesman intended to give credit to her as a principal (see *Jewsbury v Newbold* (1857) 26 LJ Ex 247; *Paquin Ltd v Beauclerk* [1906] AC 148, HL. Cf *Fick and Fick Ltd v Assimakis* [1958] 3 All ER 182, [1958] 1 WLR 1006, CA), that fact coupled with the circumstance that she herself paid for a portion of the goods, or has previously paid for goods of a similar kind, becomes almost conclusive evidence of such an intention (see *Bentley v Griffin* (1814) 5 Taunt 356; *Freestone v Butcher* (1840) 9 C & P 643; and see *Lea Bridge District Gas Co v Malvern* [1917] 1 KB 803, DC (contract made by widow before remarriage for supply of gas; presumption of continuance on remarriage)). A married woman who contracts on her own behalf is solely liable: see the Law Reform (Married Women and Tortfeasors) Act 1935 s 1; and PARA 204.

5 See **AGENCY** vol 1 (2008) PARA 157; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 186. As to the admission of extrinsic evidence to vary or add to a written agreement generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 185 et seq.

6 See *French v Howie* [1906] 2 KB 674, CA. The power of a husband and wife to contract jointly is not affected by the Law Reform (Married Women and Tortfeasors) Act 1935 Pt I (ss 1-5); see s 4(2)(c); and PARA 204. Where husband and wife are jointly liable under a contract, judgment recovered against one of them in respect of damage suffered through breach of the contract is no longer a bar to an action against the other in respect of the same damage: see the Civil Liability (Contribution) Act 1978 ss 3, 6(1); and **CONTRACT** vol 9(1) (Reissue) PARA 1087. As to the right of one joint contractor, if sued alone, to insist on his co-contractor being joined see **CONTRACT** vol 9(1) (Reissue) PARA 1080.

7 *Hodgson v Williamson* (1880) 15 ChD 87. See also PARA 267.

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206. Contracts between spouses and civil partners.

It is provided by statute that a married woman¹ may contract with her husband as with a third person, and that they may sue one another on any contract made during the marriage² in the same manner and with the same effect as if the contract had been entered into by the wife as a principal with a third person³: independently of statute, it has been held that a wife may sue her husband for the repayment of money lent⁴ and that a husband may sue his wife for money lent or money paid by him at her request after marriage⁵ and may become a purchaser for value of her property⁶.

1 Although these provisions derive from an enactments specifically referring to 'marriage' and 'married women' and from common law decisions pre-dating the concept of civil partnerships, it is submitted that these provisions must now also apply, to the extent that they have any continuing relevance, to the contractual rights of either party to a marriage and, presumably, to civil partners.

2 See the Law Reform (Married Women and Tortfeasors) Act 1935 ss 1(b), (c), 4(2)(c); and PARA 204. Mere mutual promises made in the ordinary domestic relationship of husband and wife do not, however, necessarily constitute a contract enforceable at law: *Balfour v Balfour* [1919] 2 KB 571, CA (agreement by husband to give wife an allowance for expenses). In *Pettitt v Pettitt* [1970] AC 777 at 816, [1969] 2 All ER 385 at 408, HL, Lord Upjohn said: 'That case (*Balfour v Balfour*) illustrates the well-known doctrine that in their ordinary day to day life spouses do not intend to contract in a legally binding sense with one another, though I am bound to confess that in my opinion the facts of that case stretched that doctrine to its limits'; and see *Pettitt v Pettitt* at 806 and at 400 per Lord Hodson, and at 821, 822 and at 413 per Lord Diplock. See also *Gould v Gould* [1970] 1 QB 275, [1969] 3 All ER 728, CA; *Merritt v Merritt* [1970] 2 All ER 760, [1970] 1 WLR 1211, CA (agreement after the parties had separated held intended to create legal relations); *Jones v Padavatton* [1969] 2 All ER 616 at 618, [1969] 1 WLR 328 at 330, CA per Danckwerts LJ; *Spellman v Spellman* [1961] 2 All ER 498, [1961] 1 WLR 921, CA (husband promised to buy wife car; husband acquired car on hire purchase; not intended to create legal relations); *Fribance v Fribance* [1957] 1 All ER 357, [1957] 1 WLR 384, CA; *Hoddinott v Hoddinott* [1949] 2 KB 406, CA.

In general, time runs both in favour of and against a wife in respect of any cause of action founded on any contract made with her husband (see *Re Lady Hastings, Hallett v Hastings* (1887) 35 ChD 94, CA (loan by husband to wife on an oral promise by her to repay the amount out of her separate estate; debt held barred after six years); and see *Lowe v Fox* (1885) 15 QBD 667, CA); but the application of the general provision relating to limitation of actions may be subject to special principles applicable to transactions between husband and wife (see eg *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA (loan by wife to husband at interest; time does not run so long as they live together in amity, because a gift of the interest is presumed)) and to the particular provisions relating to actions in respect of trust property, as, for example, where the husband has received money as a trustee for his wife (see eg *Re Eyre-Williams, Williams v Williams* [1923] 2 Ch 533). Actions in respect of trust property are governed by the Limitation Act 1980 s 21: see **LIMITATION PERIODS** vol 68 (2008) PARA 1140.

Where a wife seeks to avoid a contract with her husband on the ground of undue influence or duress, the burden of proof is on her: see *Gillman v Gillman* (1946) 174 LT 272 (wife signed agreement to separate, but later said she had no knowledge of its contents; no misrepresentation by husband; wife held bound by contents and no duty on husband to prove absence of undue influence).

3 *Boston v Boston* [1904] 1 KB 124, CA; *Re Shaw, Shaw v Jones* (1906) 94 LT 93; and see *Hunt v Hunt* (1908) 25 TLR 132.

4 See *Woodward v Woodward* (1863) 3 De GJ & Sm 672; *Horrell v Horrell* (1882) 46 JP 295. A loan to a husband of money belonging to the wife, though not her separate property nor held for her separate use, was valuable consideration for a settlement on the wife of the money so lent: *Re Home, ex p Home* (1885) 54 LT 301.

5 *Butler v Butler* (1885) 16 QBD 374, CA. The husband could sue his wife in equity, independently of statute, on a contract with him by which she intended to bind property held to her separate use: *Butler v Butler*.

6 *Hewison v Negus* (1853) 16 Beav 594.

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207. Bankruptcy of spouse or civil partner.

A spouse or civil partner may prove as a creditor in their spouse or civil partner's bankruptcy and is entitled to be paid *pari passu* with the other creditors in respect of any contract with that spouse or civil partner, not being a loan for the purpose of a trade or business carried on by him or her¹. Where a loan is made by a spouse or civil partner to the other spouse or civil partner for the purpose of a trade or business carried on by him or her, the loan forms part of his or her assets in case of his or her bankruptcy, and the spouse or civil partner who made the loan is not entitled to claim any dividend as a creditor until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied².

Where a loan is made by a spouse or civil partner to the other spouse or civil partner for purposes unconnected with the trade or business of the borrower, the lender may prove in the borrower's bankruptcy in competition with his or her other creditors, and is entitled to receive a dividend *pari passu* with them³. Where the loan is to a partnership firm of which the borrower is a member, the lender may prove against the joint estate of the partners, and is entitled to receive a dividend *pari passu* with the other creditors of the firm⁴.

1 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 490 et seq.

2 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 575.

3 *Re Clark, ex p Schulze* [1898] 2 QB 330, CA; *Re Tidswell, ex p Tidswell* (1887) 56 LJQB 548; *Mackintosh v Pogose* [1895] 1 Ch 505 (all involving loans from a wife to her husband, but applicable *mutatis mutandis* to any loans between spouses or civil partners).

4 *Re Tuff, ex p Nottingham* (1887) 19 QBD 88 (loans from a wife to her husband, but applicable *mutatis mutandis* to any loans between spouses or civil partners). It has been held that if a wife is a partner with her husband, she will be postponed to other creditors: *Re Childs, ex p New* (1874) 9 Ch App 508.

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208. Criminal liability of spouse or civil partner for acts of other spouse or civil partner.

A spouse or civil partner will not be liable for the criminal acts of his or her spouse or civil partner unless he or she is in the position of an agent and an offence is committed in the course of the agency¹. In the case of the offences, mainly statutory, where mens rea is not essential, a spouse or civil partner may be criminally liable for the act of his or her spouse or civil partner as agent, even where the offence is committed without his or her authority or connivance².

A person cannot conspire with his or her spouse or civil partner alone³, but may in the ordinary way participate in, or aid, abet, counsel or procure, the commission of an offence by him or her⁴. Provision is made in connection with the institution of proceedings against spouses and civil partners⁵.

¹ See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 59 et seq. The presumption of law that an offence committed by a wife in the presence of her husband was committed under the coercion of the husband was abolished by the Criminal Justice Act 1925 s 47, but that provision also provided that on a charge against a wife for any offence other than treason or murder it is a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband. As to marital coercion generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 24.

² As to strict liability for offences generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 15.

³ See the Criminal Law Act 1977 s 2(2)(a); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 67. This rule does not apply to the tort of conspiracy: see PARA 204.

⁴ See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 49. It is an offence for any person, knowing or believing that another has committed an offence, to do without lawful authority or reasonable excuse any act with intent to impede that other person's apprehension or prosecution (see the Criminal Law Act 1967 s 4(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 58), and this applies to a wife who harbours her husband unless coercion by the husband can be proved (see the Criminal Justice Act 1925 s 47; *R v Holley* [1963] 1 All ER 106, [1963] 1 WLR 199, CCA; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 24).

⁵ See the Theft Act 1968 s 30(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 291. Subject to certain exceptions, proceedings may not be instituted against a person for any offence of stealing or doing unlawful damage to property which at the time of the offence belonged to that person's spouse or civil partner or for any attempt, incitement or conspiracy to commit such an offence, unless proceedings are instituted by or with the consent of the Director of Public Prosecutions: see s 30(4); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 291. As to the competency of a defendant's spouse or civil partner to give evidence for the prosecution see PARA 212.

UPDATE

208 Criminal liability of spouse or civil partner for acts of other spouse or civil partner

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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209. Effect of marriage and civil partnership on wills and intestacy.

A will is, in general, revoked by the testator's marriage or by the formation of a civil partnership between the testator and another person¹, even if the marriage or civil partnership is voidable and whether or not it is in fact avoided². Where it appears from a will that at the time it was made the testator was expecting to be married to, or to enter into a civil partnership with, a particular person, and that he intended that the will or a disposition in it should not be revoked by the marriage or civil partnership, the will or disposition is not revoked by the marriage or civil partnership³.

Where, after a testator has made a will, his or her marriage or civil partnership is dissolved or annulled, then the provisions of that will appointing executors or trustees or conferring a power of appointment, if they appoint or confer the power on the former spouse or civil partner, take effect as if the former spouse or civil partner had died on the date on which the marriage or civil partnership is dissolved or annulled, and any property which, or an interest in which, is devised or bequeathed to the former spouse or civil partner passes as if the former spouse or civil partner had died on that date⁴.

If, while a decree of judicial separation or a separation order is in force and the separation is continuing, either of the parties to the marriage or civil partnership dies intestate as respects all or any of his or her real or personal property, that property devolves as if the other party had then been dead⁵.

1 See the Wills Act 1837 ss 18(1), 18B(1); and **WILLS** vol 50 (2005 Reissue) PARAS 379, 382. As to pre-1983 wills see **WILLS** vol 50 (2005 Reissue) PARA 380.

2 See *Re Roberts, Roberts v Roberts* [1978] 3 All ER 225, [1978] 1 WLR 653, CA. As to void and voidable marriages and civil partnerships see PARA 326 et seq.

3 See the Wills Act 1837 ss 18(3), (4), 18B(3)-(6); and **WILLS** vol 50 (2005 Reissue) PARAS 381, 383.

4 See the Wills Act 1837 ss 18A, 18C; and **WILLS** vol 50 (2005 Reissue) PARAS 468-470. This does not prejudice any right of the former spouse or civil partner to apply for financial provision under the Inheritance (Provision for Family and Dependents) Act 1975: see the Wills Act 1837 ss 18A(2), 18C(3); PARAS 538-541; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 665 et seq.

5 Matrimonial Causes Act 1973 s 18(2); Civil Partnership Act 2004 s 57.

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210. Proceedings by and against married women.

A married woman may sue or be sued in contract¹ or in tort² or otherwise in all respects as if she were a feme sole³, but this does not prevent a husband and wife from rendering themselves, or being rendered, jointly liable in respect of any tort, contract, debt or obligation, and of suing and being sued either in tort or in contract or otherwise, in like manner as if they were not married⁴. A married woman is subject to the enforcement of judgments and orders in all respects as if she were a feme sole⁵. Note that these provisions derive from enactments specifically referring to 'marriage' and 'married women' and for which no corresponding civil partnership provision has been made, and their continuing significance should be considered in the light of this.

It has been held that if a married woman obtains an injunction subject to an undertaking as to damages⁶, her sole undertaking is sufficient⁷.

1 As to the liability of a married woman on contracts entered into before her marriage, and as to the statutory exemption of her husband from liability as such on her ante-nuptial contracts, see PARA 204; as to the respective liability of a husband and wife on the contracts of the wife during the marriage see PARA 256 et seq; and as to the right of a husband or wife to sue one another on contracts entered into during the marriage see PARA 206.

2 See PARAS 204, 211.

3 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(c); and PARA 204.

4 Law Reform (Married Women and Tortfeasors) Act 1935 s 4(2)(c). See also PARA 204. As to joint contracts by a married woman and a third person see PARA 205; and as to joint liability of a husband and wife in tort see PARA 204.

5 Law Reform (Married Women and Tortfeasors) Act 1935 s 1(d). The court may order that a married woman be examined as to her means in the same way as any other judgment debtor: *Countess of Aylesford v Great Western Rly Co* [1892] 2 QB 626, DC. As to a married woman's liability to be made bankrupt see PARA 204.

6 As to the giving of an undertaking as to damages on application for an injunction see **CIVIL PROCEDURE** vol 11 (2009) PARA 419 et seq.

7 *Re Prynn* (1885) 53 LT 465; *Pike v Cave* (1893) 62 LJ Ch 937.

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211. Proceedings between spouses or civil partners.

Where an action in tort is brought by one of the parties to a marriage or a civil partnership against the other¹ during the subsistence of the relationship, the court may stay proceedings if it appears:

- 304 (1) that no substantial benefit would accrue to either party from the continuation of the proceedings²; or
- 305 (2) that the question or questions in issue could more conveniently be disposed of on an application³ to the court⁴;

and the court may⁵, in such an action, either exercise any power which could be exercised on such an application, or give such directions as it thinks fit for the disposal⁶ of any question arising in the proceedings⁷.

Spouses and civil partners are entitled to apply for maintenance from the other spouse or civil partner⁸ and for financial relief following or pending divorce, dissolution or separation⁹. They can also apply for financial provision from the estate of a deceased spouse or civil partner or former spouse or civil partner¹⁰. A spouse or civil partner who has no beneficial estate or interest in the family home may have home rights¹¹; and a spouse or civil partner may in certain circumstances apply to the court for an occupation order¹² or a non-molestation order¹³. Spouses and civil partners may sue each other in conversion or for wrongful interference with goods¹⁴, and may be restrained from interfering with the other's separate trade or business¹⁵.

1 The Law Reform (Husband and Wife) Act 1962 s 1(1) provides that 'each of the parties to a marriage shall have the like right to bring proceedings against the other in respect of a wrongful or negligent act or omission, or for the prevention of a wrongful act, as if they were not married': to the extent that such provision is not now obsolete, it may be inferred from the related provisions described in the text and notes 2-15 that civil partners also have the like right to bring proceedings against the other in tort. The Law Reform (Husband and Wife) Act 1962 s 3(3) provides that a reference for this purpose to the parties to a marriage includes references to the persons who were parties to a marriage which has been dissolved: it may be inferred that this also extends to civil partners and civil partnerships which have been dissolved. As to the rights of spouses to sue one another in contract see PARA 205. A husband has no right enforceable at law or in equity to stop his wife having, or a registered medical practitioner performing, a legal abortion: *Paton v Trustees of British Pregnancy Advisory Service* [1979] QB 276, [1978] 2 All ER 987, followed in *C v S* [1988] QB 135, [1987] 1 All ER 1230, CA (boyfriend).

2 Law Reform (Husband and Wife) Act 1962 s 1(2)(a); Civil Partnership Act 2004 s 69(1), (2)(a). The question whether consortium has come to an end and whether the claimant's proper remedy would not be found in a magistrates' court are matters to be taken into consideration in deciding whether proceedings should be allowed to continue: *McLeod v McLeod* [1963] CLY 1676.

3 Ie an application under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66: see PARA 224.

4 Law Reform (Husband and Wife) Act 1962 s 1(2)(b); Civil Partnership Act 2004 s 69(2)(b).

5 Ie without prejudice to the Law Reform (Husband and Wife) Act 1962 s 1(2)(b) or the Civil Partnership Act 2004 s 69(2)(b) (see the text and notes 3-4).

6 Ie under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66: see PARA 224.

7 Law Reform (Husband and Wife) Act 1962 s 1(2); Civil Partnership Act 2004 s 69(3). See *Church v Church* (1983) 13 Fam Law 254 (wife's claim for damages against her husband for personal injuries caused by his violence towards her transferred to the Family Division so that the question of quantum could be dealt with in conjunction with the wife's claim for ancillary relief following a divorce).

8 See PARA 542 et seq.

9 See PARA 450 et seq.

10 See the Inheritance (Provision for Family and Dependants) Act 1975; PARAS 538-541; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 665 et seq.

11 See PARA 285 et seq.

12 See PARA 289 et seq.

13 See PARA 716 et seq.

14 As to such proceedings see **TORT** vol 45(2) (Reissue) PARA 542 et seq.

15 *Wood v Wood* (1871) 19 WR 1049 (hotel settled on the wife to be managed by her for the benefit of herself and her children); *Gaynor v Gaynor* [1901] IR 217 (public house belonging to the wife); *Donnelly v Donnelly* (1886) 31 Sol Jo 45; *Green v Green* (1840) 5 Hare 400n.

UPDATE

211 Proceedings between spouses or civil partners

NOTE 14--See *White v Withers LLP* [2009] EWCA Civ 1122, [2009] 3 FCR 435 (interception of mail and removal of documents belonging to husband by wife and passed to solicitors).

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212. Compellability of spouses and civil partners as witnesses.

Any enactment or rule of law relating to the giving of evidence¹ by a spouse applies in relation to a civil partner² as it applies in relation to the spouse³.

No special rules govern the competence of the spouse or civil partner of a defendant to give evidence in criminal proceedings⁴. However, the spouse or civil partner of the defendant is compellable to give evidence on behalf of the defendant⁵, and is compellable to give evidence for the prosecution or on behalf of any person jointly charged with the defendant, unless they are themselves charged in the proceedings, if:

- 306 (1) the offence charged involves an assault on, or injury or a threat of injury to, the spouse or civil partner of the accused or a person who was at the material time under the age of 16⁶;
- 307 (2) the offence charged is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age⁷; or
- 308 (3) the offence charged consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within head (1) or head (2) above⁸.

In any proceedings a person who has been but is no longer married to the accused or has been but is no longer a civil partner of the accused is compellable to give evidence as if that person and the accused had never been married or had never been civil partners of each other⁹.

Spouses and civil partners of parties are competent witnesses in civil proceedings¹⁰. In any legal proceedings other than criminal proceedings, a person may refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for a criminal offence or for the recovery of a penalty¹¹.

1 References to 'giving evidence' are to giving evidence in any way (whether by supplying information, making discovery, producing documents or otherwise): Civil Partnership Act 2004 s 84(4).

2 This does not include a former civil partner: Civil Partnership Act 2004 s 84(3).

3 Civil Partnership Act 2004 s 84(1). This is subject to any specific amendment made by or under the Civil Partnership Act 2004 which relates to the giving of evidence by a civil partner: s 84(4).

4 As to the general competency requirements for witnesses see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1401.

5 See the Police and Criminal Evidence Act 1984 s 80(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405. The failure of the spouse or civil partner of the accused to give evidence is not to be made the subject of any comment by the prosecution: see s 80A; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405.

6 See the Police and Criminal Evidence Act 1984 s 80(2A), (3)(a), (4), (4A); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405.

7 See the Police and Criminal Evidence Act 1984 s 80(3)(b); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405.

8 See the Police and Criminal Evidence Act 1984 s 80(3)(c); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405.

9 See the Police and Criminal Evidence Act 1984 s 80(5), (5A); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405.

10 See **CIVIL PROCEDURE** vol 11 (2009) PARA 966 (noting in particular, in connection with husbands and wives, the Evidence Amendment Act 1853 s 1).

11 See the Civil Evidence Act 1968 s 14(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 974. As to evidence of spouses in proceedings instituted in consequence of adultery see s 16(5); and PARA 828.

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213. Corroboration.

Magistrates' courts should not, in general, act upon the uncorroborated testimony of either of the parties to a marriage or civil partnership¹, particularly where their evidence is in direct conflict². It is dangerous to act on a complainant's evidence alone³ especially in a case where the complainant charges the defendant with conduct which from its nature must have happened in private and prima facie with the complainant's assent, such as abnormal sexual practices, though even in such a case there is no absolute rule of law that corroboration is necessary⁴. It has been said that the practice of the court is to look for corroboration and, if on the face of the complainant's own evidence it is available, to require corroboration before finding an offence proved⁵. In spite of these rules of practice it is open to a court to act on the uncorroborated evidence of a spouse or civil partner if it is in no doubt where the truth lies⁶.

1 *Forster v Forster* (1910) 54 Sol Jo 403.

2 *Joseph v Joseph* [1915] P 122.

3 *Williams v Williams* (1932) 96 JP 267, DC; cf *Williams v Williams* (1928) 93 JP 32, DC; *Marjoram v Marjoram* [1955] 2 All ER 1, [1955] 1 WLR 520, DC (wife's evidence corroborated by husband's evidence).

4 *DB v WB* [1935] P 80, DC; and see *Davidson v Davidson* [1953] 1 All ER 611, [1953] 1 WLR 387, DC (retrial ordered as apparently magistrates' court had failed to direct itself as to desirability, though not necessity, of corroboration, and to consider question of acquiescence by wife); *Lawson v Lawson* [1955] 1 All ER 341, [1955] 1 WLR 200, CA (wife not consenting party; no rule as to corroboration applicable); *Alli v Alli* [1965] 3 All ER 480, DC.

5 *Alli v Alli* [1965] 3 All ER 480.

6 *Alli v Alli* [1965] 3 All ER 480 at 484, DC per Sir Jocelyn Simon P.

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214. Domicile of married women.

The domicile of a married woman is, instead of being the same as her husband's by virtue only of marriage¹, to be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile².

1 For a judicial statement of the former rule see *Indyka v Indyka* [1969] 1 AC 33 at 81, [1967] 2 All ER 689 at 711, HL per Lord Pearce ('it is a principle of English law that the wife acquires the husband's domicile and that she cannot . . . acquire a domicile of her own choice'). See also *A-G for Alberta v Cook* [1926] AC 444 at 458-462, PC per Lord Merrivale (where the earliest authorities for the former rule are cited).

2 Domicile and Matrimonial Proceedings Act 1973 s 1(1). As to domicile generally see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq. Where immediately before 1 January 1974 (ie the date on which s 1 came into force by virtue of s 17(5)) a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after 1 January 1974: s 1(2).

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215. Wife's assumption of husband's name.

When a woman on her marriage assumes her husband's surname in substitution for her father's surname, it may be said that she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of the marriage. Having assumed her husband's name, she is entitled to retain it notwithstanding the dissolution or annulment of the marriage or her own remarriage unless she then chooses to resume her maiden name or acquires another name by reputation, provided that no one thereby suffers any injury of which the law can take notice¹.

The court has no power to enjoin a peeress who obtains a decree of divorce against her husband from afterwards continuing to call herself by the title of which she had the use whilst married to her first husband, even if she remarries with a commoner².

¹ See *Earl Cowley v Countess Cowley* [1900] P 118 (on appeal [1900] P 305, CA; affd [1901] AC 450, HL); *Fendall (otherwise Goldsmid) v Goldsmid* (1877) 2 PD 263; *Du Boulay v Du Boulay* (1869) LR 2 PC 430.

² *Earl Cowley v Countess Cowley* [1900] P 118; on appeal [1900] P 305, CA; affd [1901] AC 450, HL.

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(2) MAINTENANCE AND COHABITATION

216. Husband's duty at common law.

The common law imposed a range of duties on a husband concerning the support and maintenance of his wife which, having been largely superseded by statute¹, are now of doubtful practical application. They are as follows:

- 309 (1) a husband has a duty to maintain his wife according to his means of supporting her²;
- 310 (2) a husband may be liable for certain debts contracted by his wife³;
- 311 (3) if a wife leaves her husband without his consent and in circumstances which do not justify her in living apart, his obligation to maintain her is suspended for so long as she wilfully absents herself⁴;
- 312 (4) if a wife commits adultery, his obligation to maintain her ceases altogether⁵;
- 313 (5) where only husband and wife are concerned, a husband separated from his wife by agreement is under no liability to maintain her unless the agreement to separate is subject to an express or implied term that the husband is to provide maintenance for the wife⁶; and
- 314 (6) the parties may agree to arrangements whereby the husband is released from his duty to maintain the wife⁷.

1 See the various statutory provisions giving spouses and civil partners the right to claim maintenance, eg the Matrimonial Causes Act 1973 s 27; the Domestic Proceedings and Magistrates' Courts Act 1978 s 1; the Civil Partnership Act 2004 Sch 5 Pt 9 (paras 39-45), Sch 6; and PARAS 542 et seq, 553 et seq.

2 *Read v Legard* (1851) 6 Exch 636; *Johnston v Sumner* (1858) 3 H & N 261; *Millichamp v Millichamp* (1931) 146 LT 96 (where the first duty of a husband was held to be towards his wife rather than his mother). There is no presumption of law that a wife is dependent on the earnings of her husband merely because of his legal obligation to maintain her: *New Monckton Collieries Ltd v Keeling* [1911] AC 648, HL. The common law right of the wife is a right to support, but not a right to an allowance: *Lilley v Lilley* [1960] P 158 at 178, [1959] 3 All ER 283 at 288, CA; *Northrop v Northrop* [1968] P 74 at 108, [1967] 2 All ER 961 at 973, CA. The fact that the husband becomes bankrupt does not affect his common law obligations to maintain his wife: *Hounslow London Borough v Peake* [1974] 1 All ER 688 at 691, [1974] 1 WLR 26 at 30, DC.

3 As to this presumption of authority see PARA 263 et seq. A wife left without means is not entitled as an agent of necessity to pledge her husband's credit for necessities: see PARA 267.

4 *Jones v Newtown and Llanidloes Guardians* [1920] 3 KB 381 (where it was held that a husband's liability to an order under the Poor Law Amendment Act 1850 s 5 (repealed), that he make payments towards his wife's maintenance, existed only where he was under a common law duty to support her, and that a common law duty which had ceased as a result of her wilful desertion had revived on her subsequently becoming of unsound mind and so incapable of voluntary conduct); *Stopher v National Assistance Board* [1955] 1 QB 486 at 494, [1955] 1 All ER 700 at 704, DC per Lord Goddard CJ. See also *National Assistance Board v Wilkinson* [1952] 2 QB 648, [1952] 2 All ER 255, DC (where a husband's liability to an order under the National Assistance Act 1948 was held to be similarly dependent on the existence of a common law duty of support, and so not to exist in respect of a wife wilfully in desertion); *National Assistance Board v Parkes* [1955] 2 QB 506, [1955] 3 All ER 1, CA (common law principle affirmed; decision in *National Assistance Board v Wilkinson* [1952] 2 QB 648, [1952] 2 All ER 255, DC approved as correct, but explained on other grounds (see PARA 217)); and see *Treharne v Treharne* (1966) 111 Sol Jo 34, DC; *Topley v Topley* (1967) 111 Sol Jo 497, DC; *Gray v Gray* [1976] Fam 324, [1976] 3 All ER 225; *Newmarch v Newmarch* [1978] Fam 79, [1978] 1 All ER 1.

5 *R v Flintan* (1830) 1 B & Ad 227 (wife's desertion and adultery; husband not liable under the Vagrancy Act 1824 s 3 (repealed so far as relevant), to penalty for neglecting and refusing to maintain her); *Culley v Charman* (1881) 7 QBD 89 (decided under the Poor Law Amendment Act 1868 s 33 (repealed)); *Mitchell v Torrington Union* (1897) 76 LT 724 (husband not heard of for 27 years; wife married again; husband returned; husband not liable to guardians of the poor in respect of her maintenance). At common law a husband was under no duty to support an adulterous wife notwithstanding that he may himself have been guilty of cruelty or other misconduct (*Govier v Hancock* (1796) 6 Term Rep 603), unless he connived at or condoned her offence or he continues to hold her out as still having the ordinary authority of a wife (see PARA 272; and as to holding out generally see PARA 269 et seq).

6 *Northrop v Northrop* [1968] P 74 at 96, [1967] 2 All ER 961 at 965, CA per Willmer LJ, and at 116 and at 978 per Winn LJ; *National Assistance Board v Parkes* [1955] 2 QB 506 at 516, [1955] 3 All ER 1 at 3, CA per Denning LJ and at 525 and at 9 per Romer LJ.

7 *Sutocki v Sutocka* (1963) 107 Sol Jo 373, CA.

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217. Statutory duty of spouses and civil partners.

For the purposes of social fund awards and income support, spouses and civil partners are liable to maintain one another¹. The statutory duty to maintain is absolute and is not ousted by unjustifiable desertion or by adultery, but desertion and adultery are circumstances to which the court is entitled to have regard in deciding whether or not an order should be made². Circumstances which would relieve spouses and civil partners of their duty at common law will not, however, be regarded as constituting an answer to the application for payment towards the cost of welfare benefits provided; consequently, where spouses or civil partners have separated by consent, an order may be made requiring them to contribute to the cost of one another's benefits not only if the separation agreement contained no provision at all as to maintenance³ but even if one party agreed under it to accept a specified allowance which does not at the relevant date amount to reasonable maintenance⁴, or even if a party has agreed to be responsible for maintaining himself⁵.

1 See **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARAS 236, 397, 398.

2 *National Assistance Board v Parkes* [1955] 2 QB 506, [1955] 3 All ER 1, CA, explaining *National Assistance Board v Wilkinson* [1952] 2 QB 648, [1952] 2 All ER 255, DC. See also *Lilley v Lilley* [1960] P 158 at 169, [1959] 3 All ER 283, CA; *Northrop v Northrop* [1968] P 74, [1967] 2 All ER 961, CA.

3 *Stopher v National Assistance Board* [1955] 1 QB 486, [1955] 1 All ER 700, DC.

4 *National Assistance Board v Prisk* [1954] 1 All ER 400, [1954] 1 WLR 443, DC.

5 *National Assistance Board v Parkes* [1955] 2 QB 506, [1955] 3 All ER 1, CA.

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218. Failure to provide reasonable maintenance.

If a person persistently refuses or neglects to maintain his spouse or civil partner, and in consequence of that refusal or neglect specified benefits are paid to or in respect of him or her, that person is guilty of an offence¹. The court's statutory powers to order payments by a party to a marriage or civil partnership who has failed to provide reasonable maintenance for the other party², and to vary or insert financial arrangements in maintenance agreements³, are considered elsewhere, as are the special statutory provisions as to the maintenance liabilities of members of Her Majesty's forces⁴.

1 See **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 397.

2 See the Matrimonial Causes Act 1973 s 27; the Domestic Proceedings and Magistrates' Courts Act 1978 s 1; the Civil Partnership Act 2004 Sch 5 Pt 9 (paras 39-45), Sch 6; and PARAS 542 et seq, 553 et seq.

3 See the Matrimonial Causes Act 1973 s 35; the Civil Partnership Act 2004 Sch 5 para 69; and PARA 700 et seq.

4 See PARAS 693-695; and **ARMED FORCES** vol 2(2) (Reissue) PARAS 74-77.

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219. Duty to cohabit.

There is no enforceable duty to cohabit¹. At common law, where a wife was living apart by her own desire, the court would not grant a writ of habeas corpus to the husband to restore her to his custody², and where a wife refused to live with him, a husband was not entitled to restrain her by force or to keep her in confinement, even if she was acting unreasonably³; indeed, it is an offence at common law for a man to take and carry away his wife against her will, whether she is cohabiting with him or not at the time⁴.

1 The remedy of restitution of conjugal rights was abolished by the Matrimonial Proceedings and Property Act 1970 s 20 (repealed). As to enticement and harbouring see PARA 221. A prolonged refusal to cohabit may constitute desertion for which there are statutory forms of relief: see PARA 363 et seq. In general, the sexual relationship in marriage cannot be enforced or restrained by court order: see *Paton v Trustees of British Pregnancy Advisory Service* [1978] 2 All ER 987 at 990, [1978] 3 WLR 687 at 690. As to the duty to cohabit under common law (to the extent that it continues to exist) see *Wilkinson v Wilkinson* (1871) LR 12 Eq 604 (condition in gift by will that donee was to cease to reside with husband held void); *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116, CA. Cf *Davies v Elmslie* [1938] 1 KB 337, [1937] 4 All ER 471, CA (agreement consistent with ultimate intention of spouses to rejoin each other not contrary to public policy). Where the court grants a decree of judicial separation, it is no longer obligatory for the petitioner to cohabit with the respondent: Matrimonial Causes Act 1973 s 18(1); and see *R v Clarke* [1949] 2 All ER 448. As to agreements for future separation see PARA 424.

2 *R v Leggatt* (1852) 18 QB 781.

3 *R v Jackson* [1891] 1 QB 671, CA (wife, kept in confinement by husband, discharged on habeas corpus), overruling *Re Cochrane* (1840) 8 Dowl 630.

4 *R v Reid* [1973] QB 299, [1972] 2 All ER 1350, CA.

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220. Marital rape.

The rule that a husband could not be criminally liable for raping his wife if he had sexual intercourse with her without her consent no longer forms part of the law of England since a husband and wife are now to be regarded as equal partners in marriage and it is unacceptable that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances or that it is an incident of modern marriage that the wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force¹.

¹ See *R v R (rape: marital exemption)* [1992] 1 AC 599, [1991] 4 All ER 481, HL.

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221. Enticement, harbouring and loss of consortium.

No person is liable in tort under the law of England and Wales:

315 (1) to any other person on the ground only of his having induced the wife or husband of that other person to leave or remain apart from the other spouse¹;

316 (2) to any other person for harbouring the wife of that other person²;

317 (3) to a husband on the ground only of his having deprived him of the services or society of his wife³.

A husband may, however, maintain an action in respect of impairment, as distinct from total loss, of consortium⁴.

1 Law Reform (Miscellaneous Provisions) Act 1970 s 5(a).

2 Law Reform (Miscellaneous Provisions) Act 1970 s 5(c).

3 Administration of Justice Act 1982 s 2(a).

4 *Hodgson v Trapp* [1988] 1 FLR 69, [1988] Fam Law 60 (wife sustained serious injuries in an accident; the wife's consortium as an alert, capable and adult partner to the husband had been gross and had left him with a vegetative, inert and childlike charge).

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222. Gifts and legacies inducing separation.

A gift of income to a married person living with his or her spouse, or presumably to a civil partner living with his or her civil partner, to be paid only during such time as the parties should live apart, is void, as it is contrary to the policy of the law that spouses (or civil partners) should be separated without their consent and a gift in these terms would tend to bring about such a separation¹. If a condition having the same tendency is attached to a legacy or gift to a married person or a civil partner, the condition is void as encouraging that person to commit a breach of duty, and the legacy or gift will be treated as unconditional². Where, however, the married person or civil partner is not living with his or her spouse or civil partner at the date of the gift, and the object of the gift is to maintain the married person or civil partner during the separation rather than to induce that person to continue to live apart from his or her spouse or civil partner, the gift is valid³.

1 *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116, CA (gift by will of a sum to be paid weekly during such time as the legatee should live apart from her husband, for her maintenance while so living apart; the legatee was living with her husband at the time of the testator's death, but separated from him some time afterwards; legacy held to be void), distinguishing *Wren v Bradley* (1848) 2 De G & Sm 49 (gift when parties were separated, with a condition defeating it if wife returned to cohabitation, held valid). See also **GIFTS** vol 52 (2009) PARA 256.

2 *Wilkinson v Wilkinson* (1871) LR 12 Eq 604 (gift by will of residue to married woman with a conditional gift over if she did not cease to reside in the place where her husband carried on business within 18 months of the testator's death; held that she took free from the condition).

3 *Re Charleton, Bracey v Sherwin* (1911) 55 Sol Jo 330; *Re Lovell, Sparks v Southall* [1920] 1 Ch 122; *Mather v Rhodes* (1934) 78 Sol Jo 414.

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223. Confidences.

Confidences will be protected even after divorce or dissolution¹ unless both parties have assented to making their private lives public². It has been held that the implied obligation of confidence is a concomitant of marriage (and, presumably, of civil partnership) and remains enforceable, even where the party seeking to restrain publication has published limited details and does not come with clean hands, provided that the 'balance of perfidy' is in that party's favour in that the claimant's publication was less pernicious than that proposed or published by the defendant³. A party's infidelity does not negate entitlement to protection for past confidences⁴. In view of the number of persons likely to be interested in disclosures, the extent of an injunction may differ from that used to protect other forms of confidence⁵.

Where spouses or civil partners have regarded their relationship as being in the public domain rather than their own private business, it may be that the court would refuse to grant an injunction to restrain publication of confidences⁶.

1 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611.

2 *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA.

3 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at 330, [1965] 1 All ER 611 at 625 per Ungood-Thomas J.

4 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at 331, [1965] 1 All ER 611 at 626.

5 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 255, 256, sub nom *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545 at 643, HL.

6 See *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA.

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(3) OWNERSHIP OF PROPERTY

(i) Resolution of Disputes

224. Resolution of disputes involving property.

Where any question arises between spouses or civil partners¹ as to the title to or possession of property², either party may apply to the court³ for its determination and the court may make such order with respect to the property as it thinks fit⁴. Such an application may be made by either of the parties notwithstanding that their marriage or civil partnership has been dissolved or annulled so long as the application is made within the period of three years beginning with the date of dissolution or annulment⁵.

This procedure was devised as a means of resolving a question as to title and is not a means of giving a title not previously existing⁶; wider powers of adjustment of property rights also exist⁷. It is also applicable in relation to the property of engaged couples and persons who have entered into a civil partnership agreement⁸.

1 Cohabitants may have rights in property which is vested in the other cohabitant where it was acquired for their joint benefit; these rights do not arise by statute but under the principles of constructive or resulting trusts: see *Cooke v Head* [1972] 2 All ER 38, [1972] 1 WLR 518, CA; *Richards v Dove* [1974] 1 All ER 888; and PARA 284. In *Shaw v Fitzgerald* [1992] 1 FCR 162, [1992] 1 FLR 357, it was held that the court has jurisdiction to hear an application by a man claiming a beneficial interest in a woman's property on the basis that there had been an agreement to marry, even though, when the alleged agreement was made, the man was married and could not have given immediate effect to the alleged agreement.

2 The Married Women's Property Act 1882 s 24 provides that 'property' includes a thing in action; no corresponding provision is made by the Civil Partnership Act 2004. As to the property to which the court's powers extend see PARA 227.

3 He may apply to the High Court or such county court as may be prescribed by rules of court, which may for these purposes confer jurisdiction on county courts whatever the situation or value of the property in dispute: Married Women's Property Act 1882 s 17 (amended by the Matrimonial and Family Proceedings Act 1984 s 43); Civil Partnership Act 2004 s 66(1), (3). For the applicable rules see the Family Proceedings Rules 1991, SI 1991/1247, rr 3.6, 3.7; and PARA 955 et seq. The Limitation Act 1980 s 23 (actions for an account to be brought within six years: see **LIMITATION PERIODS** vol 68 (2008) PARA 1008) does not apply to an application under these provisions: *Spoor v Spoor* [1966] 3 All ER 120. Proceedings may be commenced, or, if already commenced, continued, by a deceased party's personal representatives: see *Re Cummins, Cummins v Thompson* [1972] Ch 62, [1971] 3 All ER 782, CA.

4 Married Women's Property Act 1882 s 17 (as amended: see note 3); Civil Partnership Act 2004 s 66(2).

5 Matrimonial Proceedings and Property Act 1970 s 39; Civil Partnership Act 2004 s 68. References in these provisions to a spouse or civil partner are to be construed accordingly: Matrimonial Proceedings and Property Act 1970 s 39; Civil Partnership Act 2004 s 68(2). As to applications where an agreement to enter into a marriage or civil partnership is terminated see PARA 230.

6 See *Pettitt v Pettitt* [1970] AC 777 at 798, [1969] 2 All ER 385 at 392, HL per Lord Morris of Borth-y-Gest; and PARA 225.

7 See PARA 499 et seq. Save in exceptional cases, it is undesirable for parties to divorce or dissolution proceedings to make an application under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 for the determination of property rights as between them; the proper course is to make appropriate applications for financial provision and property adjustment orders (see PARA 450 et seq): see

Fielding v Fielding [1978] 1 All ER 267, [1967] 1 WLR 1146n, CA; and PARA 278. However, in order to take advantage of such applications it is essential for the parties to take care to initiate proceedings before remarrying or entering into a subsequent civil partnership: *Fielding v Fielding*.

8 See the Law Reform (Miscellaneous Provisions) Act 1970 s 2(2); the Civil Partnership Act 2004 s 74(3); and PARA 230. As to the meaning of 'civil partnership agreement' see PARA 16.

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225. General extent of court's powers.

In exercising its jurisdiction over property disputes between spouses or civil partners¹, the court has power to ascertain the respective rights of the parties to the disputed property, and may make such order as may be appropriate for its return or for restitution². The court has no power to vary established or agreed rights merely because in the light of subsequent events it thinks that the original agreement was unfair³, but it does seem that the court has power to vary orders made under the dispute resolution provisions⁴ where there has been a change in the value of the property before the order for its sale has been carried into effect⁵.

The statutory provision is a procedural provision only and the question for the court is 'Whose is this?', and not 'To whom shall this be given?'⁶. Although the court has no power under this provision to vary established property rights, it may, in its discretion⁷, prevent one of the parties from enforcing those rights if the result would be unjust to the other party⁸. In general, however, the rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property, while making full allowances in view of the parties' relationship, and where the original conveyance or lease of the land declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest, that necessarily concludes the question of title as between the parties for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any subsequent time even on death or dissolution⁹.

1 le under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66: see PARA 224. As to the principles to be applied in determining property rights see PARAS 278-284.

2 See PARA 224.

3 *Cobb v Cobb* [1955] 2 All ER 696 at 700, [1955] 1 WLR 731 at 737, CA per Romer LJ, approved in *Pettit v Pettit* [1970] AC 777, [1969] 2 All ER 385, HL. See also *Fribance v Fribance* [1957] 1 All ER 357, [1957] 1 WLR 384, CA; *Tasker v Tasker* [1895] P 1 (jewels given to wife were her property). In *Short v Short* [1960] 3 All ER 6 at 18, [1960] 1 WLR 833 at 849, CA, Devlin LJ stated that the powers of the court under the Married Women's Property Act 1882 s 17 were substantially the same as in any other proceeding where the ownership or possession of property was in question; and that the court's discretion was no wider and no narrower than the ordinary discretion of the court in such cases. This statement was approved by Lord Upjohn in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1235, [1965] 2 All ER 472 at 486, HL, who added that the Married Women's Property Act 1882 s 17 was a purely procedural one, providing a very useful summary method of determining between husband and wife questions of title and the right to possession of property, but did not confer any new substantive rights on either of the spouses. Cf the comments of Lord Denning MR in *Jansen v Jansen* [1965] P 478 at 488, [1965] 3 All ER 363 at 366, CA, and note that provision for civil partnerships corresponding to that made by the Married Women's Property Act 1882 s 17 is made by the Civil Partnership Act 2004 s 66 (see PARA 224). See also PARAS 278-284.

4 le under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66: see PARA 224.

5 *Gee v Gee* (1972) 116 Sol Jo 219, CA.

6 *Pettitt v Pettitt* [1970] AC 777 at 798, [1969] 2 All ER 385 at 393, HL per Lord Morris of Borth-y-Gest. See also *Pettitt v Pettitt* at 792 and at 388 per Lord Reid, at 807 and at 401 per Lord Hodson, at 812 and at 404, 405 per Lord Upjohn, and at 819 and at 410 per Lord Diplock; *Taylor v Taylor* [1968] 1 All ER 843 at 847, [1968] 1 WLR 378 at 383, 384, CA per Danckwerts LJ (where the wife issued a summons under the Married Women's Property Act 1882 s 17, seeking a declaration that she and her husband were the joint beneficial owners of the matrimonial home and registered a *lis pendens* under the Land Charges Act 1925 in respect of those proceedings; it was held, on appeal, that her interest was at the most a share in the proceeds of sale and not an

interest in land and accordingly the entry in the register was not a proper one and should be vacated under the court's inherent jurisdiction to remove improper entries from the register; the Married Women's Property Act 1882 s 17 was a purely procedural provision and not intended to alter the rights of parties in the property in question). See also *Burke v Burke* [1974] 2 All ER 944 at 947, [1974] 1 WLR 1063 at 1066, CA per Buckley LJ.

7 See note 1.

8 See *Bedson v Bedson* [1965] 2 QB 666, [1965] 3 All ER 307, CA (where the court refused to allow a wife to force a sale of the property at that time as such a sale would defeat the husband's right to apply to the court for a property adjustment order under what is now the Matrimonial Causes Act 1973 s 24(1)(c) (see PARA 510)). Cf *Rawlings v Rawlings* [1964] P 398, [1964] 2 All ER 804, CA (home sold), followed in *Re Solomon (a bankrupt), ex p Trustee of Property of Bankrupt v Solomon* [1967] Ch 573, sub nom *Re Debtor, ex p Trustee v Solomon* [1966] 3 All ER 255 (property sold because it was equitable to make such an order in all the circumstances); cf also *Burke v Burke* [1974] 2 All ER 944, [1974] 1 WLR 1063, CA (home sold; in exercising its discretion whether or not the husband as trustee should continue to postpone the execution of the trust for sale, the court had to have regard to all the relevant circumstances of the case and to the situation of the beneficial owners; the children's interests were to be taken into consideration only in so far as they affected the equities as between the husband and wife; dictum of Salmon LJ in *Rawlings v Rawlings* at 419 and at 814 disapproved).

9 *Pettitt v Pettitt* [1970] AC 777 at 813, [1969] 2 All ER 385 at 405, HL per Lord Upjohn. See also *Wilson v Wilson* [1963] 2 All ER 447, [1963] 1 WLR 601, CA; *Re John's Assignment Trusts, Niven v Niven* [1970] 2 All ER 210n, [1970] 1 WLR 955 (where husband and wife purchased a leasehold house and shop chiefly out of the proceeds of sale of the former matrimonial home, the assignment containing an express declaration of trust for the husband and wife as beneficial joint tenants; the husband then claimed to be the sole beneficial owner, and it was held that no sufficient ground was shown entitling him to go behind the express trust in the assignment which, as drawn, accorded with the probable intentions of the parties at the time, and that accordingly the house and shop were held for them both in equal shares).

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226. Power to order sale.

The court's power to make orders concerning disputes relating to matrimonial or civil partnership property¹ includes power to order a sale of the property². The rights of occupation of a spouse or civil partner who has no proprietary, contractual or statutory interest in the family home are protected by statute³, whereas a spouse or civil partner who has a proprietary or contractual right to remain in occupation may enforce that right at common law⁴. A right of occupation is, therefore, not a right which falls to be determined by a court dealing only with proceedings relating to property disputes⁵, although the court may take such matters into account in determining whether to order a sale of the property in question or to make any other order which would necessarily exclude a spouse or civil partner from occupation⁶. It has been held that where parties were joint owners of a property, the court would not make an order for delivery up of it to one party only (in this case, the wife)⁷. Where the parties are co-owners, and the wife was an innocent party, it could be wrong to order a sale because the husband could have been under a duty to provide her with a roof over her head⁸: however, such a matter can best be considered by the court when dealing with financial provision and property adjustment⁹, when the amount payable to one party might be less by reason that that party continues to occupy the family home¹⁰. There is no authority that the provisions for dealing with property disputes¹¹ give the court jurisdiction to turn one party out of occupation of the family home where both parties have equal rights of ownership¹². After decree absolute or the making of a final order for dissolution, if one party desires to remain in the property which was the property of the other the parties must set up some kind of contract unless a claim for relief can be established by way of transfer of property¹³.

1 Ie the power conferred by the Married Women's Property Act 1882 s 17 and the Civil Partnership Act 2004 s 66: see PARA 224. As to the principles to be applied in determining property rights see PARAS 278-284.

2 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(7); Civil Partnership Act 2004 s 66(2).

3 See the Family Law Act 1996 s 30 et seq; and PARA 285 et seq.

4 *Gurasz v Gurasz* [1970] P 11, [1969] 3 All ER 822, CA; and see *Tarr v Tarr* [1973] AC 254, [1972] 2 All ER 295, HL.

5 Ie under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66: see PARA 224.

6 See eg *Cobb v Cobb* [1955] 2 All ER 696, [1955] 1 WLR 731, CA; *Bedson v Bedson* [1965] 2 QB 666, [1965] 3 All ER 307, CA; *Burke v Burke* [1974] 2 All ER 944, [1974] 1 WLR 1063, CA.

7 *Richman v Richman* [1950] WN 233; *Bedson v Bedson* [1965] 2 QB 666, [1965] 3 All ER 307, CA (wife and husband joint owners of home; sale refused); cf *Cobb v Cobb* [1955] 2 All ER 696, [1955] 1 WLR 731, CA (cited in note 8).

8 *Cobb v Cobb* [1955] 2 All ER 696, [1955] 1 WLR 731, CA (house conveyed to spouses as joint tenants; both assumed responsibility for repayments, although in fact they were deducted from the husband's wages because the money had been advanced by his employer; this was compensated for by a joint arrangement as to housekeeping expenses; the marriage then broke down; held that he could not be given an order for sale with vacant possession); applied in *McDowell v McDowell* (1957) 169 Estates Gazette 264, CA, distinguishing *Lee v Lee* [1952] 2 QB 489n, [1952] 1 All ER 1299, CA. Cf *Jackson v Jackson* [1970] 3 All ER 854, [1971] 1 WLR 59 (where the court exercised discretion, having regard to the conduct of the parties and the circumstances of the case, to order sale under the Law of Property Act 1925 s 30 (repealed), where the cost of allowing the wife to remain in the matrimonial home was in excess of anything the husband would be ordered to pay in matrimonial

proceedings); affd [1971] 3 All ER 774, [1971] 1 WLR 1539, CA (where it was emphasised that the house was larger than was reasonably required by the wife: see at 778, 780, 782 and at 1543, 1544, 1547); *Re Hardy's Trust, Sutherst v Sutherst* (1970) 114 Sol Jo 864; *Farquharson v Farquharson* (1971) 115 Sol Jo 444, CA (question whether the matrimonial home should be sold was linked with the question of maintenance); *Burke v Burke* [1974] 2 All ER 944, [1974] 1 WLR 1063, CA.

9 See PARA 450 et seq.

10 See *Cobb v Cobb* [1955] 2 All ER 696 at 699, [1955] 1 WLR 731 at 734, CA per Denning LJ.

11 Ie the Married Women's Property Act 1882 s 17 and the Civil Partnership Act 2004 s 66: see PARA 224.

12 *McDowell v McDowell* (1957) 169 Estates Gazette 264, CA.

13 *Vaughan v Vaughan* [1953] 1 QB 762, [1953] 1 All ER 209, CA. As to transfers of property see PARA 499 et seq. In *Vaughan v Vaughan* it was held that if the wife had a contract giving her the right to remain in the house for the rest of her life, it would be a post-nuptial settlement which the divorce court could vary: see *Vaughan v Vaughan* at 768 and at 212 per Denning LJ; and see PARA 511. In proceedings by the husband under the Married Women's Property Act 1882 for possession of the matrimonial home of which he was tenant, the adjournment of the proceedings until either the husband had provided the wife with suitable alternative accommodation, or until the pending divorce proceedings had been heard, was held, on appeal, to be a judicial exercise of the discretion conferred by the 1882 Act: *Short v Short* [1960] 3 All ER 6, [1960] 1 WLR 833, CA.

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227. Property to which court's powers extend.

The most common dispute between spouses and civil partners is that relating to a house, particularly the family home where both parties claim to have contributed to the cost in varying degrees¹, or the contents thereof². A dowry given on a Jewish marriage has been the subject of an application under the provisions³ concerning property disputes⁴; and so too have been title deeds to property⁵, jewellery⁶, wedding presents⁷, gifts⁸, and the benefit of a hire-purchase agreement⁹. A loan by one party to the other is not, however, a matter which may be dealt with by the court in such proceedings¹⁰.

It is no longer necessary that the property should still be in the possession of the other party or that there should be an identifiable fund in existence¹¹. It has been held that the jurisdiction of the English court is not limited to property in England and Wales but can extend to property abroad, and a party cannot oust the court's jurisdiction by removing property from England and Wales¹², although the court may have no power to exercise jurisdiction where the property in question is already the subject matter of proceedings in a foreign court¹³. Where the property in dispute is land which is held by the parties as joint tenants, a notice of severance may prevent proceedings being taken under the dispute resolution provisions¹⁴. It has been held that a summons and supporting affidavit under the dispute resolution provisions¹⁵ may operate as the severance of a joint tenancy¹⁶.

1 See eg *Hutchinson v Hutchinson* [1947] 2 All ER 792; *Stewart v Stewart* [1948] 1 KB 507, [1947] 2 All ER 813, CA; *Re Rogers' Question* [1948] 1 All ER 328, CA. As to the meaning of an undertaking by a husband to a wife to make a house available 'for her use' see *Morss v Morss* [1972] Fam 264, [1972] 1 All ER 1121, CA.

2 See eg *W v W* [1951] 2 TLR 1135.

3 Ie under the Married Women's Property Act 1882 s 17, for which the corresponding civil partnership provision is the Civil Partnership Act 2004 s 66: see PARA 224.

4 *Joseph (otherwise King) v Joseph* [1909] P 217; *Kelner v Kelner* [1939] P 411, [1939] 3 All ER 957.

5 *Re Knight's Question* [1959] Ch 381, [1958] 1 All ER 812.

6 *Tasker v Tasker* [1895] P 1.

7 *Samson v Samson* [1960] 1 All ER 653, [1960] 1 WLR 190, CA; and see PARA 247.

8 *Glaister-Carlisle v Glaister-Carlisle* (1968) 112 Sol Jo 215, CA (alleged gift of a dog).

9 *Spellman v Spellman* [1961] 2 All ER 498, [1961] 1 WLR 921, CA.

10 *Crystall v Crystall* [1963] 2 All ER 330, [1963] 1 WLR 574, CA.

11 See the Matrimonial Causes (Property and Maintenance) Act 1958 s 7; the Civil Partnership Act 2004 s 67; and PARA 228.

12 See *Razelos v Razelos* [1969] 3 All ER 929, [1970] 1 WLR 392 (where a wife instituted proceedings in respect of shares held by the husband in the United States of America and in respect of realty in Greece, all of which she alleged had been purchased with her money; and it was held that the court had jurisdiction in respect of the shares as they had at one time been in the husband's possession and under his control in England and the fact that he had put them out of his possession in the United States did not oust that jurisdiction, and that the court's jurisdiction in respect of the realty in Greece stemmed from the husband's presence in England at

the time that the summons was issued, and there was no evidence that an order in respect of that realty would be ineffectual in Greece). The court will not exercise its jurisdiction where an order would be ineffective: see *Hamlin v Hamlin* [1986] Fam 11, [1985] 2 All ER 1037, CA, applying *Razelos v Razelos*.

13 See *Re Granz's Question, Granz v Granz* (1968) 112 Sol Jo 439 (where, the parties being domiciled in Switzerland by the law of which the husband had management and control of the property belonging to both parties during the subsistence of the marriage, the wife commenced proceedings under the Married Women's Property Act 1882 s 17 in England in respect of property which the husband had brought to England but in respect of which the Swiss court had already refused to make an order in favour of the wife; it was held that until an order was made by the Swiss court to the contrary the husband's right to the possession of that property was unqualified and the right to its management unfettered, and the English court had no power to exercise jurisdiction which was vested in the Swiss court).

14 *Radziej (otherwise Sierkowska) v Radziej* [1967] 1 All ER 944, [1967] 1 WLR 659; affd [1968] 3 All ER 624, [1968] 1 WLR 1928, CA.

15 See note 3.

16 See *Re Draper's Conveyance, Nihan v Porter* [1969] 1 Ch 486, [1967] 3 All ER 853 (where the summons, coupled with the supporting affidavit, clearly showed an intention on the wife's part that she wished the property to be sold and the proceeds distributed, one-half to her and one-half to the husband).

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228. Property no longer in possession of spouse or civil partner.

Any right of a spouse or civil partner to apply to the court for the resolution of a property dispute¹ includes the right to make such an application where that person claims that the other party has had in his possession or under his control:

- 318 (1) money to which, or to a share of which, the first person was beneficially entitled²; or
- 319 (2) property, other than money, to which, or to an interest in which, that person was beneficially entitled³,

and that either that money or other property has ceased to be in the possession or under the control of the other party or that the first person does not know whether it is still in the possession or under the control of the other party⁴.

Where, on such an application, the court is satisfied:

- 320 (a) that the other party has had in his possession or under his control that money or other property⁵; and
- 321 (b) that he has not made to the applicant in respect of it such payment or disposition⁶ as would have been appropriate in the circumstances⁷,

it may order that party to pay to the applicant:

- 322 (i) in a case falling within head (1) above, such sum in respect of the money to which the application relates, or the applicant's share thereof⁸; or
- 323 (ii) in a case falling within head (2) above, such sum in respect of the value of the property to which the application relates, or the applicant's interest therein⁹.

Where it appears to the court that there is any property which represents the whole or part of the money or property in question and is property in respect of which an order for the resolution of a property dispute¹⁰ could have been made had an application been made for one in a question as to the title to or possession of that property, the court may, either in substitution for or in addition to making an order for payment referred to above, make such order as it could have made had there been an application as to the title to or possession of that property¹¹.

These provisions also apply in relation to the property of engaged couples and persons who have entered into a civil partnership agreement¹².

1 le under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66: see PARA 224. Such an application may be made by either of the parties notwithstanding that their marriage or civil partnership has been dissolved or annulled so long as the application is made within the period of three years beginning with the date of dissolution or annulment; Matrimonial Proceedings and Property Act 1970 s 39; Civil Partnership Act 2004 s 68. References in these provisions to a spouse or civil partner are to be construed accordingly; Matrimonial Proceedings and Property Act 1970 s 39; Civil Partnership Act 2004 s 68(2).

2 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(1)(a), (5); Civil Partnership Act 2004 s 67(1)(a). For these purposes it does not matter whether the first person is beneficially entitled to the money or share because it represents the proceeds of property to which, or to an interest in which, he was beneficially entitled, or for any other reason: Matrimonial Causes (Property and Maintenance) Act 1958 s 7(1)(a); Civil Partnership Act 2004 s 67(2). The Matrimonial Causes (Property and Maintenance) Act 1958 s 8(1) provides that for these purposes 'property' means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action and any other right or interest whether in possession or not. No corresponding provision is made by the Civil Partnership Act 2004.

3 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(1)(b); Civil Partnership Act 2004 s 67(1)(b).

4 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(1); Civil Partnership Act 2004 s 67(1).

5 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(2)(a); Civil Partnership Act 2004 s 67(3)(a).

6 The Matrimonial Causes (Property and Maintenance) Act 1958 s 8(1) provides that for these purposes 'disposition' does not include any provision contained in a will or codicil, but includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise. No corresponding provision is made by the Civil Partnership Act 2004.

7 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(2)(b); Civil Partnership Act 2004 s 67(3)(b).

8 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(3)(a); Civil Partnership Act 2004 s 67(4)(a). The Matrimonial Causes (Property and Maintenance) Act 1958 s 7(3) provides that the payment to be made is 'such sum in respect of the money to which the application relates, or the applicant's share thereof, as the case may be', while the Civil Partnership Act 2004 s 69(4) provides that it is to be 'such sum in respect of the money to which the application relates, or [the applicant's] share of it, as the court considers appropriate': *quaere* whether there is any meaningful distinction between these wordings. Any power of a judge which is exercisable under the Married Women's Property Act 1882 s 17 and the Civil Partnership Act 2004 s 66 (see PARA 224) is exercisable in relation to an application made under these provisions: Matrimonial Causes (Property and Maintenance) Act 1958 s 7(6) (substituted by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 3); Civil Partnership Act 2004 s 67(6).

9 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(3)(b); Civil Partnership Act 2004 s 67(4)(b). These provisions contain similar drafting discrepancies to those described in note 8. As to the powers of a judge see note 8.

10 *le* an order under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66: see PARA 224.

11 Matrimonial Causes (Property and Maintenance) Act 1958 s 7(4); Civil Partnership Act 2004 s 67(5). The court may also make an order in respect of property which, although once in the relevant party's possession, is at the time of the hearing out of his possession and abroad: see *Razelos v Razelos* [1969] 3 All ER 929, [1970] 1 WLR 390; and PARA 227 note 12.

12 See the Law Reform (Miscellaneous Provisions) Act 1970 s 2(2); the Civil Partnership Act 2004 s 74(3); and PARA 230. As to the meaning of 'civil partnership agreement' see PARA 16.

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229. Property of former spouses or civil partners.

Where a marriage or civil partnership has been dissolved, and there is a dispute between the former spouses or civil partners as to property pooled by them during the marriage or civil partnership¹, the principles to be applied in determining the ownership of those resources are the same as if the proceedings had been brought during the currency of the marriage or civil partnership². The breakdown of the marriage or civil partnership is irrelevant in the determination of a question as to where ownership lay before breakdown³. It is also possible that, after dissolution, the transaction may be regarded as an ante-nuptial settlement (or civil partnership equivalent) and may be variable as such⁴.

1 As to the right of either of the parties to a marriage or civil partnership which has been dissolved or annulled to apply to the court under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 see PARA 224.

2 See *Pettitt v Pettitt* [1970] AC 777 at 793, [1969] 2 All ER 385 at 389, HL per Lord Reid; and PARA 278 et seq. Cf *Jones v Challenger* [1961] 1 QB 176, [1960] 1 All ER 785, CA; *Jackson v Jackson* [1971] 3 All ER 774, [1971] 1 WLR 1539, CA.

3 See *Pettitt v Pettitt* [1970] AC 777 at 803, [1969] 2 All ER 385 at 397, HL per Lord Morris of Borth-y-Gest.

4 See PARA 510 et seq.

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230. Rights over property where engagement or civil partnership agreement terminated.

Where an agreement to marry or a civil partnership agreement¹ is terminated, the statutory provisions conferring a share or an enlarged share of property on persons who have contributed to improvements to that property² apply in relation to any property in which either or both of the parties to the agreement had a beneficial interest while the agreement was in force as they apply in relation to property in which a spouse or civil partner has a beneficial interest³, and the statutory provisions relating to the resolution of property disputes between spouses or civil partners⁴ apply to any dispute between, or claim by one of, the parties in relation to property in which either or both had a beneficial interest while the agreement was in force, as if the parties were married or were civil partners of each other⁵.

1 As to the meaning of 'civil partnership agreement' see PARA 16.

2 I.e the Matrimonial Proceedings and Property Act 1970 s 37 and the Civil Partnership Act 2004 s 65 (see PARA 283).

3 Law Reform (Miscellaneous Provisions) Act 1970 s 2(1); Civil Partnership Act 2004 s 74(1), (2).

4 I.e the Married Women's Property Act 1882 s 17, the Matrimonial Causes (Property and Maintenance) Act 1958 s 7, and the Civil Partnership Act 2004 ss 66, 67 (see PARAS 224, 228).

5 Law Reform (Miscellaneous Provisions) Act 1970 s 2(2); Civil Partnership Act 2004 s 74(3). An application made by virtue of this provision must be made within three years of the termination of the agreement: Law Reform (Miscellaneous Provisions) Act 1970 s 2(2); Civil Partnership Act 2004 s 74(4). As to undue influence being exercised by one party to an engagement over the other see *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA.

It is also provided, in relation to agreements to marry, that any rule of law relating to the rights of husbands and wives in relation to property in which either or both has or have a beneficial interest applies, in relation to any property in which either or both of the parties to the agreement had a beneficial interest while the agreement was in force, as it applies in relation to property in which a husband or wife has a beneficial interest: see the Law Reform (Miscellaneous Provisions) Act 1970 s 2(1); and see also *Mossop v Mossop* [1989] Fam 77, [1988] 2 All ER 202, CA (court has no jurisdiction to make a property transfer order under the Matrimonial Causes Act 1973 s 24(1) (see PARA 499 et seq) in relation to an unmarried couple who have called off their engagement (or, presumably, to make a property transfer order under the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9) (see PARA 499 et seq) in relation to persons who have terminated a civil partnership agreement).

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(ii) Property Rights in the Family Home

231. Property rights in the event of separation.

The court has wide discretionary powers in proceedings for divorce, dissolution, nullity or judicial or legal separation to distribute matrimonial and civil partnership property as it sees fit without having to ascertain the shares of the parties in the property¹. If property is purchased in joint names without any declaration of trust there is a prime facie case that both the legal and beneficial interests in the property are joint and equal², although the respective parties' shares in the property will vary according to the share of the purchase money each provided and the contributions each has made to, for example, mortgage repayments³. The position is further complicated where the house is taken in only one of the two names⁴. A person may acquire a share or an enlarged share in joint property by making or contributing to improvements to that property⁵.

Spouses' and civil partners' rights of occupation are also protected by statute⁶, under which it is provided that where one spouse or civil partner is entitled to occupy a dwelling house and the other spouse or civil partner is not so entitled, the spouse or civil partner not so entitled has a right not to be evicted or excluded from the dwelling house or any part of it by the other spouse or civil partner except with the leave of the court and, if not in occupation of the dwelling house, has a right with the leave of the court so given to enter into and occupy it⁷. These rights are known as 'home rights'.

1 See *Fielding v Fielding* [1978] 1 All ER 267, [1977] 1 WLR 1146n; and PARA 278.

2 See *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929; and PARA 279. The intention to share the beneficial interest may be inferred by the court from the actions of the parties (see PARA 281), and provision is made as to their exact quantification (see PARA 282).

3 See PARA 279.

4 See PARA 280.

5 See PARA 283.

6 Ie the Family Law Act 1996 s 30 et seq (see PARA 285 et seq).

7 See the Family Law Act 1996 s 30(1), (2); and PARA 285.

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(iii) Powers of Appointment

232. Married woman's right to exercise power.

A married woman¹ has always been able to execute a power of appointment limited or reserved to her, over either real or personal estate, whether the power is to be executed inter vivos or by will², the form of instrument required depending on the terms of the power. A power to appoint by deed only cannot be exercised by will³, nor can a power to appoint by will only be exercised by deed⁴. A will executed and attested as required by law in ordinary cases is, however, a sufficient execution by a married woman of a power to appoint by will, even where the formalities required by the instrument creating the power have not been complied with⁵. There is nothing to prevent the exercise of a joint power given to husband and wife⁶.

1 The provisions described in this paragraph derive from common law decisions (and, in one case, an enactment) specifically dealing only with 'marriage' and 'married women' and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this.

2 *Peacock v Monk* (1751) 2 Ves Sen 190; *Downes v Timperon* (1828) 4 Russ 334; *Doe d Blomfield v Eyre* (1848) 5 CB 713, Ex Ch; *Pride v Bubb* (1871) 7 Ch App 64; *Guise v Small* (1793) 1 Anst 277.

3 *Earl of Darlington v Pulteney* (1775) 1 Cowp 260; *Bushell v Bushell* (1803) 1 Sch & Lef 90.

4 *Reid v Shergold* (1805) 10 Ves 370; *Sockett v Wray* (1794) 4 Bro CC 483; *Anderson v Dawson* (1808) 15 Ves 532.

5 In this respect the Wills Act 1837 s 27 (see **POWERS** vol 36(2) (Reissue) PARA 310), applied to the wills of married woman made during marriage, even though that Act did not alter the capacity of a married woman to make a will: *Bernard v Minshull* (1859) John 276.

6 Law Reform (Married Women and Tortfeasors) Act 1935 s 4(2)(d).

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233. Power not suspended by marriage.

Marriage¹ does not operate to suspend a power of appointment given to a single woman²; and, where a general power is given to a single woman under a settlement of her property, with trusts in default of appointment for herself and any future husband, the power may be exercised by her during the marriage³. A power in a marriage settlement to appoint at any time during and notwithstanding the marriage cannot, however, be exercised during widowhood or a second marriage⁴.

1 The provisions described in this paragraph derive from common law decisions specifically dealing only with 'marriage' and 'married women' and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this.

2 *Burnet v Mann* (1748) 1 Ves Sen 156.

3 *Wood v Wood* (1870) LR 10 Eq 220.

4 *Horseman v Abbey* (1819) 1 Jac & W 381; *Morris v Howes* (1845) 4 Hare 599; on appeal 16 LJ Ch 121. The making of a will during marriage has, however, been held a good exercise of a power to appoint by will during marriage, even though the wife survived the husband: *Re Safford's Settlement*, *Davies v Burgess* [1915] 2 Ch 211.

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234. Minority.

The minority of a married woman¹ does not affect her capacity to exercise a power of appointment with regard to personal estate by deed or will if it appears to have been the donor's intention that the power should be exercisable during minority². A minor married woman cannot, however, exercise a power of appointment over real estate if it is coupled with an interest, that is to say if the exercise of the power will affect her own freehold interest³.

A will made by a married woman in exercise of a power of appointment does not require her husband's assent⁴.

1 The provisions described in this paragraph derive from common law decisions specifically dealing only with 'marriage' and 'married women' and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this. The age of majority for all persons is now reached on attaining the age of 18: see the Family Law Reform Act 1969 s 1(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

2 *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228, CA; *Re Cardross's Settlement* (1878) 7 ChD 728; *Re Sutton, Boscawen v Wyndham* [1921] 1 Ch 257.

3 *Hearle v Greenbank* (1749) 3 Atk 695.

4 *Re Anstis, Chetwynd v Morgan, Morgan v Chetwynd* (1886) 31 ChD 596, CA; and see *Re James, Hole v Bethune* [1910] 1 Ch 157.

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235. Effect of appointment by will.

If a married woman¹ who has a general power of appointment by will² expresses an intention by her will that it is to operate³ on all property over which she has a power of appointment, she thereby makes the property her own and prevents it from going as in default of appointment, even though the will may fail effectively to dispose of the property by reason of the death of the residuary devisee or legatee in her lifetime⁴.

1 The provisions described in this paragraph derive from common law decisions specifically dealing only with 'marriage' and 'married women' and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this.

2 See the Wills Act 1837 s 27; *Re Powell's Trusts* (1869) 39 LJ Ch 188; and **POWERS** vol 36(2) (Reissue) PARA 310.

3 For the purpose of the rule against perpetuities, time runs from the death of the married woman: *Rous v Jackson* (1885) 29 ChD 521; cf *Re Powell's Trusts* (1869) 39 LJ Ch 188; and **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1062.

4 *Willoughby Osborne v Holyoake* (1882) 22 ChD 238; *Re Pinede's Settlement* (1879) 12 ChD 667.

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236. Power to appoint in favour of husband or herself.

A married woman¹ may exercise a general power of appointment in favour of herself², her husband³ or herself and her husband jointly⁴; and, if any appointment to the husband is impeached on the ground of his undue influence, the burden of proving its invalidity lies on the party impeaching it⁵.

1 The provisions described in this paragraph derive from common law decisions specifically dealing only with 'marriage' and 'married women' and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this.

2 *Bower v Smith* (1871) LR 11 Eq 279; and see *Fussell v Dowding* (1872) LR 14 Eq 421; *Bond v Taylor* (1861) 2 John & H 473.

3 *Wood v Wood* (1870) LR 10 Eq 220; *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228, CA; *Bernard v Minshull* (1859) John 276; *Allen v Papworth* (1731) 1 Ves Sen 163 (bill by husband and wife submitting that the property subject to the power should be applied in payment of his debts, held equivalent to an appointment by her, and decreed accordingly).

4 *Wood v Wood* (1870) LR 10 Eq 220. See also the Law Reform (Married Women and Tortfeasors) Act 1935 s 4(2)(d) (there is nothing to prevent the exercise of a joint power given to husband and wife); and PARA 232.

5 *Nedby v Nedby* (1852) 5 De G & Sm 377 (income given to wife for life for her separate use, with power to appoint the remainder by deed or will; it was sought to set aside an appointment by deed in favour of the husband on the ground of ignorance and want of professional advice, the deed having been prepared by the husband's solicitor; appointment upheld).

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237. Contracts as to exercise of power.

A married woman¹ may by deed release or contract not to exercise any power, whether coupled with an interest or not, and it is not necessary that the husband should concur².

Where a married woman has a general power of appointment by will, a contract by her to exercise it in favour of a particular person will not be specifically enforced, but the breach of such a contract gives rise to a claim for damages against her estate, and, if the power of appointment is exercised, the appointed property forms part of her assets³.

1 The provisions described in this paragraph derive from common law decisions specifically dealing only with 'marriage' and 'married women' and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this.

2 Power to release or to contract not to exercise a power of appointment is conferred generally by the Law of Property Act 1925 s 155: see **POWERS** vol 36(2) (Reissue) PARA 376. As to the principle that a married woman may act without her husband's concurrence see *Re Chisholm's Settlement*, *Re Hemphill's Settlement*, *Hemphill v Hemphill* [1901] 2 Ch 82, CA (life interest in personalty subject to restraint on anticipation, with power of appointment; the power could be released by deed without acknowledgment); *Re Onslow*, *Plowden v Gayford* (1888) 39 ChD 622; *Re Davenport*, *Turner v King* [1895] 1 Ch 361.

3 *Re Parkin*, *Hill v Schwarz* [1892] 3 Ch 510 (covenant by wife in favour of the trustees of her marriage settlement to exercise any power of appointment which might become vested in her; she became the donee of a general testamentary power and exercised it in favour of others; the trustees of the settlement were not entitled to specific performance, but they had a claim for damages against her executors to the extent of her assets, the measure of the damages being the value of the appointed property, which formed part of her assets).

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238. Defective execution.

A defective execution of a power in favour of creditors or purchasers for valuable consideration will be remedied in equity¹, provided that there was an attempt to exercise it in their favour².

¹ *Hughes v Wells* (1852) 9 Hare 749; *Sergison v Sealey* (1742) 2 Atk 412 at 415; *Tollet v Tollet* (1728) 2 P Wms 489; *Cotter v Laver* (1731) 2 P Wms 623; and see **POWERS** vol 36(2) (Reissue) PARA 359 et seq.

² *Bull v Vardy* (1791) 1 Ves 270. As to a defective appointment in favour of a husband see PARA 236.

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(iv) Equity of Exoneration

239. Right of indemnity where one party's property charged for other's benefit.

If the property of a spouse or a civil partner¹ is mortgaged or charged in order to raise money for the payment of the other spouse or civil partner's debts, or otherwise for the other spouse or civil partner's benefit, it is presumed, in the absence of evidence showing an intention to the contrary, that the first spouse or civil partner meant to charge the property merely by way of security, and in such case that spouse or a civil partner is in the position of surety² and is entitled to be indemnified by the other spouse or civil partner, and to throw the debt primarily on that person's estate to the exoneration of his own³.

The right to exoneration is, however, a presumptive right only; it depends on the intention of the parties to be ascertained from all the circumstances of each particular case⁴. It may be rebutted by evidence showing that the first spouse or civil partner intended to make a gift of the property to the other⁵; and it has been held to be rebutted where the money was raised to pay debts which, though legally one party's, had been contracted by reason of the extravagant mode of living of both⁶.

No presumption of a right to exoneration arises where the money is raised to discharge the debts or obligations of the party whose property is being mortgaged or charged, or otherwise for that person's benefit⁷; and, where the mortgage of one spouse or civil partner's estate is contemporaneous with a settlement of it, the whole will be presumed to be one transaction so as to exclude that person's claim to indemnity, especially if the money is raised for the purpose of discharging any of their debts or charges on the estate, even though more money has been raised than is necessary for that purpose⁸.

The court may order an inquiry as to which sums forming part of the money raised under the charge went solely to the benefit of the other spouse or civil partner, whether in their business or on their personal account, and which went for the benefit of the spouse or civil partner whose property has been mortgaged or charged, either solely or jointly with their spouse or civil partner or children; and, in respect of the latter sums, the spouse or civil partner whose property has been mortgaged or charged has no right of exoneration⁹.

Equity of exoneration is waived and barred if the right is disclaimed and the executors of the disclaimer's spouse or civil partner pay legacies on the faith of the disclaimer¹⁰.

1 Although the provisions described in this paragraph and PARAS 240-244 derive from common law decisions pre-dating the concept of civil partnerships, and are concerned with protecting the property of a wife against her husband's creditors, it is submitted that they must now apply equally to the property of either party to a marriage and also to the property of civil partners.

2 See *Stamford, Spalding and Boston Banking Co v Ball* (1862) 4 De GF & J 310 (where a wife's reversionary interest in personalty, held for her separate use, was assigned to trustees for a bank on trust to receive the same and retain and pay certain money due from her husband, there being no proviso for redemption or power of sale, it was held that the bank was not entitled to foreclosure but only to retain the money due from the husband when the wife's interest fell into possession).

3 *Earl of Huntingdon v Countess Dowager Huntingdon* (1702) 2 Bro Parl Cas 1, HL (wife joined with husband in mortgage of her freeholds of inheritance; husband paid off the mortgage, and took an assignment of it in trust for himself; it was held that the wife's heir was entitled to the property as against the devisee of the

husband); *Pocock v Lee* (1707) 2 Vern 604 (wife joined husband in mortgage, the equity of redemption being reserved to husband and wife and their heirs; the husband having died, it was held that the mortgage must be discharged out of his estate in exoneration of that of the wife); *Hudson v Carmichael* (1854) Kay 613; *Parteriche v Powlet* (1742) 2 Atk 383; *Aguilar v Aguilar Lousada* (1820) 5 Madd 414 (contest between wife and husband's assignee in bankruptcy); *Gee v Smart* (1857) 8 E & B 313; *Tate v Austin* (1714) 1 P Wms 264; cf *Grant v Callaghan* (1956) 107 L Jo 105.

See also *Lancaster v Evors* (1847) 10 Beav 266 (after her death the wife's creditors are entitled to claim the benefit of her right, but, as a general rule, interest will not be allowed on the sum which she is entitled to be repaid); and as to jurisdiction see *Drummond v Drummond* (1868) 37 LJ Ch 811 (action by plaintiff domiciled in England against defendant resident in Scotland to have plaintiff's Scottish real estate exonerated; the defendant having appeared, the court accepted jurisdiction). As to a guarantor's rights to exoneration generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1151 et seq.

4 *Paget v Paget* [1898] 1 Ch 470, CA. See also *Noyes v Pollock* (1886) 32 ChD 53, CA; *Skottowe v Williams, Williams v Skottowe* (1861) 3 De GF & J 535.

5 *Clinton v Hooper* (1791) 3 Bro CC 201.

6 *Paget v Paget* [1898] 1 Ch 470, CA.

7 *Earl Kinnoul v Money* (1767) 3 Swan 202; *Gray v Dowman* (1858) 27 LJ Ch 702; *Bagot v Oughton* (1717) 1 P Wms 347; *Re Pittortou, ex p Trustee of Property of Bankrupt v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58 (money used for general household and family living expenses will be treated as used for the joint benefit of the wife and the husband).

8 *Lewis v Nangle* (1752) 1 Cox Eq Cas 240.

9 *Re Pittortou, ex p Trustee of Property of Bankrupt v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58.

10 *Clinton v Hooper* (1791) 3 Bro CC 201.

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240. Position where other spouse or civil partner is party to a mortgage.

Where a spouse or civil partner¹ joins in the mortgage of his spouse or civil partner's property and covenants for repayment, or where it appears on the face of the mortgage deed that the money was paid to him, there is a presumption that the money was raised for his benefit and that his spouse or civil partner is a surety for it², although extrinsic evidence is admissible to show the contrary³.

1 See PARA 239 note 1.

2 *Hudson v Carmichael* (1854) Kay 613; *Hall v Hall* [1911] 1 Ch 487; and see *Lewis v Nangle* (1752) 1 Cox Eq Cas 240 per Lord Thurlow. Spouses and civil partners may sue jointly for money received in respect of an advance to them both on the security of the property of one of them: *Jones v Cuthbertson* (1873) LR 8 QB 504.

3 *Hudson v Carmichael* (1854) Kay 613; *Gray v Dowman* (1858) 27 LJ Ch 702; *Hall v Hall* [1911] 1 Ch 487.

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241. Property charged partly for benefit of other spouse or civil partner.

If the property of a spouse or civil partner¹ is charged partly for their spouse or civil partner's benefit and partly for the discharge of their own debts and obligations, the first spouse or civil partner is presumptively entitled to exoneration to the extent of the other's interest².

1 See PARA 239 note 1.

2 *Gee v Smart* (1857) 8 E & B 313 at 319.

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242. Estates of both spouses or civil partners charged for one party's benefit.

Where the estates of both spouses or civil partners¹ are mortgaged or charged for the benefit of one of them, the other is prima facie entitled to place the mortgage debt primarily on the property of the first².

¹ See PARA 239 note 1.

² *Bagot v Oughton* (1717) 1 P Wms 347; *Gray v Dowman* (1858) 27 LJ Ch 702; and see *Pitt v Pitt* (1823) Turn & R 180.

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243. Charge of property over which one party has general power.

The presumptive right to exoneration¹ extends to cases where one spouse or civil partner² mortgages for the benefit of the other spouse or civil partner property over which the first spouse or civil partner has a general power of appointment³, and even to cases of property over which they have a joint power, if the property is limited to the first spouse or civil partner in default of appointment⁴.

1 See PARA 239.

2 See PARA 239 note 1.

3 *Thomas v Thomas* (1855) 25 LJ Ch 159.

4 *Re Trueman, ex p Trueman* (1872) 42 LJ Bcy 1; cf *Scholefield v Lockwood* (1863) 4 De GJ & Sm 22.

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244. Effect of bankruptcy.

Where the property of a spouse or civil partner¹ is mortgaged or charged for the benefit of their spouse or civil partner and the second spouse or civil partner becomes bankrupt, the first spouse or civil partner will be able, if the equity of exoneration is applied, to throw the burden of any charge or mortgage on to the bankrupt's beneficial interest in any jointly held property².

¹ See PARA 239 note 1.

² *Re Pittortou, ex p Trustee of Property of Bankrupt v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58; and see *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of Property of Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952, DC.

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(v) Minor Financial Matters

245. Joint banking account.

Where spouses or civil partners¹ have a common purse and a pool of their resources, whether in a joint banking account or otherwise, the remuneration of one party is usually regarded as being earned on behalf of both and to be joint property, and amounts paid in and withdrawn by each party are irrelevant². This will not be the case, however, where one party provides all the money in the joint account and it is simply used as a matter of convenience of administration³.

¹ Although the provisions described in this paragraph derive from common law decisions pre-dating the concept of civil partnerships, it is submitted that they must now apply equally to the property of either party to a marriage and also to the property of civil partners.

² See *Jones v Maynard* [1951] Ch 572, [1951] 1 All ER 802 (where a husband authorised his wife to draw on his bank account which was then operated as a joint account into which both paid their income and earnings, his payments being much the larger, and from time to time he withdrew money to pay for investments which he purchased in his own name, and it was held that the principle of equality ought to be applied and the wife was entitled to half the final balance in the joint account and to half the value of the investments existing at the date when the account was closed). Cf *Re Bishop, National Provincial Bank Ltd v Bishop* [1965] Ch 450, [1965] 1 All ER 249 (where a joint account was opened for a husband and wife on the terms that either could draw on it; then, in the absence of evidence to the contrary, each spouse could draw on it not only for the benefit of them both but also for his, or her, individual benefit). See also the Married Women's Property Act 1964 s 1 (if any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property is, in the absence of any agreement between them to the contrary, to be treated as belonging to the husband and the wife in equal shares).

³ *Heseltine v Heseltine* [1971] 1 All ER 952 at 956, [1971] 1 WLR 342 at 347, CA per Lord Denning MR.

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246. Paraphernalia.

The term 'paraphernalia' comprises jewels and ornaments, exclusive of old family jewels¹, which belong to the husband but which the wife is permitted to wear². It is extremely doubtful whether the doctrine of paraphernalia is applicable at the present day³, but it cannot be treated as definitely obsolete⁴, and the relevant law would appear to be as follows.

Jewels and trinkets given to the wife by relatives or friends are generally considered her property, and not paraphernalia⁵. In case of gifts by the husband, there is a presumption that they are intended as absolute gifts, and not as gifts of paraphernalia, if they are given to the wife at Christmas, or on her birthday, or in order to settle differences⁶. During the lifetime of the husband, paraphernalia cannot be disposed of by the wife⁷; but they may be sold, pledged or given away by him⁸. On the death of the husband, paraphernalia belong to the wife, subject to liability for the husband's debts on failure of other assets⁹, and the husband cannot, therefore, dispose of them by will¹⁰; they are not liable to satisfy his legacies¹¹; and, if he has pledged them during his life, his widow is entitled to have them redeemed out of his personalty, to the prejudice of legatees¹².

1 *Jervoise v Jervoise* (1853) 23 LJ Ch 703; and see *Laing v Walker* (1891) 64 LT 527; *Lord Hastings v Douglas* (1634) Cro Car 343.

2 *Viscountess Bindon's Case* (1586) Moore KB 213; *Burton v Pierpoint* (1722) 2 P Wms 78; *Graham v Londonderry* (1746) 3 Atk 393.

3 The doctrine was discussed at length in *Masson, Templier & Co v De Fries* [1909] 2 KB 831, CA (where Farwell LJ stated his opinion that after the Married Women's Property Act 1882 it had ceased to exist). Cf *Tasker v Tasker* [1895] P 1 at 4 per Sir Francis Jeune P (the Married Women's Property Act 1882 had not abolished the general law as to gifts of paraphernalia, although 'the law of paraphernalia and the practice of constituting paraphernalia are unfamiliar, if not antiquated').

4 See *Masson, Templier & Co v De Fries* [1909] 2 KB 831 at 840, CA per Kennedy LJ ('the only occasion on which an issue as to paraphernalia might perhaps still be raised is a dispute as to the possession of property in the nature of ornaments and the like articles between a wife and the representative of her deceased husband'); but see note 3.

5 *Graham v Londonderry* (1746) 3 Atk 393; *Lucas v Lucas* (1738) 1 Atk 270; but see *Jervoise v Jervoise* (1853) 17 Beav 566.

6 *Tasker v Tasker* [1895] P 1; cf *Masson, Templier & Co v De Fries* [1909] 2 KB 831, CA.

7 *Masson, Templier & Co v De Fries* [1909] 2 KB 831, CA.

8 *Graham v Londonderry* (1746) 3 Atk 393 at 394.

9 *Ridout v Earl of Plymouth* (1740) 2 Atk 104; *Burton v Pierpoint* (1722) 2 P Wms 78; *Lord Townshend v Windham* (1750) 2 Ves Sen 1 at 7; *Parker v Harvey* (1726) 4 Bro Parl Cas 604 at 609.

10 *Seymour v Tresilian* (1737) 3 Atk 358 at 359.

11 *Graham v Londonderry* (1746) 3 Atk 393 at 395. The right of the widow to paraphernalia may, however, be barred by a provision in the marriage settlement (*Cholmely v Cholmely* (1688) 2 Vern 82), or by agreement between her and her husband, or by her election or acquiescence, as eg where he bequeaths them to her for life, by her taking under the will instead of claiming them absolutely (*Clarges v Duchess of Albemarle* (1691) 2 Vern 245).

12 See note 11.

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247. Wedding presents and gifts on formation of civil partnership.

If there is no evidence of the donor's intention, the court may infer that wedding presents from the husband's family were meant for him, and those from the wife's family for her¹. It is likely that a similar inference could be made in relation to civil partnerships.

¹ *Samson v Samson* [1960] 1 All ER 653, [1960] 1 WLR 190, CA. As to the property of formerly engaged couples see PARAS 230, 253.

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(vi) Gifts between Parties

248. Rules concerning gifts and transfers.

It is provided by statute that husband and wife are empowered to convey to each other freeholds and choses in action¹ and that they may also make gifts to each other of leaseholds and chattels²; these provisions are almost certainly obsolete, and have not been amended so as also to apply to civil partners. The statutory provisions concerning the exemption from inheritance tax of transfers between spouses and the treatment of disposals between spouses for the purposes of capital gains tax have, however, been extended to include civil partners³.

1 See the Law of Property Act 1925 s 72(2); and **GIFTS** vol 52 (2009) PARA 205. As to property rights in the family home see PARA 278 et seq.

2 See the Law of Property Act 1925 s 37; and **GIFTS** vol 52 (2009) PARA 205. A gift from husband to wife or from wife to husband must, in general, be established in the same way as a gift between strangers: see **GIFTS** vol 52 (2009) PARA 205.

3 See the Inheritance Tax Act 1984 s 18; **INHERITANCE TAXATION** vol 24 (Reissue) PARA 515; the Taxation of Chargeable Gains Act 1992 s 58; and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARAS 101, 102.

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249. Undue influence.

It has been held that a gift from a wife to her husband¹, in order to be valid, had to be made by her freely and voluntarily, with a full knowledge and understanding of the nature of the transaction, and without any pressure or the exercise of undue influence on the husband's part². The burden of proving undue influence is on the wife³, but, although no presumption of undue influence exists⁴, husband and wife are not treated in this respect as strangers, and, especially where the gift is of a large amount or of considerable value, the husband may without much difficulty be required to show that the transaction was fair and proper⁵.

1 The provisions described in this paragraph derive from common law decisions specifically dealing with gifts between husbands and wives and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this.

2 *Willis v Barron* [1902] AC 271, HL (deeds by which the wife surrendered her rights under a post-nuptial settlement without consideration set aside, the solicitor who prepared them being one of the trustees, and having failed to explain to her the real nature of the transaction or to see that she had advice independent of her husband); *Turnbull & Co v Duval* [1902] AC 429, PC (deed executed by wife as security for husband's debt set aside on the grounds of pressure, want of independent advice, and concealment of material facts), applied in *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA; *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, CA (guarantee for husband's debts obtained by him from wife without sufficiently explaining the nature of the transaction); *Hughes v Wells* (1852) 9 Hare 749; *Milnes v Busk* (1794) 2 Ves 488; *Essex v Atkins* (1808) 14 Ves 542; *Beck v Beck* (1916) 50 ILT 135 (assignment by wife without independent advice set aside though made for an illegal purpose). Where, however, on a disposition by deed acknowledged the wife consented to payment of the purchase money being made to the husband, it was held that she could not dispute the validity of the gift: *Tennent v Welch* (1888) 37 ChD 622. As to the impeachment on the grounds of undue influence of transactions between husband and wife see also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 850.

3 *Bank of Montreal v Stuart* [1911] AC 120, HL; *Re Lloyds Bank Ltd, Bomze and Lederman v Bomze* [1931] 1 Ch 289 at 301, 302; and see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 850.

4 As to presumed undue influence see **EQUITY** vol 16(2) (Reissue) PARA 667; and see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 850.

5 *Re Lloyds Bank Ltd, Bomze and Lederman v Bomze* [1931] 1 Ch 289 at 302 per Maugham J.

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250. Fraudulent dispositions.

Dispositions between spouses or civil partners may be voidable under the provisions relating to transactions defrauding creditors¹, transactions at an undervalue and preferences², or voluntary dispositions of land made with intent to defraud subsequent purchasers³.

Where a gift of chattels takes the form of a deed of gift and the deed is not duly registered as a bill of sale and the chattels remain in the possession or apparent possession of the grantor, the deed is void as against the grantor's creditors⁴. This is, however, subject to the principle that, where two persons are together in the enjoyment of chattels, the law refers possession to the one who has the legal title; and, if one spouse gives or sells to the other chattels in the matrimonial home, the chattels are, in general, deemed to pass into the possession of the donee or purchaser and not to remain in the possession or apparent possession of the settlor or vendor⁵.

1 See the Insolvency Act 1986 Pt XVI (ss 423-425); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 663-667.

2 See the Insolvency Act 1986 ss 339-342; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 653-662.

3 See the Law of Property Act 1925 s 173; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 868 et seq.

4 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1849-1850.

5 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1852.

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251. Receipt of one party's property by the other.

Where a spouse or civil partner receives property or money belonging to his spouse or civil partner, and the circumstances are not such as to establish a gift¹ or loan², the receiving spouse or civil partner is accountable as a trustee for the other party³ and, so long as the receiving spouse or civil partner retains the property or money, or if he converts it to his own use, he is not entitled to the benefit of any statute of limitation⁴.

If a spouse or civil partner is liable to pay interest to his spouse or civil partner, or to that spouse or civil partner's trustees, in respect of a capital sum due from the first spouse or civil partner, and the first spouse or civil partner is permitted to retain this interest in circumstances such that a gift of it is presumed in his favour⁵, the period of limitation in respect of his capital liability does not run in his favour during the time the presumption continues⁶.

1 See PARA 248.

2 See *Woodward v Woodward* (1863) 3 De GJ & Sm 672; and PARA 206.

3 *Parker v Brooke* (1804) 9 Ves 583; *Dixon v Dixon* (1878) 9 ChD 587 (a trustee of stock for the separate use of a married woman transferred it into the joint names of himself and her husband, and the husband, after receiving the dividends for six years, sold the stock and applied the proceeds to his own use; it was held that the wife was entitled to have the stock replaced by the husband, and to an account against him of the arrears of income from the time of the wrongful sale). Where a husband executed a voluntary settlement in favour of his wife which contained an assignment of leasehold property to the trustees of the settlement, and the husband subsequently obtained a renewal of the lease in his own name, he was held, in taking the new lease, to have acted for the benefit of his wife and as agent for her and the trustees of the settlement, and the new lease was held to be subject to the trusts of the settlement: *Re Lulham, Brinton v Lulham* (1885) 53 LT 9, CA. A third person who, with notice of a wife's claim to goods or chattels, deals with them on the husband's instructions in a manner inconsistent with her title is liable to her: *Davis v Artingstall* (1880) 49 LJ Ch 609 (auctioneer entrusted by husband with goods for sale). See also *Heseltine v Heseltine* [1971] 1 All ER 952, [1971] 1 WLR 342, CA (where the wife transferred considerable properties and assets to husband but had no independent legal advice as she trusted her husband; it was held that the transfers were not intended as absolute gifts but as transfers for family purposes, that it would be inequitable to permit the husband to retain the assets for himself beneficially, and that he held them as trustee for the wife alone, although he was to be given credit for payments made by him for family purposes out of the capital and interest).

4 *Wassell v Leggatt* [1896] 1 Ch 554 (husband took possession by force in 1876 of a legacy to which his wife was entitled and died in 1894 without having repaid any portion of it, although she had from time to time demanded repayment; he was held to be a trustee, and his executors were, therefore, accountable). As to the limitation of actions in respect of trust property see the Limitation Act 1980 s 21; and **LIMITATION PERIODS** vol 68 (2008) PARA 1140.

5 As to gifts see PARA 248.

6 *Re Hawes, Re Burchell, Burchell v Hawes* (1892) 62 LJ Ch 463 (wife's trustees lent her money to the husband on mortgage; she and her husband lived together, and he paid no interest under the mortgage; it was held that, so long as they were living together, a gift of the interest to him was presumed, and time did not run in his favour as regards his liability to repay the sum borrowed). See also *Re Dixon, Haynes v Dixon* [1900] 2 Ch 561, CA.

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252. Discharge of incumbrances.

Where a spouse or civil partner pays off incumbrances on his spouse or civil partner's estate he is entitled, in the absence of proof of an intention to the contrary, to a charge on the property for the sums so paid¹.

¹ *Outram v Hyde* (1875) 24 WR 268; *Pitt v Pitt* (1823) Turn & R 180; *Gooch v Gooch* (1851) 15 Jur 1166. As to the equitable rights of a person other than the mortgagor who pays off a mortgage debt see eg *Chetwynd v Allen* [1899] 1 Ch 353.

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253. Gifts between engaged couples and persons who have entered into a civil partnership agreement.

A party to an agreement to marry or a civil partnership agreement¹ who makes a gift of property to the other party to the agreement on the condition, express or implied, that it is to be returned if the agreement is terminated is not prevented from recovering the property by reason only of having terminated the agreement². The gift of an engagement ring, however, is presumed to be an absolute gift, although this presumption may be rebutted by proving that the ring was given on the condition, express or implied, that it was to be returned if the marriage did not take place for any reason³.

1 As to the meaning of 'civil partnership agreement' see PARA 16.

2 Law Reform (Miscellaneous Provisions) Act 1970 s 3(1); Civil Partnership Act 2004 s 74(5).

3 Law Reform (Miscellaneous Provisions) Act 1970 s 3(2), reversing the presumption that engagement rings are conditional gifts (see *Jacobs v Davis* [1917] 2 KB 532).

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(vii) Property Rights after Spouse or Civil Partner's Death

254. Rights of surviving spouse or civil partner in deceased's estate.

Where a person dies domiciled in England and Wales and is survived by his or her spouse or civil partner, that spouse or civil partner may apply to the court for an order on the ground that the disposition of the deceased's estate effected by his or her will or the law relating to intestacy, or the combination of the will and that law, is not such as to make reasonable financial provision for the applicant¹. Among the orders which the court has power to make on such an application are orders for the transfer to the applicant, or for the settlement for the benefit of the applicant, of such property comprised in the deceased's estate as may be specified in the order².

Where at the time of an intestate's death the surviving spouse or civil partner of the intestate is resident in a dwelling house an interest in which forms part of the intestate's residuary estate, the surviving spouse or civil partner may require the personal representative of the intestate to appropriate the intestate's interest in the house in or towards satisfaction of any absolute interest of the surviving spouse or civil partner in the residuary estate³.

1 See the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1); PARA 539; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 666-667. Application may also be made by a person, other than the spouse or civil partner or former spouse or civil partner of the deceased who was living in the same household as the deceased as the spouse or civil partner of the deceased during the whole of the period of two years ending immediately before the date when the deceased died: see s 1(1A); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 667.

2 See the Inheritance (Provision for Family and Dependants) Act 1975 s 2(1)(c), (d); PARA 539; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 691. As to the matters to be considered by the court and the mode of procedure see generally **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 671 et seq.

3 See the Intestates' Estates Act 1952 Sch 2; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 593-594.

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255. Statutory tenant by succession.

On the death of a protected or statutory tenant there may be a transmission to a surviving spouse or civil partner who becomes a statutory or assured tenant by succession¹.

1 See **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 844 et seq.

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(4) AUTHORITY TO MAKE CONTRACTS

(i) Authority and Liability

256. Authority to contract.

It has been held that a wife¹ has no authority, by virtue of the marriage alone, to contract on behalf of her husband without his authority², and that in order that the husband may be bound he must expressly or impliedly authorise the contract³, or must have so conducted himself as to be estopped from denying the authority⁴, or must have ratified the contract⁵. It has also been held that a wife has neither presumed nor implied authority in any case to contract on behalf of her husband and herself jointly⁶, unless they carry on a business in partnership⁷.

On the general principles applicable to the law of agency, a spouse or civil partner who contracts professedly on behalf of his spouse or civil partner but who has no authority to do so may be liable to be sued for breach of warranty of authority, even though he has so contracted in good faith⁸.

It has been held that where a contract made by a wife on her husband's behalf was expressly authorised by him he was liable, and entitled to sue, on it as in the case of a contract made by any other agent⁹.

1 Although the provisions described in this paragraph and PARAS 257-273 derive from common law decisions concerning the authority of a wife to contract on behalf of her husband or on behalf of them both, it is submitted that they must now apply, to the extent that they have any continuing relevance, to the contractual rights of either party to a marriage and, presumably, to civil partners.

2 *Debenham v Mellon* (1880) 6 App Cas 24, HL.

3 *Debenham v Mellon* (1880) 6 App Cas 24, HL.

4 As to agency by estoppel see PARA 269.

5 As to ratification see PARA 269 et seq.

6 *Morel Bros & Co Ltd v Earl of Westmoreland* [1904] AC 11, HL.

7 As to the power of a partner to bind the firm see the Partnership Act 1890 s 5; and **PARTNERSHIP** vol 79 (2008) PARA 45.

8 As to the general principles on which an agent may be liable for breach of warranty of authority see **AGENCY** vol 1 (2008) PARA 160. The decision in *Smout v Ilbery* (1842) 10 M & W 1 (where it was held that a wife was not liable where, unknown to her, her authority had at the date of contract been determined by her husband's death) must be considered as overruled in so far as it was based on the view that an agent innocently continuing to act without knowledge of revocation of his authority is not liable to a third party, and is no longer law in so far as it was based on the former inability of a married woman to render herself personally liable on a contract: see *Yonge v Toynbee* [1910] 1 KB 215, CA; and **AGENCY** vol 1 (2008) PARA 160. As to the effect of a party's death on the right to pledge his credit see PARAS 262, 271.

9 *Stevenson v Hardie* (1773) 2 Wm Bl 872 (loan to wife at husband's request).

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257. Bills, notes and cheques.

It is essential to liability on a bill of exchange, promissory note or cheque¹ that the signature of the person to be liable should be written on the instrument as that of the contracting party²; and the only person who can be liable as the acceptor of a bill of exchange, except when it is accepted for honour, is the drawee³.

It has been held that if a bill of exchange is drawn on a husband⁴, and is accepted by his wife with his authority, express or implied⁵, he is liable as acceptor; and this is so, it seems, even where the acceptance is in the wife's name⁶. If the husband is not named as the drawee, he is not liable as acceptor, even if the acceptance is in his name or is expressed to be on his behalf and it is proved that he expressly authorised it⁷. Where a bill of exchange, promissory note or cheque is signed by a wife as drawee, indorser or maker, with her husband's authority, express or implied⁸, he is liable on it if the signature is in his name or is expressed to be written on his behalf⁹, but not otherwise¹⁰.

1 As to the liability of the parties to bills of exchange, promissory notes and cheques generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1574 et seq.

2 See the Bills of Exchange Act 1882 s 23; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1467-1468. As to the application of s 23 to cheques and promissory notes see ss 73, 89; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1405.

3 *Polhill v Walter* (1832) 3 B & Ad 114; *Davis v Clarke* (1844) 6 QB 16. See generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1451 et seq.

4 See PARA 256 note 1.

5 Where a wife had the general management of her husband's business, and was in the habit of drawing and indorsing bills and notes for the purposes of the business, it was held that the question whether the indorsement of a note in his name was within the scope of her authority was one of fact, and that the jury was justified in finding that it was: *Lord v Hall* (1849) 8 CB 627. Where, however, in an action on a bill of exchange accepted in the name of the husband, there was no evidence as to who had written the acceptance, it was held that evidence of the fact of the wife having discounted the bill and applied the proceeds in discharge of the husband's debts was not sufficient proof of his having authorised the acceptance: *Goldstone v Tovey* (1839) 6 Bing NC 98. In *Lindus v Bradwell* (1848) 5 CB 583, a promise by a husband to pay a bill drawn on him and accepted by his wife in her own name was held sufficient evidence of his having either authorised or ratified the acceptance.

6 *Lindus v Bradwell* (1848) 5 CB 583; and see **AGENCY** vol 1 (2008) PARAS 47, 128; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1452.

7 *Polhill v Walter* (1832) 3 B & Ad 114.

8 See note 5.

9 *Aggs v Nicholson* (1856) 1 H & N 165.

10 See the Bills of Exchange Act 1882 s 23; *Ducarrey v Gill* (1830) Mood & M 450; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1467-1468.

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258. Undisclosed principal.

It has been held that, except in the case of bills of exchange, promissory notes and cheques, a husband¹ is liable, and entitled to sue, on a contract which is in fact made by his wife on his behalf and with his express or implied authority, even though it was made by the wife in her own name and without disclosing that she was a married woman².

Where it is not inconsistent with the terms of a written contract, extrinsic evidence may be given in order to show that the contract was made on one party's behalf so as to render him liable or to entitle him to sue on it³.

1 See PARA 256 note 1.

2 *Paquin Ltd v Beauclerk* [1906] AC 148, HL. However, although the mere fact that goods are invoiced in the name of the wife does not necessarily indicate that the tradesman intended to give credit to her as a principal (see *Jewsbury v Newbold* (1857) 26 LJ Ex 247; *Paquin Ltd v Beauclerk*. Cf *Fick and Fick Ltd v Assimakis* [1958] 3 All ER 182, [1958] 1 WLR 1006, CA), that fact coupled with the circumstance that she herself paid for a portion of the goods, or has previously paid for goods of a similar kind, becomes almost conclusive evidence of such an intention (see *Bentley v Griffin* (1814) 5 Taunt 356; *Freestone v Butcher* (1840) 9 C & P 643; and see *Lea Bridge District Gas Co v Malvern* [1917] 1 KB 803, DC (contract made by widow before remarriage for supply of gas; presumption of continuance on remarriage)). See also the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(b); and PARA 204. As to the rights and liabilities of undisclosed principals generally see **AGENCY** vol 1 (2008) PARA 125 et seq; and as to the effect of exclusive credit being given see PARA 259.

3 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 186.

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259. Exclusive credit.

It has been held that a husband¹ is not liable on a contract made by his wife exclusively on her own behalf², or made on the credit of a third person³, or in any case where the other contracting party elects, with a knowledge of the circumstances, to give exclusive credit to the wife⁴. If the contract is such that the husband and wife can only be liable on it alternatively (and not jointly or jointly and severally⁵) and the other contracting party sues the wife to judgment on the contract, he will be conclusively taken to have elected to give exclusive credit to her⁶, but, in any case other than where he has obtained judgment, the question whether he has made such an election is one of fact depending on the particular circumstances⁷. If, however, leave to sign judgment against the wife is obtained but judgment is never signed, proceedings may be taken against the husband if the circumstances of the case do not show that a conclusive election had been made to charge the wife to the exclusion of the husband⁸.

¹ See PARA 256 note 1.

² *Jewsbury v Newbold* (1857) 26 LJ Ex 247; *Freestone v Butcher* (1840) 9 C & P 643; *Taylor v Brittan* (1823) 1 C & P 16n; *Bentley v Griffin* (1814) 5 Taunt 356. Where a wife ordered clothes in excessive quantities unsuited to the husband's style of living, and credit was given to her, it was held that the supplier was not entitled to recover against the husband for such portion of the goods as the jury considered necessities: *Metcalfe v Shaw* (1811) 3 Camp 22.

³ *Harvey v Norton* (1840) 4 Jur 42 (a married woman living with her uncle apart from her husband ordered necessities from a tradesman on the credit of the uncle, who had previously paid for necessities supplied to her by the same tradesman; the husband was not liable, even though he did not make the wife any allowance).

⁴ *Callot v Nash* (1923) 39 TLR 292; *French v Howie* [1906] 2 KB 674, CA; *Addison v Gandassequi* (1812) 4 Taunt 574; *Bentley v Griffin* (1814) 5 Taunt 356; *Metcalfe v Shaw* (1811) 3 Camp 22; and see **AGENCY** vol 1 (2008) PARA 132.

⁵ As to joint and several liability see PARA 205.

⁶ *Morel Bros & Co Ltd v Earl of Westmoreland* [1904] AC 11, HL. The rule stated in the text applies even though the judgment against the wife is for only a portion of the amount claimed, unless it appears that there were in effect two contracts by her, one on her own behalf in respect of the items for which judgment has been entered against her, and the other as agent for her husband in respect of the residue of the amount claimed: *French v Howie* [1906] 2 KB 674, CA; *Debenham's Ltd v Perkins* (1925) 133 LT 252.

⁷ *Calder v Dobell* (1871) LR 6 CP 486, Ex Ch; *Curtis v Williamson* (1874) LR 10 QB 57. As to goods invoiced in the name of the wife generally see PARA 205.

⁸ *Christopher (Hove) Ltd v Williams* [1936] 3 All ER 68, CA. As to the common law doctrine of election, and as to the effect of judgment against one of two persons alternatively liable, see further **ESTOPPEL** vol 16(2) (Reissue) PARA 962.

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260. Separate business.

It has been held that in the absence of proof of express authority or holding out¹, a husband² is not liable on any contracts made by his wife for the purposes of a trade or business carried on by her separately from him³.

1 As to holding out see PARA 269 et seq.

2 See PARA 256 note 1.

3 *Re Shepherd, ex p Shepherd* (1879) 10 ChD 573, CA.

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261. Acknowledgment of debt.

Where a debt has been contracted by a wife¹ with the authority, express or implied, of her husband, she has implied authority to acknowledge it on her husband's behalf²; but, in order to interrupt the operation of the period of limitation, the acknowledgment must be in writing and signed by her as his agent³.

¹ See PARA 256 note 1.

² *Gregory v Parker* (1808) 1 Camp 394 (necessaries ordered by wife); *Anderson v Sanderson* (1817) 2 Stark 204; *Palethorp v Furnish* (1783) 2 Esp 511n; *Emerson v Blonden* (1794) 1 Esp 141 (acknowledgment by wife carrying on husband's business).

³ See the Limitation Act 1980 s 30; and **LIMITATION PERIODS** vol 68 (2008) PARA 1185. Where an unsigned letter acknowledging a debt was written by the wife at the husband's dictation, and was enclosed in the same envelope with another letter signed by her and containing a reference to the unsigned acknowledgment, it was held that there was no sufficient signature by her as her husband's agent: *Ingram v Little* (1883) Cab & El 186.

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262. Termination of authority.

A wife's authority to pledge her husband's credit¹ is revoked by his death, and a contract made by her after his death in the exercise of her presumed authority to pledge his credit does not bind his estate, even if the contract was made by both parties in ignorance of his death², although his executors or administrators may ratify the contract if they choose to do so³. A wife's authority to pledge her husband's credit is terminated by his bankruptcy⁴. A wife judicially separated has in general no authority to pledge her husband's credit⁵. An act of adultery on the part of the wife may revoke any authority to pledge her husband's credit⁶.

1 See PARA 256 note 1.

2 *Blades v Free* (1829) 9 B & C 167; and see **AGENCY** vol 1 (2008) PARA 188. Where, however, the husband has expressly held out the wife as his agent, it seems that notice to the other party of revocation of her authority by death may be required in order to free his estate from liability: see PARA 271. As to a wife's liability for breach of warranty of authority to contract on behalf of her husband see PARA 256.

3 *Foster v Bates* (1843) 12 M & W 226.

4 See *Drew v Nunn* (1879) 4 QBD 661 at 665, CA; and **AGENCY** vol 1 (2008) PARA 190.

5 See PARA 268.

6 See eg *Atkyns v Pearce* (1857) 2 CBNS 763. As to the position where the wife's misconduct is condoned by the husband see PARA 272.

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(ii) Contract for Necessaries

263. Presumption of authority from cohabitation.

It has been held that where a husband and wife¹ are living together, the wife is presumed to have her husband's authority to pledge his credit for necessities suitable to their style of living². This presumption, which is founded on the mere fact of cohabitation as husband and wife, also arises and is of equal force where a man lives with a woman to whom he is not married and allows her to pass as his wife; and, if in such a case necessities are ordered on his credit by the woman with whom he lives, he is liable, even if the supplier is aware that they are not married³.

¹ See PARA 256 note 1.

² *Jolly v Rees* (1864) 15 CBNS 628; *Harrison v Grady* (1865) 13 LT 369; *Miss Gray Ltd v Earl Cathcart* (1922) 38 TLR 562. See also PARA 205. If a wife orders necessities with her husband's authority, and nothing is said by her and no inquiries are made by the tradesman as to whether she is contracting on her husband's behalf or her own, she will be taken to have contracted as the agent of her husband, and the tradesman as having given credit to him, unless from the circumstances of the case it is plain that the tradesman has treated her as the debtor: *Paquin Ltd v Beauclerk* [1906] AC 148, HL; *Freestone v Butcher* (1840) 9 C & P 643. See also *Fick and Fick Ltd v Assimakis* [1958] 3 All ER 182, [1958] 1 WLR 1006, CA (where the tradesman had plainly treated the wife as his debtor). It is not necessary, in order to exclude liability, that she should profess to contract as an agent: it is sufficient if she does so in fact: *Paquin Ltd v Beauclerk*.

This authority to pledge the husband's credit for necessities is distinct from the former agency of necessity of a wife left without means: see PARAS 216, 267. The presumption of authority to pledge the husband's credit for necessities does not necessarily extend to the borrowing of money to pay for them: see *Knox v Bushell* (1857) 3 CBNS 334; but cf *Re Cook, ex p Vernal* (1892) 10 Morr 8 at 10 per Vaughan Williams J.

³ *Ryan v Sams* (1848) 12 QB 460; *Watson v Threlkeld* (1798) 2 Esp 637; *Robinson v Nahon* (1808) 1 Camp 245; *Blades v Free* (1829) 9 B & C 167. No presumption of authority arises from the mere circumstance that a man allows a woman to whom he is not married to assume his name, where he does not live with her; it is the fact of cohabitation as man and wife that raises the presumption: *Gomme v Franklin* (1859) 1 F & F 465. The presumption of authority does not continue after the parties have separated (*Munro v De Chemant* (1815) 4 Camp 215; *Swan and Edgar Ltd v Mathieson* (1910) 27 TLR 153), although liability may be incurred subsequently to the separation by estoppel (*Ryan v Sams* (1848) 12 QB 460: see PARA 269).

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264. Necessaries suitable to style of living.

The presumed authority for the wife to pledge her husband's credit¹ is confined to necessities² suitable to his style of living³ or that permitted by him to be assumed by the wife⁴ and belonging to a department of the household usually entrusted to the wife⁵, but, if she has the management of his household, it extends to household provisions and all other things incidental to the ordinary course of such management⁶. The presumption does not extend to articles of luxury⁷, nor will any authority be presumed where the orders given are extravagant in their nature or are for excessive quantities of goods⁸.

The question whether things ordered by a wife are suitable necessities does not depend on the actual means of the husband but on the style of living assumed by him, or permitted by him to be assumed by the wife⁹. A husband has the right to determine in what style he will live and to fix his standard of expenditure¹⁰. On the one hand, he may choose to assume, or permit his wife to assume, an appearance far beyond his means¹¹; and, on the other hand, although a wealthy man, he may prefer to live on a very small sum¹².

The burden of proving that articles supplied are suitable necessities lies, as a general rule, on the person seeking to charge the husband¹³; but such things as articles of dress delivered at the joint residence will be presumed to be necessities unless and until it is shown that they are either unsuitable or extravagant¹⁴.

1 See PARA 256 note 1.

2 For examples of goods and services which constitute necessities see *Hunt v De Blaquiére* (1829) 5 Bing 550 at 559 (food, clothes and medicine); *Morgan v Chetwynd* (1865) 4 F & F 451 (articles of dress); *Harrison v Grady* (1865) 13 LT 369 and *Forristall v Lawson, Connelly v Lawson* (1876) 34 LT 903 (medical attendance); *Shoolbred v Baker* (1867) 16 LT 359; *Phillipson v Hayter* (1870) LR 6 CP 38 (ordinary or necessary clothing for the children); *Jenkinson v Bullock* (1891) 8 TLR 61 (millinery).

3 *Montague v Benedict* (1825) 3 B & C 631; 2 Smith LC (13th Edn) 447; *Atkins v Curwood* (1837) 7 C & P 756; *Hunt v De Blaquiére* (1829) 5 Bing 550; *Morgan v Chetwynd* (1865) 4 F & F 451; *Debenham v Mellon* (1880) 6 App Cas 24, HL; *Canham v Howard* (1887) 3 TLR 458.

4 See the text and notes 9-12.

5 *Phillipson v Hayter* (1870) LR 6 CP 38.

6 *Ruddock v Marsh* (1857) 1 H & N 601; *Emmett v Norton* (1838) 8 C & P 506; *Debenham v Mellon* (1880) 6 App Cas 24, HL; *Phillipson v Hayter* (1870) LR 6 CP 38.

7 *Phillipson v Hayter* (1870) LR 6 CP 38.

8 *Metcalfe v Shaw* (1811) 3 Camp 22; *Debenham v Mellon* (1880) 6 App Cas 24, HL; *Lane v Ironmonger* (1844) 13 M & W 368; *Freestone v Butcher* (1840) 9 C & P 643; *Walter v Aldridge* (1884) 1 TLR 138. In an action against husband and wife for goods supplied to the wife which were held not to be necessities, judgment was given against the wife with costs and for the husband with costs, the husband's remedy to be against the wife: *Knights v Gordon* (1931) 76 Sol Jo 68.

9 *Harrison v Grady* (1865) 13 LT 369; *Phillipson v Hayter* (1870) LR 6 CP 38; *Morgan v Chetwynd* (1865) 4 F & F 451; and see *Miss Gray Ltd v Earl Cathcart* (1922) 38 TLR 562 at 566 per McCardie J; and *Callot v Nash* (1923) 39 TLR 292 at 293 per McCardie J. Subject to the principle stated in the text, the question whether things supplied are necessities is one of fact: *Dennys v Sargeant* (1834) 5 C & P 419; *Phillipson v Hayter* (1870) LR 6 CP 38.

- 10 See note 9.
- 11 *Waithman v Wakefield* (1807) 1 Camp 120.
- 12 He must, however, in such a case limit his expenditure in clear and definite terms: see PARA 265.
- 13 *Phillipson v Hayter* (1870) LR 6 CP 38.
- 14 *Jewsbury v Newbold* (1857) 26 LJ Ex 247; *Clifford v Laton* (1827) 3 C & P 15.

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265. Rebuttal of presumption of authority.

The presumption of authority from spouses¹ cohabitation is only one of fact² and may be rebutted by proof that the husband had prohibited his wife from pledging his credit or expressly revoked her authority to do so³. It is not necessary for the husband, in order to escape liability, to show that he gave any notice of the prohibition or revocation⁴, except where his conduct has been such as to create an estoppel between him and the person supplying the necessities⁵. If, however, the husband did give actual notice to that person not to supply goods to his wife, the supplier is precluded from relying on any presumption of authority, even though the wife may not herself have been forbidden to pledge her husband's credit⁶.

Where a husband intends to prohibit his wife from pledging his credit, in order that the prohibition may be effectual, he must forbid her to do so in plain and definite terms; merely protesting against her rate of expenditure is not sufficient to deprive her of her presumed authority⁷.

1 See PARA 256 note 1.

2 *Lane v Ironmonger* (1844) 13 M & W 368; *Freestone v Butcher* (1840) 9 C & P 643; *Reid v Teakle* (1853) 13 CB 627.

3 *Jolly v Rees* (1864) 15 CBNS 628; *Debenham v Mellon* (1880) 6 App Cas 24, HL; *Sabine v Legge* (1921) 152 LT Jo 364; *Miss Gray Ltd v Earl Cathcart* (1922) 38 TLR 562. As to the revocation of an agent's authority generally see **AGENCY** vol 1 (2008) PARA 177 et seq.

4 See note 3.

5 See PARA 269.

6 *Etherington v Parrot* (1703) 1 Salk 118.

7 *Shoolbred v Baker* (1867) 16 LT 359; *Morgan v Chetwynd* (1865) 4 F & F 451.

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266. Adequate or agreed allowance for necessities.

The presumption of authority may also be rebutted by proof that the wife¹ was sufficiently provided with necessities², or with an adequate allowance for the purpose of purchasing them³. If, by arrangement with her husband, the wife is allowed a definite sum for household and other expenses, the presumption of authority is rebutted whether the allowance is adequate or not, because in such case they must be taken to have agreed that she should not pledge his credit beyond the amount of the allowance, even if he did not in definite terms prohibit her from doing so⁴; but this will not be the case where the wife manages her husband's household and is held out as having the usual authority of a housekeeper⁵. The mere fact that the wife has adequate separate means is not sufficient to rebut the presumption that she has authority to pledge her husband's credit for necessities⁶.

1 See PARA 256 note 1.

2 *Seaton v Benedict* (1828) 5 Bing 28; *Debenham v Mellon* (1880) 6 App Cas 24, HL; *Re Cook, ex p Vernal* (1892) 10 Morr 8; *Miss Gray Ltd v Earl Cathcart* (1922) 38 TLR 562.

3 *Reneaux v Teakle* (1853) 8 Exch 680; *Holt v Brien* (1821) 4 B & Ald 252; *Morgan v Chetwynd* (1865) 4 F & F 451; *Slater v Parker* (1908) 24 TLR 621; *Miss Gray Ltd v Earl Cathcart* (1922) 38 TLR 562. It will not be rebutted by proof of an allowance found to be inadequate, unless fixed by arrangement between the husband and wife: see note 4.

4 *Remington v Broadwood* (1902) 18 TLR 270, CA (definite allowance for personal expenditure and clothing); *Morel Bros & Co Ltd v Earl of Westmoreland* [1904] AC 11, HL (agreed allowance for household expenses); but the principle stated in the text does not apply unless the amount of the allowance is fixed and definite. Where a portion of the husband's income and the whole of the wife's were paid to a separate account kept for mutual convenience, on which the wife drew for household expenses, and the amounts paid in by the husband varied, it was held that the arrangement did not amount to a prohibition from pledging his credit, and that he was liable on the wife's orders for necessities: *Goodyear v Part* (1897) 13 TLR 395.

5 See PARA 270.

6 *Re Wood's Estate, Davidson v Wood* (1863) 32 LJ Ch 400; *Seymour v Kingscote* (1922) 38 TLR 586; *Callot v Nash* (1923) 39 TLR 292 at 292, 293 per McCardie J. The fact that the wife has separate means must, however, be taken into consideration in determining whether credit was given to the husband or the wife: *Freestone v Butcher* (1840) 9 C & P 643.

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267. Proof of authority.

In the absence of evidence to the contrary¹, a wife² living apart³ from her husband does not have authority to pledge his credit, and in an action against the husband on a contract entered into by her the claimant has the burden of proving either that the circumstances of the separation are such as to justify her in pledging her husband's credit, or that she was expressly authorised to do so or was held out as having authority so as to create an estoppel against the husband⁴. In the absence of any such holding out, it is immaterial whether the claimant knew that the wife was separated from her husband or not⁵.

1 Eg separation due to the husband's profession or calling: *Travers v Sen* (1917) 33 TLR 202; cf *R v Creamer* [1919] 1 KB 564, CCA.

2 See PARA 256 note 1.

3 As to when a husband and wife can be said to be living apart generally see *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA.

4 *Johnston v Summer* (1858) 3 H & N 261; *Wilson v Glossop* (1888) 20 QBD 354, CA; *Edwards v Towels* (1843) 5 Man & G 624; *Bird v Jones* (1828) 3 Man & Ry KB 121; *Mainwaring v Leslie* (1826) 2 C & P 507; *Reed v Moore* (1832) 5 C & P 200; *Clifford v Laton* (1827) 3 C & P 15. As to holding out see PARA 269.

5 *Wallis v Biddick* (1873) 22 WR 76; *Willson v Smyth* (1831) 1 B & Ad 801.

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268. Judicial separation.

A wife judicially separated from her husband¹ has no authority to pledge his credit². The husband's liability on any contract entered into by the wife before the date of the decree of judicial separation is not, however, affected by the decree, even though the contract may be a continuing one in respect of which liabilities are incurred subsequently to the date of the decree³.

1 See PARA 256 note 1.

2 See *Re Wingfield and Blew* [1904] 2 Ch 665 at 678, 680, 684, CA.

3 See *Re Wingfield and Blew* [1904] 2 Ch 665, CA (where the wife, under the husband's implied authority, retained a solicitor to defend divorce proceedings brought by the husband and to conduct an action of detinue against him, and the husband was held liable to pay her costs). A decree of judicial separation did not affect the court's power to order the husband to give security for the costs of the wife's defence in divorce proceedings: *Sheppard v Sheppard* [1905] P 185.

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(iii) Ratification and Holding Out

269. Agency by estoppel.

Where by his conduct a husband holds out his wife¹ as having authority to pledge his credit, he will not be permitted to deny that she has that authority with respect to any person contracting with her on the faith of the holding out². Failure to disclose that the wife had no authority to act on the husband's behalf may amount to a representation that she had that authority³.

If a husband pays for goods ordered by his wife on his credit, he is deemed to hold her out to the supplier as having authority to give subsequent orders for goods of a similar kind⁴. The principle is not confined to necessities but, by paying for necessities bought on his credit, a husband does not hold his wife out as having authority to order things which are not suitable to his style of living or that permitted by him to be assumed by the wife⁵. Dealing with a tradesman for ready money is not a holding out that the wife has any authority to deal on credit⁶.

1 See PARA 256 note 1.

2 *Filmer v Lynn* (1835) 4 Nev & MKB 559; *Jetley v Hill* (1884) Cab & El 239; *M'George v Egan* (1839) 5 Bing NC 196.

3 See *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA; and **ESTOPPEL** vol 16(2) (Reissue) PARA 1059.

4 *Wallis v Biddick* (1873) 22 WR 76; *Hinton v Hudson* (1677) Freem KB 248; *Filmer v Lynn* (1835) 4 Nev & MKB 559; but see *Durrant v Holdsworth* (1886) 2 TLR 763.

5 *Atkins v Curwood* (1837) 7 C & P 756.

6 *Wallis v Biddick* (1873) 22 WR 76.

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270. Person managing household.

It has been held that where a wife manages her husband's household¹ she is deemed to be held out by him as having the usual authority of a housekeeper, and, therefore, as having authority to order on his credit such provisions as are generally bought on credit². Although the husband may have made her a sufficient allowance for housekeeping expenses, he will be liable on any such orders if the tradesman in question had no notice of the allowance³.

¹ See PARA 256 note 1.

² Thus, if the wife manages her husband's business, she is deemed to be held out as having the ordinary authority of such a manager: *Meredith v Footner* (1843) 11 M & W 202; *Anderson v Sanderson* (1817) 2 Stark 204; *Smallpiece v Dawes* (1835) 7 C & P 40. See also *Petty v Anderson* (1825) 3 Bing 170 (where a wife had carried on her husband's business while he was in prison, and he was held liable for goods supplied with his knowledge after his return, although the invoices were made out in her name).

³ *Ruddock v Marsh* (1857) 1 H & N 601; *Debenham v Mellon* (1880) 6 App Cas 24, HL. This principle is limited to goods which are usually bought on credit: see *Morel Bros & Co Ltd v Earl of Westmoreland* [1904] AC 11, HL. Where the tradesman has notice of the allowance, the husband is not liable: *Holt v Brien* (1821) 4 B & Ald 252. Cf the cases cited in PARA 266 notes 3, 4.

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271. Revocation of authority.

If a wife is held out as having authority to contract on her husband's behalf¹, the person to whom she is so held out is entitled to assume that her authority continues until he has notice to the contrary². A husband is, therefore, liable for the price of goods supplied to his wife after a separation if he held her out to the supplier as having authority to pledge his credit while they were living together and the supplier has had no notice of the separation³.

A general notice by advertisement in a newspaper of the revocation of a wife's authority to pledge her husband's credit does not affect his liability to persons to whom he has held her out as having authority unless he can show that the advertisement came to their actual knowledge⁴.

Where, after the husband's death, goods are supplied to the wife in ignorance of her husband's death on the basis of her presumed authority to pledge his credit, his estate is not liable⁵. Where, however, the husband has expressly held out his wife to the other contracting party as his agent, it seems that notice of revocation of her authority by death may be required if the husband's estate is to escape liability⁶.

1 See PARA 256 note 1.

2 *Drew v Nunn* (1879) 4 QBD 661, CA.

3 *Wallis v Biddick* (1873) 22 WR 76; *Hinton v Hudson* (1677) Freem KB 248; *Filmer v Lynn* (1835) 4 Nev & MKB 559. The principle applies where a man and woman who are not married live together as husband and wife (*Ryan v Sams* (1848) 12 QB 460), but merely cohabiting with a woman and allowing her to pass as a wife is not sufficient to render the person living with her liable on her contracts after a separation if he did not, by paying for goods ordered on his credit while they were living together, or otherwise, hold her out as having authority to pledge his credit (*Munro v De Chemant* (1815) 4 Camp 215).

4 *Hunt v De Blaquiére* (1829) 5 Bing 550 at 560; cf *Swan and Edgar Ltd v Mathieson* (1910) 27 TLR 153. See also *Vickers v Vickers* 1966 SLT (Notes) 69 (husband and wife living apart; husband not entitled to publish advertisement where he had no grounds for believing wife had incurred or was going to incur debts for which tradesmen would seek to make him liable).

5 See PARA 262.

6 See *Drew v Nunn* (1879) 4 QBD 661 at 668, CA.

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272. Husband's liability after wife's misconduct.

If a husband¹, knowing that his wife is guilty of misconduct of such a kind as to justify his bringing proceedings for divorce², permits her to continue to reside in his house with the children or otherwise holds her out as still having the ordinary authority of a wife, he will be liable for necessities supplied to her by persons ignorant of the relevant facts to the same extent as if the misconduct had not occurred³.

1 See PARA 256 note 1.

2 As to the conduct and circumstances which may constitute a ground for divorce see PARA 346 et seq.

3 *Norton v Fazan* (1798) 1 Bos & P 226 (adultery).

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273. Ratification.

Where a contract is made by a wife on behalf of her husband¹ but without his authority, he may, by ratifying the contract, render it as binding, both with respect to himself and the other contracting party², as if it had been entered into with his previous express authority³. This rule applies to a contract of any kind⁴, provided that it is in fact made on the husband's behalf and credit is given to him, but it does not apply to a contract entered into by the wife on her own behalf⁵, or professedly on behalf of some third person⁶. A ratification by a husband of a contract made on his behalf discharges the wife from liability for breach of warranty of authority⁷.

An express promise to pay a debt incurred by the wife without authority is a sufficient ratification to render the husband liable⁸, and the fact that he sees his wife wearing things which are not suitable to his style of living but were ordered on his credit, and that he does not express disapproval, is some evidence of a ratification⁹. It is only necessary that the husband's conduct should be such as to show an intention to recognise the transaction as binding on him¹⁰; but a ratification may be conditional, and will then bind the husband only if the condition is fulfilled¹¹.

1 See PARA 256 note 1.

2 *Millard v Harvey* (1864) 34 Beav 237 (wife bought land without her husband's knowledge; ratification by the husband rendered the contract binding on the seller).

3 *Montague v Benedict* (1825) 3 B & C 631; *Lane v Ironmonger* (1844) 13 M & W 368; *Waithman v Wakefield* (1807) 1 Camp 120. See generally **AGENCY** vol 1 (2008) PARA 58 et seq.

4 *Stevenson v Hardie* (1773) 2 Wm Bl 872 (loan to the wife); *Lindus v Bradwell* (1848) 5 CB 583 and see the cases cited in notes 2, 3.

5 *Saunderson v Griffiths* (1826) 5 B & C 909; *Keighley, Maxsted & Co v Durant* [1901] AC 240, HL; *Bentley v Griffin* (1814) 5 Taunt 356.

6 *Heath v Chilton* (1844) 12 M & W 632; cf *Wilson v Barker* (1833) 4 B & Ad 614.

7 *Spittle v Lavender* (1821) 5 Moore CP 270; *Risbourg v Bruckner* (1858) 3 CBNS 812. As to the liability of the wife for breach of warranty of authority see PARA 256.

8 *Harrison v Hall* (1832) 1 Mood & R 185; *Lindus v Bradwell* (1848) 5 CB 583; *Hornbuckle v Hornbury* (1817) 2 Stark 177.

9 *Montague v Benedict* (1825) 3 B & C 631; cf *Atkins v Curwood* (1837) 7 C & P 756.

10 *Jenner v Hill* (1858) 1 F & F 269; *West v Wheeler* (1849) 2 Car & Kir 714. In *Waithman v Wakefield* (1807) 1 Camp 120, the husband's failure to return goods ordered by the wife was deemed to be ratification. As to the wife's agency by estoppel see PARA 269.

11 *Holt v Brien* (1821) 4 B & Ald 252 (where the husband promised to pay, provided that he was not arrested for the debt).

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(5) LIFE ASSURANCE POLICIES

274. Policies effected by spouses or civil partners for one another's benefit.

In general, where a person takes out an insurance policy on his life expressed to be for the benefit of a third party, the policy money belongs to his estate unless he has constituted himself a trustee for the third party¹. However, a policy effected by a spouse or a civil partner on his or her own life and expressed to be for the benefit of his or her spouse, civil partner or children² or spouse or civil partner and children, or any of them, creates a trust in favour of the objects³ named, and the money payable under the policy does not, so long as any object of the trust remains unperformed, form part of the estate of the insured, and is not subject to his or her debts⁴. If, however, it is proved that the policy was effected and premiums paid with intent to defeat the creditors of the insured, they are entitled to receive out of the money payable under the policy a sum equal to the premiums so paid⁵.

1 See *Re Engelbach's Estate, Tippetts v Engelbach* [1924] 2 Ch 348; **GIFTS** vol 52 (2009) PARA 246; **INSURANCE** vol 25 (2003 Reissue) PARAS 557, 559; cf **CONTRACT** vol 9(1) (Reissue) PARA 749. For the principle that, where a father effects an insurance on his life in the name of his child, it constitutes a gift to the child see *Re Richardson, Weston v Richardson* (1882) 47 LT 514; and **TRUSTS** vol 48 (2007 Reissue) PARA 715.

2 For these purposes, 'children' includes illegitimate children (Family Law Reform Act 1969 s 19(1)), although this does not affect policies effected before 1 January 1970 (s 19(3)). A child adopted before 30 December 2005 is treated in law, where the adopters are a married couple, as if he had been born as a child of the marriage, whether or not he was in fact born after the marriage was solemnised, and a child adopted after that date is treated in law, from the date of the adoption (but subject to any contrary intention) as if born as the legitimate child of the adopters or adopter: see the Adoption Act 1976 s 39(1)(a); the Adoption and Children Act 2002 s 67(1), (2); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 376, 377.

3 'Object' in this context means purpose: see *Cousins v Sun Life Assurance Society* [1933] Ch 126, CA, distinguishing and doubting *Robb v Watson* [1910] 1 IR 243 (where the word 'object' as used in the expression 'so long as any object of the trust remains' in the Married Women's Property Act 1870 s 11 was construed as meaning beneficiary).

4 Married Women's Property Act 1882 s 11; Civil Partnership Act 2004 s 70. An endowment policy effected by a husband, payable at the end of 20 years and expressed to be for his wife's benefit if he should die before that date but otherwise for the benefit of himself or his estate, was a policy effected on his own life and expressed to be for the benefit of his wife within the meaning of the Married Women's Property Act 1882 s 11: *Re Ioakimidis' Policy Trusts, Ioakimidis v Hartcup* [1925] Ch 403. See also *Re Gladitz, Guaranty Executor and Trustee Co Ltd v Gladitz* [1937] Ch 588, [1937] 3 All ER 173; *Griffiths v Fleming* [1909] 1 KB 805, CA; *Re Policy of Equitable Life Assurance Society of the United States and Mitchell* (1911) 27 TLR 213; *Re Fleetwood's Policy* [1926] Ch 48.

The Married Women's Property Act 1882 s 11 (amended by the Law Reform (Married Women and Tortfeasors) Act 1935 Sch 1) specifically provides that a married woman may effect a policy of insurance on her own life, or on the life of her husband, for her own benefit, and that the benefit of such policy enures accordingly: no corresponding provision is made in respect of civil partners and this provision may now be considered obsolete.

5 See note 4.

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275. Effect of policy for benefit of spouse, civil partner or children.

Where a policy effected¹ by a spouse or civil partner on his life is expressed to be for the benefit of a spouse or civil partner named in the policy and that benefit is not expressed to be conditional on the second spouse or civil partner surviving the insured², the beneficiary spouse or civil partner takes an immediate vested interest which on his death in the insured's lifetime passes to the beneficiary's personal representatives³ and is not affected by the insured's subsequent marriage or remarriage or subsequent entering into a civil partnership⁴. Similar principles apply in the case of a policy in favour of named children of the insured⁵. If in the case of a policy in favour of a named spouse or civil partner the insured continues to pay the premiums after the death of the named spouse or civil partner in order to keep the policy alive, he or his estate is entitled to a lien on the policy money for the amount of the premiums so paid as being money expended by him as a trustee for the preservation of the trust property⁶. Such a policy constitutes a post-nuptial settlement (or civil partnership equivalent) which the court has power to vary in the event of a decree or order of divorce, dissolution or nullity being pronounced during the life of the spouses or civil partners⁷.

If a spouse or civil partner effects a policy in favour of his spouse or civil partner but no named spouse or civil partner is mentioned in the policy, and if the spouse or civil partner living at the date of the policy dies in the lifetime of the insured and the insured does not marry, remarry or enter into a subsequent civil partnership, it seems that, even if benefit to the deceased spouse or civil partner is not made expressly conditional on him surviving the insured, the policy money forms part of the insured's estate⁸. If the insured party remarries or enters into a subsequent civil partnership, the subsequent spouse or civil partner (if he survives the insured) is, it seems, entitled to the benefit of the policy⁹ in the absence of any indication to the contrary¹⁰. Similarly, if the policy is in favour of the widow or widower or surviving civil partner of the insured, the subsequent spouse or civil partner is entitled to the benefit¹¹. Where the policy is in favour of the spouse or civil partner and children, or the children only, of the insured, children of the first and second marriages or civil partnerships will be entitled to participate alike¹².

Where a policy is expressed to be for the benefit of the spouse or civil partner and children of the insured, they take concurrently as joint tenants, unless a contrary intention appears¹³.

If a policy is effected for the benefit of the spouse or civil partner or the children of the insured if that spouse or civil partner or those children survive the insured, and by the terms of the policy an option is conferred on the insured, if living at the expiration of a particular period, to receive the cash value of the policy or to convert it into a paid-up policy, the option must be exercised for the benefit of the persons contingently entitled to the benefit of the policy¹⁴.

Where the purposes of the trust created by any such policy fail, and there is no indication to the contrary in the policy, the insurance money forms part of the estate of the insured and may be recovered by his personal representatives¹⁵.

1 Ie pursuant to the Married Women's Property Act 1882 s 11 and the Civil Partnership Act 2004 s 70: see PARA 274.

2 For examples of a policy for the benefit of a named wife if surviving see eg *Re Policy of Equitable Life Assurance Society of the United States and Mitchell* (1911) 27 TLR 213; *Re Fleetwood's Policy* [1926] Ch 48.

3 *Cousins v Sun Life Assurance Society* [1933] Ch 126, CA, approving and following *Prescott v Prescott* [1906] 1 IR 155, and not following *Robb v Watson* [1910] 1 IR 243, or views expressed in *Re Collier* [1930] 2 Ch 37 at 42, 43 (a decision as to a policy in which the wife was not named: see note 8).

4 See *Prescott v Prescott* [1906] 1 IR 155; *Re Smith's Estate, Bilham v Smith* [1937] Ch 636, [1937] 3 All ER 472.

5 See *Cousins v Sun Life Assurance Society* [1933] Ch 126 at 140, CA per Romer LJ.

6 *Re Smith's Estate, Bilham v Smith* [1937] Ch 636, [1937] 3 All ER 472.

7 See *Gunner v Gunner and Stirling* [1949] P 77, [1948] 2 All ER 771; and PARA 511.

8 *Re Collier* [1930] 2 Ch 37 (husband became bankrupt in lifetime of wife; policy money belonged to the husband's trustee in bankruptcy); but see *Cousins v Sun Life Assurance Society* [1933] Ch 126 at 137, CA (where the grounds stated for the decision in *Re Collier* were criticised as erroneous by Lawrence LJ). As to the effect of the failure of the objects of the trusts of the policy see further the text and note 15.

9 *Re Browne's Policy, Browne v Browne* [1903] 1 Ch 188 (policy for benefit of wife or children; widow and child by second marriage entitled to benefit jointly with children of first marriage); *Cousins v Sun Life Assurance Society* [1933] Ch 126 at 135, CA.

10 See *Re Griffith's Policy* [1903] 1 Ch 739 (policy for benefit of wife or, if she was dead, children; widow by second marriage not entitled to participate but children of first and second marriages entitled to participate in equal shares).

11 *Re Parker's Policies* [1906] 1 Ch 526 (policies in favour of assured's widow or widow and children or some or one of them as he should by deed or will appoint; appointment by deed to second wife who survived assured).

12 *Re Browne's Policy, Browne v Browne* [1903] 1 Ch 188 (cited in note 10); *Re Griffith's Policy* [1903] 1 Ch 739 (cited in note 10); *Re Parker's Policies* [1906] 1 Ch 526 at 529.

13 *Re Seyton, Seyton v Satterthwaite* (1887) 34 ChD 511; *Re Davies' Policy Trusts* [1892] 1 Ch 90 (not following dicta in *Re Adam's Policy Trusts* (1883) 23 ChD 525, to the effect that the wife took a life interest with remainder to the children); *Re Browne's Policy, Browne v Browne* [1903] 1 Ch 188.

14 *Re Policy of Equitable Life Assurance Society of the United States and Mitchell* (1911) 27 TLR 213; *Re Fleetwood's Policy* [1926] Ch 48.

15 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA (policy by husband for benefit of wife; wife murdered husband; the trust in her favour having failed by her criminal act on the ground of public policy, the husband's representatives were entitled to recover the policy money); and see *Re Collier* [1930] 2 Ch 37; *Robb v Watson* [1910] 1 IR 243; but, as to the criticism of the decision in these cases that the trusts created by the policies had failed, see notes 3, 8 and PARA 274 note 3.

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Appointment of trustees.

276. Appointment of trustees.

In the case of a policy effected by a spouse or a civil partner on his own life and expressed to be for the benefit of his spouse, civil partner or children¹, the insured may, by the policy or by any memorandum under his hand, appoint a trustee or trustees of the money payable under the policy, and from time to time appoint a new trustee or new trustees of it, and may make provision for the appointment of new trustees and for the investment of the money payable under the policy². In default of any such appointment, the policy immediately on its being effected vests in the insured and his legal representatives in trust for the objects named in the policy³. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment or of notice thereof to the insurance office, the receipt of the legal personal representatives of the insured, is a good discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part⁴.

¹ In the case of a policy effected pursuant to the Married Women's Property Act 1882 s 11 and the Civil Partnership Act 2004 s 70: see PARA 274.

² Married Women's Property Act 1882 s 11; Civil Partnership Act 2004 s 70.

³ Married Women's Property Act 1882 s 11; Civil Partnership Act 2004 s 70. As to 'objects' see PARA 274 note 3.

⁴ Married Women's Property Act 1882 s 11; Civil Partnership Act 2004 s 70.

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277. Lien for payment of premiums.

If a spouse or civil partner pays the premiums on a policy effected by his spouse or civil partner on their own life and for their own benefit¹ the payer is not, nor are his representatives after his death, entitled to any lien on the policy for the premiums so paid in the absence of a contract between himself and his spouse or civil partner giving him such a lien².

¹ If a policy effected pursuant to the Married Women's Property Act 1882 s 11 and the Civil Partnership Act 2004 s 70: see PARA 274.

² *Re Leslie, Leslie v French* (1883) 23 ChD 552. Similarly, it has been held that if a wife voluntarily pays the premiums on a policy on her husband's life which is subject to their marriage settlement, and on which he has covenanted to pay the premiums, she is not entitled to a lien on the policy for what she has paid: *Re Jones' Settlement, Stunt v Jones* [1915] 1 Ch 373; but see *Re McKerrell, McKerrell v Gowans* [1912] 2 Ch 648 (joint policy).

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5. PROPERTY RIGHTS IN THE FAMILY HOME

(1) APPLICABLE PRINCIPLES IN DETERMINATION OF PROPERTY RIGHTS

278. Resolution of disputes.

Disputes between spouses and civil partners rarely require resolution of their strict property rights under trust law as the court has wide discretionary powers in proceedings for divorce, dissolution, nullity or judicial or legal separation to distribute the property as it sees fit without having to ascertain the shares of the parties in the property¹. In the rare cases where it is necessary to do so², it is clearly established that the proper approach is through the law of trusts³. What is less clearly established is exactly which trust principles apply; in particular, the cases commonly fail to distinguish between resulting⁴, implied and constructive⁵ trusts. A further complication is the uncertain relationship with the doctrine of proprietary estoppel⁶. When they uphold a claim, the courts are often content to say that it is on the ground of constructive trust or proprietary estoppel without attempting to distinguish between them⁷. If, however, there is an express declaration of trust, it will be conclusive in the absence of fraud or mistake⁸.

¹ See *Fielding v Fielding* [1978] 1 All ER 267, [1977] 1 WLR 1146n; PARAS 458 et seq, 499 et seq, 520-522.

² See eg *Re Cummins, Cummins v Thompson* [1972] Ch 62, [1971] 3 All ER 782, CA; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL.

³ *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL.

4 As to resulting trusts see **TRUSTS** vol 48 (2007 Reissue) PARA 705 et seq.

5 As to constructive trusts see **TRUSTS** vol 48 (2007 Reissue) PARA 687 et seq.

6 In *Grant v Edwards* [1986] Ch 638 at 656, [1986] 2 All ER 426 at 439, CA, Browne-Wilkinson V-C said that the common intention constructive trust and proprietary estoppel rest on the same foundation; but in *Stokes v Anderson* [1991] FCR 539 at 543, [1991] 1 FLR 391 at 399, CA, Nourse LJ observed that they were not yet assimilated. In *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498, the equity which arises in cases of proprietary estoppel was said to be in the nature of a constructive trust. See also *Taylor v Dickens* [1998] 3 FCR 455, [1998] 1 FLR 806; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA. See also **ESTOPPEL** vol 16(2) (Reissue) PARA 1089 et seq.

7 *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL; *Hammond v Mitchell* [1992] 2 All ER 109, [1991] 1 WLR 127.

8 *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Pink v Lawrence* (1977) 36 P & CR 98, CA; *Brykiert v Jones* (1981) 125 Sol Jo 323, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Goodman v Gallant* [1986] Fam 106, [1986] 1 All ER 311, CA; *Turton v Turton* [1988] Ch 542, [1987] 2 All ER 641, CA; *Re Gorman (a bankrupt), ex p trustee of bankrupt v bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616.

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279. Property purchased in joint names.

Where a domestic property is conveyed into the joint names of cohabitants without any declaration of trust there is a prime facie case that both the legal and beneficial interests in the property are joint and equal¹. If the purchase money was provided out of jointly pooled resources, an equitable joint tenancy exists²; but, if the purchase money was provided in unequal shares, each party has an equitable tenancy in common under a resulting trust with shares proportionate to his or her respective contributions to the purchase price³. Provision of the purchase price may arise from payment of mortgage instalments or of the deposit or of legal fees⁴. It may arise indirectly, as where one party's salary is used for household expenses and holidays so that the other party's salary which would otherwise have to bear such expenses may be used to pay the mortgage instalments⁵. Where property is bought with the aid of a mortgage, the court has to assess each of the parties' respective contributions in a broad sense; but the court is entitled to look only at the financial contributions, or their real or substantial equivalent, to the acquisition of the property⁶. Prima facie, if the purchase is financed in whole or in part on mortgage, the person who assumed liability for the mortgage payments, as between the joint owners, is to be treated as having contributed the mortgage money⁷.

1 See *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929. An express declaration as to the parties' beneficial interests would be conclusive in the absence of fraud or mistake: *Pettitt v Pettitt* [1970] AC 777 at 813, [1969] 2 All ER 385 at 405, HL; *Leak (formerly Bruzzi) v Bruzzi* [1974] 2 All ER 1196, [1974] 1 WLR 1528, CA; *Pink v Lawrence* (1977) 36 P & CR 98, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Re Gorman (a bankrupt), ex p trustee of bankrupt v bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616.

2 Clear evidence is required that the parties did in fact pool their assets in one jointly owned fund, as English law knows no doctrine of 'family assets' or 'family property': *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL; *Cowcher v Cowcher* [1972] 1 All ER 943, [1972] 1 WLR 425.

3 *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA (where the principles applicable to spouses were applied to an unmarried couple); *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, [2004] 3 All ER 703, [2004] 2 FCR 295 (same); see also *Brassford v Patel* [2007] BPIR 1049, [2007] All ER (D) 256 (Feb) (the fact that the property was held in joint names could be treated as evidence that it was to be held in equal shares notwithstanding unequal contributions, but each case depends upon its own facts). *Young v Young* [1984] FLR 375, [1984] Fam Law 271, CA is an unusual case where the house was in joint names but the man had made no contribution and was held to have no beneficial interest.

4 *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL; *Re Densham (a bankrupt), ex p trustee of bankrupt v Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519. The contribution must be to capital expenditure and not to income expenditure, eg rent: *Savage v Dunningham* [1974] Ch 181, [1973] 3 All ER 429.

5 It seems essential that there should be some common intention or agreement that the party's relieving payments are to entitle him or her to a corresponding interest in the house: see *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL; *Cowcher v Cowcher* [1972] 1 All ER 943, [1972] 1 WLR 425; *McFarlane v McFarlane* [1972] NI 59, NI CA; *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338, CA; *Re Densham (a bankrupt), ex p trustee of bankrupt v Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Allen v Snyder* [1977] 2 NSWLR 685, NSW CA; *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA. Lord Denning MR has indicated otherwise (see *Hargrave v Newton* [1971] 3 All ER 866, [1971] 1 WLR 1611, CA; *Hazell v Hazell* [1972] 1 All ER 923, [1972] 1 WLR 301, CA), but these decisions have been criticised (see (1972) LQR 333; (1971) 115 Sol Jo 615).

6 *Burns v Burns* [1984] Ch 317 at 344, [1984] 1 All ER 244 at 264, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA.

7 *Re Gorman (a bankrupt), ex p trustee of bankrupt v bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616; *Huntingford v Hobbs* [1993] 1 FCR 45, [1993] 1 FLR 736, CA.

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280. Property purchased in one name only.

Where the house is taken in only one of the two names, the position is more complicated. Subject to any express declaration of trust¹, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price², or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially³. This common intention, which has been said to mean a shared intention communicated between them⁴ and which must relate to the beneficial ownership of the property⁵ can only be based on evidence of express discussions between the parties, however imperfectly remembered and however imprecise their terms may have been⁶. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel⁷.

1 See PARA 278 text and note 8. See also *McHardy & Sons (a firm) v Warren* [1994] 2 FLR 338, [1994] Fam Law 567, CA (where it was held that it could be inferred, where a parent had made a deposit on his child's first matrimonial home, that the bride and groom had equal interests in the home, it being irrelevant that the title was registered in the name of only one of the spouses). Similarly, in *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA, it was held that a loan to a married couple from one of their parents to finance a deposit on a house was capable of founding an inference of a common intention to share the property beneficially, even if the house was conveyed into the husband's name alone.

2 *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL; *Cowcher v Cowcher* [1972] 1 All ER 943, [1972] 1 WLR 425; *Re Densham (a bankrupt), ex p trustee of bankrupt v Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519.

3 *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL, citing the leading cases of *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL. As to improvements to the property see PARA 283.

4 *Springette v Defoe* [1992] 2 FCR 561 at 567, [1992] 2 FLR 388 at 393, CA per Dillon LJ. A common intention by laymen to own their home jointly will be taken to mean an intention to own it equally: *Savill v Goodall* [1994] 1 FCR 325, [1993] 1 FLR 755, CA.

5 In *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 130, [1990] 1 All ER 1111 at 1117, HL, Lord Bridge of Harwich observed that neither a common intention that the house is to be renovated as a joint venture nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to its beneficial ownership. See also *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114, [1986] 1 WLR 1512, HL.

6 See *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA; *Hammond v Mitchell* [1992] 2 All ER 109, [1991] 1 WLR 1127. See also *Ungurian v Lesnoff* [1990] Ch 206, [1989] 3 WLR 840.

7 *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL, distinguished in *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, [1996] 2 FCR 771, CA; *Hammond v Mitchell* [1992] 2 All ER 109, [1991] 1 WLR 1127.

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281. No evidence of agreement or arrangement to share beneficial interest.

It may be that there is no evidence to support a finding of an agreement or arrangement to share the beneficial interest, however reasonable it might have been for the parties to make such an agreement if they had applied their minds to the question. Here the court, relying entirely on the conduct of the parties, may first infer from it a common intention to share the property beneficially. If the inference can properly be drawn, the same conduct may be relied on to show that the party has acted to his or her detriment or has significantly altered his or her position in reliance on the inferred agreement. While direct contributions to the purchase price by a party who is not the legal owner, whether initially or by payment of mortgage instalments, would readily justify the court in drawing the inference of a common intention, it has been said to be very doubtful whether anything less would do¹. If the conduct does not justify the court in drawing the necessary inference, the court cannot impute to the parties a common intention which they did not have by forming its own opinion as to what reasonable persons in the position of parties would have intended.

Even if a common intention is established, a claimant will not succeed unless he establishes that he has acted to his detriment on the basis of that common intention². The fact that one partner gratuitously cooks and cleans and looks after any children does not alone entitle him to any share in the house³.

1 *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 133, [1990] 1 All ER 1111 at 1119, HL per Lord Bridge of Harwich. However, in *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA and *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA it seems to have been thought that indirect contributions would suffice, provided that they are referable to the acquisition of the property. The need for referability was repeated in *Windeler v Whitehall* [1990] FCR 268, [1990] 2 FLR 505. See also *Layton v Martin* [1986] 2 FLR 227, [1986] Fam Law 212; *R v Robson* (1990) 92 Cr App Rep 1, CA.

2 *Midland Bank plc v Dobson and Dobson* [1986] 1 FLR 171, [1986] Fam Law 55, 75, CA; *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA.

3 *Kowalczyk v Kowalczyk* [1973] 2 All ER 1042, [1973] 1 WLR 930, CA; *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA; *Thomas v Fuller-Brown* [1988] 1 FLR 237, [1988] Fam Law 53, CA; *Howard v Jones* [1989] Fam Law 231, CA.

UPDATE

281 No evidence of agreement or arrangement to share beneficial interest

NOTE 1--See also *Jones v Kernott* [2009] EWHC 1713 (Ch), [2010] 1 P & CR D9, [2009] All ER (D) 123 (Jul).

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282. Quantification of beneficial interests.

So far as quantification of the claimant's beneficial interest is concerned, which also depends on the common intention of the parties, either express or, more usually, to be inferred from all the circumstances¹, the court can take into account both direct and indirect contributions². The court may infer an agreement as to the proportion of the parties' beneficial interests notwithstanding positive evidence that they neither discussed nor intended any such agreement³. As a last resort the court can fall back on the maxim 'equality is equity' where each has clearly made a substantial contribution but it is virtually impossible to quantify contribution precisely⁴. The value of the respective shares will be determined when the property is sold or where one party buys out the other⁵.

1 *Stokes v Anderson* [1991] FCR 539 at 543, [1991] 1 FLR 391 at 399, CA.

2 See *Marsh v von Sternberg* [1986] 1 FLR 526, [1986] Fam Law 160 (discount to sitting tenant); *Risch v McFee* (1990) 61 P & CR 42, [1991] FCR 168, CA (interest-free loan); *Springett v Defoe* [1992] 2 FCR 561, [1992] 2 FLR 388, CA (discount under the right to buy); *Drake v Whipp* [1996] 2 FCR 296, [1996] 1 FLR 826, CA (where a constructive trust exists, a 'broad brush' approach can be adopted by a court in order to determine the parties' respective beneficial interests in a house); *Brassford v Patel* [2007] BPIR 1049, [2007] All ER (D) 256 (Feb) (quantification of beneficial interests reflecting wife's provision of initial deposit). The shares should normally be ascertained as at the date of separation: *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA per Denning MR and Kerr LJ (but see the different views of Griffiths LJ). All the members of the court agreed, however, that acts and events up to at least the date of separation were circumstances from which the common intention could be inferred. See also *Gissing v Gissing* [1971] AC 886 at 909, [1970] 2 All ER 780 at 793, HL per Lord Diplock, cited by Fox LJ in *Burns v Burns* [1984] Ch 317 at 327, [1984] 1 All ER 244 at 251, CA and by Nourse LJ in *Stokes v Anderson* [1991] FCR 539 at 542, 543, [1991] 1 FLR 391 at 399, CA; *Passee v Passee* [1988] 1 FLR 263, [1988] Fam Law 132, CA.

3 *Midland Bank plc v Cooke* [1995] 4 All ER 562, [1996] 1 FCR 442, CA.

4 *Pettit v Pettit* [1970] AC 777 at 813, 814, [1969] 2 All ER 385 at 406, HL per Lord Upjohn, cited by Griffith LJ in *Bernard v Josephs* [1982] Ch 391 at 402, [1982] 3 All ER 162 at 169, CA; *Gissing v Gissing* [1971] AC 886 at 903, [1970] 2 All ER 780 at 788, HL per Lord Pearson, cited by May LJ in *Burns v Burns* [1984] Ch 317 at 337, [1984] 1 All ER 244 at 259, CA.

5 *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Gordon v Douce* [1983] 2 All ER 228, [1983] 1 WLR 563, CA; *Walker v Hall* [1984] FLR 126, [1984] Fam Law 21, CA; *Turton v Turton* [1988] Ch 542, [1987] 2 All ER 641, CA, disapproving *Hall v Hall* (1981) 3 FLR 379, CA. As to the equitable accounting that must take place before the money is distributed see *Shinh v Shinh* [1977] 1 All ER 97, 6 Fam Law 245; *Suttill v Graham* [1977] 3 All ER 1117, [1977] 1 WLR 819, CA; *Bernard v Josephs*; *Re Gorman (a bankrupt), ex p trustee of bankrupt v bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616; *Re Pavlou (a bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046; *Wilcox v Tait* [2006] EWCA Civ 1867, [2007] 3 FCR 611, [2007] 2 FLR 871; *Young v Laurentani* [2007] EWHC 1244 (Ch), [2008] 1 FCR 669, [2007] 2 FLR 1211.

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283. Improvements to property.

Where a spouse or civil partner contributes in money or money's worth to the improvement of real or personal property in which, or in the proceeds of sale of which, either or both of the spouses or civil partners has or have a beneficial interest, then, if the contribution is of a substantial nature¹, and subject to any agreement between them to the contrary express or implied, the spouse or civil partner so contributing is to be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have then been agreed or, in default of such agreement, as may seem in all the circumstance just to any court before which the question of the existence or extent of the beneficial interest of that spouse or civil partner arises, whether in proceedings between them or in any other proceedings².

These provisions are also applicable in relation to the property of engaged couples and persons who have entered into a civil partnership agreement³.

1 As to the meaning of 'substantial nature' see *Button v Button* [1968] 1 All ER 1064, [1968] 1 WLR 457, CA (cleaning, decorating and gardening insufficient); *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL (usual 'do-it-yourself' jobs by husband insufficient); *Harnett v Harnett* [1973] Fam 156, [1973] 2 All ER 593; affd [1974] 1 All ER 764, [1974] 1 WLR 219, CA (the contribution must not only be substantial but identifiable with the relevant improvement; general contributions are not sufficient).

2 Matrimonial Proceedings and Property Act 1970 s 37; Civil Partnership Act 2004 s 65. The Matrimonial Proceedings and Property Act 1970 s 37 restored the decision in *Appleton v Appleton* [1965] 1 All ER 44, [1965] 1 WLR 25, CA, which had been overruled by *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL. As to the circumstances in which the court will declare a beneficial interest see *Davis v Vale* [1971] 2 All ER 1021, [1971] 1 WLR 1022, CA (wife provided wholly or partly money to connect up the electricity supply; she paid for a water heater, a sink unit, a wall and an iron gate, and three fireplaces; beneficial interest declared). As to the calculation of the share in the beneficial interest see *Griffiths v Griffiths* [1973] 3 All ER 1155, [1973] 1 WLR 1454; on appeal [1974] 1 All ER 932, [1974] 1 WLR 1350, CA; *Re Nicholson, Nicholson v Perks* [1974] 2 All ER 386, [1974] 1 WLR 476. For older cases as to reimbursement of expenditure by the husband on improvements to his wife's property see *Campion v Cotton* (1810) 17 Ves 263; *Neesom v Clarkson* (1845) 4 Hare 97; *Wiles v Cooper* (1846) 9 Beav 294; *Hamer v Tilsley* (1859) John 486. In connection with contributions made by a party to a recognised overseas relationship see the Civil Partnership (Treatment of Overseas Relationships) Order 2005, SI 2005/3042, art 3(2).

3 See the Law Reform (Miscellaneous Provisions) Act 1970 s 2(1); the Civil Partnership Act 2004 s 74(1), (2); and PARA 230. As to the meaning of 'civil partnership agreement' see PARA 16.

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284. Property rights of cohabitants.

The principles which apply to property rights of spouses (and, presumably, civil partners)¹ also govern the property rights of cohabitants² in the absence of a valid, express declaration of trust³. It has been held that the absence of the commitment of marriage may, however, mean that the court will not make the same assumptions and draw the same inferences from the behaviour of an unmarried couple as in the case of a married couple⁴, and that only if the court is satisfied that the relationship was intended to involve the same degree of commitment as marriage is it legitimate to regard the couple as no different from a married couple, for example, if they have children by each other and intend to marry when free to do so⁵. In the case of engaged couples where the agreement to marry is terminated, any rule of law relating to property in which either or both has or have a beneficial interest applies⁶.

Where a cohabiting couple have made no clear agreement as to the ownership of property, it will inevitably be difficult for a claimant without a legal interest to show that he or she has an equitable interest. Accordingly the following practice should be followed:

- 324 (1) it is essential that all issues, including that of maintenance, should be raised at the earliest stage so that an informed judgment can be made as to the forum and the procedure which will provide the quickest and most effective way of dealing with them;
- 325 (2) if issues of disputed ownership of household chattels need to be decided, the proper way is by way of a claim for a declaration or inquiry as to the beneficial interest, supported by affidavit evidence⁷;
- 326 (3) disclosure should be made early in the proceedings and enforced strictly;
- 327 (4) when formulating a claim to a beneficial interest in substantial assets such as property and investments, the express discussions between the parties should be pleaded in the greatest detail, both as to language and circumstance;

particularity will have the advantage to both sides of enabling the strength of the claim to be assessed at an early stage, with sufficient definition to provide for a reasonable compromise⁸.

¹ See PARA 278 et seq.

² *Cooke v Head* [1972] 2 All ER 38, [1972] 1 WLR 518, CA; *Richards v Dove* [1974] 1 All ER 888; *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA. See also *Bristol and West Building Society v Henning* [1985] 2 All ER 606, [1985] 1 WLR 778, CA; *Equity and Law Home Loans Ltd v Prestidge* [1992] 1 All ER 909, [1992] 1 WLR 137, CA; *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, [2004] 3 All ER 703, [2004] 2 FCR 295; *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929. Cf *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, [1999] 4 All ER 705, HL.

³ An express declaration is conclusive in the absence of fraud or mistake: *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Re Gorman (a bankrupt), ex p trustee of bankrupt v bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616. See also the cases cited in PARA 278 note 8.

⁴ *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA.

⁵ *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338, CA.

6 See the Law Reform (Miscellaneous Provisions) Act 1970 s 2; and PARA 230. Reliance on this provision appears to be of little assistance as no special rules of trust law, except the presumption of advancement which itself is of little significance where evidence of intention is available, apply to husband and wife unless, perhaps, the provision empowers the court to use all the powers of the Matrimonial Causes Act 1973 to adjust the rights of property of engaged couples. This point was left open in *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA. See also *Mossop v Mossop* [1989] Fam 77, [1988] 2 All ER 202, CA; *Shaw v Fitzgerald* [1992] 1 FCR 162, [1992] 1 FLR 357.

7 le on lines similar to the procedure for resolving disputes under the Married Women's Property Act 1882 s 17 and the Civil Partnership Act 2004 s 66: see PARA 224 et seq.

8 *Hammond v Mitchell* [1992] 2 All ER 109, sub nom *H v M (property dispute)* [1991] FCR 938, sub nom *H v M (property: beneficial interests)* [1992] 1 FLR 229 (unmarried couple living together; property purchased in man's sole name; couple lived in, and carried on trading activities in, property; woman held, on the basis of an express agreement, to be entitled to a beneficial interest in the property).

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(2) HOME RIGHTS

285. Rights where one spouse or civil partner has no estate.

If:

- 328 (1) one spouse or civil partner¹ is entitled to occupy a dwelling house² by virtue of a beneficial estate or interest or contract or any enactment giving that spouse or civil partner the right to remain in occupation³; and
- 329 (2) the other spouse or civil partner is not so entitled⁴,

the spouse or civil partner not so entitled has⁵ the following rights ('home rights'):

- 330 (a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part of it by the other spouse or civil partner except with the leave⁶ of the court⁷;
- 331 (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house⁸.

If by virtue of his or her home rights a spouse or civil partner is so entitled to occupy a dwelling house or any part of a dwelling house, any payment or tender made or other thing done by that spouse or civil partner in or towards satisfaction of any liability of the other spouse or civil partner in respect of rent, mortgage payments⁹ or other outgoings affecting the dwelling house is, whether or not it is made or done in pursuance of an order of the court¹⁰, as good as if made or done by the other spouse or civil partner¹¹.

A spouse or civil partner's home rights continue only so long as the marriage or civil partnership subsists, except to the extent that an order of the court¹² otherwise provides and only so long as the other spouse or civil partner is entitled¹³ to occupy the dwelling house, except where provision is made¹⁴ for those rights to be a charge on an estate or interest in the dwelling house¹⁵.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 For these purposes 'dwelling house' includes any building or part of a building which is occupied as a dwelling, any caravan, house-boat or structure which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to it and occupied with it: Family Law Act 1996 s 63(1). However, the inclusion in this definition of caravans, house-boats or structures which are occupied as a dwelling is disappplied for the purposes of s 31 (see PARA 286; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638), s 32 (see **LAND CHARGES** vol 26 (2004 Reissue) PARA 638), s 53 (see PARA 310 et seq) and s 54 (see note 3) and such other provisions of Pt IV (ss 30-63), if any, as may be prescribed: s 63(4).

Section 30 does not apply to a dwelling house which has at no time been, and which was at no time intended by the spouses or civil partners to be, a family home of theirs: Family Law Act 1996 s 30(7) (ss 30(1)-(9), 54 amended by the Civil Partnership Act 2004 Sch 9 paras 1, 12); and see *Collins v Collins* (1973) 4 Fam Law 133, CA; *Syed v Syed* (1980) 1 FLR 129; *Barnett v Hassett* [1982] 1 All ER 80, [1981] 1 WLR 1385. The test whether a house is a matrimonial home (or, presumably, a civil partnership home) is an objective one: *Hall v King* [1988] 1 FLR 376, CA; and see *Moore v Moore* [2004] EWCA Civ 1243, [2004] 3 FCR 461, [2005] 1 FLR 666. Whether the

whole of a hotel was matrimonial home was a matter of fact and degree: *Kinzler v Kinzler* [1985] Fam Law 26, CA. As to claims by mortgagees see PARA 287.

3 Family Law Act 1996 s 30(1)(a) (as amended: see note 2). In determining for these purposes whether a person is entitled to occupy a dwelling house by virtue of an estate or interest, any right to possession of the dwelling house conferred on a mortgagee of the dwelling house under or by virtue of his mortgage is to be disregarded, whether or not the mortgagee is in possession: s 54(1), (2). Where a person is entitled to occupy a dwelling house by virtue of an estate or interest, a connected person does not, by virtue of any home rights or any rights conferred by an occupation order (ie an order under s 35 (see PARAS 297, 298) or s 36 (see PARAS 301, 302)), have any larger right against the mortgagee to occupy the dwelling house than the entitled person has by virtue of his estate or interest and of any contract with the mortgagee (s 54(3) (as so amended)), although this does not apply, in the case of home rights, if under s 31 (see PARA 286; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638) those rights are a charge, affecting the mortgagee, on the estate or interest mortgaged (s 54(4) (as so amended)). For these purposes, 'connected person', in relation to any person, means that person's spouse, former spouse, civil partner, former civil partner, cohabitant or former cohabitant: ss 54(5), 55(1) (s 54(5) as so amended). As to the meaning of 'cohabitants' and 'former cohabitants' see PARA 292 note 5. 'Mortgage', 'mortgagor' and 'mortgagee' have the same meaning as in the Law of Property Act 1925 (see **MORTGAGE** vol 77 (2010) PARA 101); Family Law Act 1996 s 63(1).

4 Family Law Act 1996 s 30(1)(b) (as amended: see note 2).

5 le subject to the provisions of the Family Law Act 1996 Pt IV (ss 30-63). On an application for home rights the court has no jurisdiction to grant an injunction against third parties with a right of occupation, and the Court of Appeal cannot amend the grounds of appeal to reflect an entirely new cause of action so that the matter must be remitted to the court of first instance for separate, new proceedings against the third parties to be consolidated with the application under s 30: *Kalsi v Kalsi* [1992] 2 FCR 1, [1992] 1 FLR 511, CA.

6 le given by an order under the Family Law Act 1996 s 33: see PARA 292. As to the meaning of 'court' see PARA 958.

7 Family Law Act 1996 s 30(2)(a) (as amended: see note 2). A spouse or civil partner's occupation by virtue of his or her home rights:

23 (1) is to be treated, for the purposes of the Rent (Agriculture) Act 1976 and the Rent Act 1977 (other than the Rent Act 1977 Pt V (ss 77-85) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 989 et seq) and ss 103-106 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1002 et seq)) as occupation by the other spouse as the other spouse's residence (Family Law Act 1996 s 30(4)(a) (as amended: see note 2)); and

24 (2) if by virtue of his or her home rights the spouse or civil partner occupies the dwelling house as his or her only or principal home, is to be treated, for the purposes of the Housing Act 1985 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1300 et seq), the Housing Act 1988 Pt I (ss 1-45) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1011 et seq) and the Housing Act 1996 Pt V Chapter I (ss 124-143) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1286 et seq), as occupation by the other spouse or civil partner as that spouse or civil partner's only or principal home (Family Law Act 1996 s 30(4)(b) (as so amended; also amended by SI 1997/74)).

A person who has an equitable interest in a dwelling house or in its proceeds of sale, but is not a person in whom there is vested, whether solely or as joint tenant, a legal estate in fee simple or a legal term of years absolute in the dwelling house, is to be treated, only for the purpose of determining whether he or she has home rights, as not being entitled to occupy the dwelling house by virtue of that interest: Family Law Act 1996 s 30(9) (as amended: see note 2).

8 Family Law Act 1996 s 30(2)(b) (as amended: see note 2). As to the nature of an occupation by virtue of home rights see note 7.

9 For these purposes 'mortgage payments' includes any payments which, under the terms of the mortgage, the mortgagor is required to make to any person: Family Law Act 1996 s 63(1).

10 le under the Family Law Act 1996 s 40: see PARA 294.

11 Family Law Act 1996 s 30(3) (as amended: see note 2); and see *Penn v Dunn* [1970] 2 QB 686, [1970] 2 All ER 858, CA; *Hastings and Thanet Building Society v Goddard* [1970] 3 All ER 954, [1970] 1 WLR 1544, CA. If a spouse or civil partner is entitled under the Family Law Act 1996 s 30 to occupy a dwelling house or any part of a dwelling house and makes any payment in or towards satisfaction of any liability of the other spouse or civil partner in respect of mortgage payments affecting the dwelling house, the person to whom the payment is made may treat it as having been made by the second spouse or civil partner, but the fact that that person has

treated any such payment as having been so made does not affect any claim of the first spouse or civil partner against the second spouse or civil partner to an interest in the dwelling house by virtue of the payment: s 30(5) (as so amended). If a spouse or civil partner is entitled under s 30 to occupy a dwelling house or part of a dwelling house by reason of an interest of the other spouse or civil partner under a trust, the provisions of s 30(3)-(5) apply in relation to the trustees as they apply in relation to the other spouse or civil partner: s 30(6) (as so amended).

12 Ie under the Family Law Act 1996 s 33(5): see PARA 297.

13 Ie as mentioned in the Family Law Act 1996 s 30(1).

14 Ie by the Family Law Act 1996 s 31: see PARA 286.

15 Family Law Act 1996 s 30(8) (as amended: see note 2). See *Moore v Moore* [2004] EWCA Civ 1243, [2004] 3 FCR 461, [2005] 1 FLR 666.

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286. Effect of home rights as charge on dwelling house.

If, at any time during a marriage or civil partnership¹, one spouse or civil partner is entitled to occupy a dwelling house² by virtue of a beneficial estate or interest³, the other spouse or civil partner's home rights⁴ are a charge on the estate or interest⁵.

If a spouse or civil partner's home rights are a charge on an estate or interest in the dwelling house and that estate or interest is surrendered to merge in some other estate or interest expectant on it in such circumstances that, but for the merger, the person taking the estate or interest would be bound by the charge, the surrender has effect subject to the charge and the persons thereafter entitled to the other estate or interest are, for so long as the estate or interest surrendered would have endured if not so surrendered, to be treated⁶ as deriving title to the other estate or interest under the other spouse or civil partner or, as the case may be, under the trustees for the other spouse or civil partner, by virtue of the surrender⁷. If the title to the legal estate by virtue of which a spouse or civil partner is entitled to occupy a dwelling house, including any legal estate held by trustees for that spouse or civil partner, is registered⁸, registration of a land charge affecting the dwelling house⁹ is to be effected by registering¹⁰ a notice¹¹.

1 As to the meanings of 'civil partnership' and 'civil partner' see PARA 2 note 1.

2 As to the meaning of 'dwelling house' see PARA 285 note 2.

3 Family Law Act 1996 s 31(1) (s 31(1), (2), (9), (10) amended by the Civil Partnership Act 2004 Sch 9 para 2). In determining whether a person is entitled to occupy a dwelling house by virtue of an estate or interest, any right to possession of the dwelling house conferred on a mortgagee of the dwelling house under or by virtue of his mortgage is to be disregarded, whether or not the mortgagee is in possession: see PARA 285 note 3.

4 As to the meaning of 'home rights' see PARA 285.

5 Family Law Act 1996 s 31(2) (as amended: see note 3). Any such charge is a Class F land charge: see the Land Charges Act 1972 s 2(7); the Family Law Act 1996 s 31(3)-(8), (12), (13); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.

6 Ie for all purposes of the Family Law Act 1996 Pt IV (ss 30-63).

7 Family Law Act 1996 s 31(9) (as amended: see note 3).

8 Ie under the Land Registration Act 2002 or any enactment replaced by that Act: Family Law Act 1996 s 31(10) (amended by the Land Registration Act 2002 Sch 11 para 34; Family Law Act 1996 s 31(10) as amended: see note 3). As to registration under the Land Registration Act 2002 see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 801 et seq.

9 Ie by virtue of the Family Law Act 1996 Pt IV (ss 30-63).

10 Ie under the Land Registration Act 2002: see note 8.

11 Family Law Act 1996 s 31(10)(a) (as amended: see note 8). In such circumstances a spouse or civil partner's home rights are not capable of falling within the Land Registration Act 2002 Sch 1 para 2 or Sch 3 para 2 (as to which see **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 866, 962): Family Law Act 1996 s 31(10)(b) (substituted by the Land Registration Act 2002 Sch 11 para 34; Family Law Act 1996 s 31(10)(b) as amended: see notes 3, 8). As to the restriction on registration where a spouse or civil partner is entitled to more than one charge, contracts for sale of a house affected by a registered charge required to include a term

requiring the cancellation of registration before completion, and the cancellation of registration after divorce, dissolution etc see **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.

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287. Claims by mortgagees.

If a mortgagee¹ of land which consists of or includes a dwelling house² brings a claim in any court for the enforcement of his security, a connected person³ who is not already a party to the claim is entitled to be made a party⁴ if:

332 (1) the connected person is enabled⁵ to meet the mortgagor's⁶ liabilities under the mortgage⁷;

333 (2) he has applied to the court⁸ before the claim is finally disposed of in that court⁹; and

334 (3) the court sees no special reason against his being made a party to the claim and is satisfied:

2

1. (a) that he may be expected to make such payments or do such other things in or towards satisfaction of the mortgagor's liabilities or obligations as might affect the outcome of the proceedings¹⁰; or

2. (b) that the expectation of it should be¹¹ considered¹².

3

If a mortgagee of land which consists, or substantially consists, of a dwelling house brings a claim for the enforcement of his security, and at the relevant time¹³ there is:

335 (i) in the case of unregistered land, a land charge of Class F registered against the person who is the estate owner at the relevant time or any person who, where the estate owner is a trustee, preceded him as trustee during the subsistence of the mortgage¹⁴; or

336 (ii) in the case of registered land, a subsisting registration of a notice¹⁵ or, as the case may be, a notice or caution¹⁶,

then, if the person on whose behalf the land charge is registered or the notice or caution is entered, is not a party to the claim, the mortgagee must serve notice of the claim on him¹⁷.

1 As to the meaning of 'mortgagee' see PARA 285 note 3.

2 As to the meaning of 'dwelling house' see PARA 285 note 2.

3 As to the meaning of 'connected person' see PARA 285 note 3.

4 Family Law Act 1996 s 55(1), (2).

5 Ie by the Family Law Act 1996 s 30(3) or (6) (see PARA 285), or by s 30(3) or (6) as applied by s 35(13) (see PARA 297 note 2) or s 36(13) (see PARA 301).

6 As to the meaning of 'mortgagor' see PARA 285 note 3.

7 Family Law Act 1996 s 55(3)(a). As to the meaning of 'mortgage' see PARA 285 note 3.

8 As to the meaning of 'court' see PARA 958.

9 Family Law Act 1996 s 55(3)(b).

10 Family Law Act 1996 s 55(3)(c)(i).

11 le under the Administration of Justice Act 1970 s 36: see **MORTGAGE** vol 77 (2010) PARA 554.

12 Family Law Act 1996 s 55(3)(c)(ii).

13 If: (1) an official search has been made on behalf of the mortgagee which would disclose any land charge of Class F, notice or caution within the Family Law Act 1996 s 56(1)(a) or (b) (see the text and notes 14-16); (2) a certificate of the result of the search has been issued; and (3) the claim is commenced within the priority period, the relevant time is the date of the certificate: s 56(3). In any other case, the relevant time is the time when the claim is commenced: s 56(4). The priority period is, for both registered and unregistered land, the period for which, in accordance with the Land Charges Act 1972 s 11(5), (6) (see **LAND CHARGES** vol 26 (2004 Reissue) PARAS 614, 701), a certificate on an official search operates in favour of a purchaser: Family Law Act 1996 s 56(5). As to Class F land charges see **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.

14 Family Law Act 1996 s 56(1)(a).

15 le under the Family Law Act 1996 s 31(10) (see PARA 286) or the Matrimonial Homes Act 1983 s 2(8) (repealed).

16 Family Law Act 1996 s 56(1)(b). The 'notice or caution' referred to in the text is a notice or caution under the Matrimonial Homes Act 1967 s 2(7) (repealed).

17 Family Law Act 1996 s 56(2).

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288. Rights of bankrupts.

Nothing in the initial period of bankruptcy, that is to say the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting of the bankrupt's estate in a trustee, is to be taken as having given rise to any home rights in relation to a dwelling house comprised in the bankrupt's estate¹. Where a spouse or civil partner's home rights are a charge on the estate or interest of the other spouse or civil partner, or of trustees for the other spouse or civil partner, and the other spouse or civil partner is adjudged bankrupt, the charge continues to subsist notwithstanding the bankruptcy and binds the trustee of the bankrupt's estate and persons deriving title under that trustee².

Where a person who is entitled to occupy a dwelling house by virtue of a beneficial interest is adjudged bankrupt and any persons under the age of 18 with whom that person had at some time occupied that dwelling house had their home with that person at the time when the bankruptcy petition was presented and at the commencement of the bankruptcy, then, whether or not the bankrupt's spouse or civil partner, if any, has home rights, the bankrupt has the following rights as against the trustee of his estate:

- 337 (1) if in occupation, a right not to be evicted or excluded from the dwelling house or any part of it, except with the leave of the court³;
- 338 (2) if not in occupation, a right with the leave of the court to enter into and occupy the dwelling house⁴.

1 See the Insolvency Act 1986 s 336(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 648. As to home rights see PARA 285 et seq.

2 See the Insolvency Act 1986 s 336(2)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 648.

3 See the Insolvency Act 1986 s 337(1), (2)(a)(i); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 650.

4 See the Insolvency Act 1986 s 337(2)(a)(ii); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 650.

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(3) OCCUPATION ORDERS

(i) Applications and Orders

289. Applications to the court.

An application may be made to the court¹ for an order (an 'occupation order')² by:

- 339 (1) a person who has an estate or interest or has home rights³;
- 340 (2) a former spouse or civil partner with no existing right to occupy⁴;
- 341 (3) a cohabitant or former cohabitant with no existing right to occupy⁵;
- 342 (4) a person who is a former spouse or civil partner with no existing right to occupy⁶; or
- 343 (5) a person who is a cohabitant or former cohabitant with no existing right to occupy⁷.

An application for an occupation order may be made in other family proceedings⁸ or without any other family proceedings being instituted⁹.

If an application for an occupation order is made¹⁰ and the court considers that it has no power to make the order under the relevant statutory provision, but that it has power to make an order under one of the other relevant statutory provisions, the court may make an order under that other statutory provision¹¹.

The fact that a person has applied for an occupation order¹², or that an occupation order has been made, does not affect the right of any person to claim a legal or equitable interest in any property in any subsequent proceedings¹³.

A child under the age of 16 may not apply for an occupation order except with the leave of the court¹⁴; and the court may grant such leave only if it is satisfied that the child has sufficient understanding to make the proposed application for the occupation order¹⁵.

It has been held that an occupation order, which overrides proprietary rights, is of such a Draconian nature that it should be restricted to exceptional cases and used as a last resort¹⁶.

1 As to the meaning of 'court' see PARA 958.

2 Family Law Act 1996 ss 39(1), 63(1). The fee payable on applying for an occupation order, or on applying simultaneously for both a non-molestation order (see PARA 716 et seq) and an occupation order is £60: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 1.3.

3 Ie under the Family Law Act 1996 s 33: see PARAS 292-293, 295. As to home rights see PARA 285 et seq.

4 Ie under the Family Law Act 1996 s 35: see PARAS 292-293, 295.

5 Ie under the Family Law Act 1996 s 36: see PARAS 301-302, 304.

6 Ie under the Family Law Act 1996 s 37: see PARAS 305-307.

7 Ie under the Family Law Act 1996 s 38: see PARAS 305-307.

8 By virtue of the Family Law Act 1996 s 63(1), (2) (amended by the Adoption and Children Act 2002 Sch 3 paras 85, 88; the Civil Partnership Act 2004 Sch 9 para 14; the Forced Marriage (Civil Protection) Act 2007 Sch 2 para 3), 'family proceedings' means any proceedings under:

- 25 (1) the inherent jurisdiction of the High Court in relation to children (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 200);
- 26 (2) the Family Law Act 1996 Pt IV (ss 30-63) (see PARAS 285 et seq, 292 et seq);
- 27 (3) the Matrimonial Causes Act 1973 (see PARA 317 et seq);
- 28 (4) the Adoption Act 1976 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 375 et seq);
- 29 (5) the Domestic Proceedings and Magistrates' Courts Act 1978 (see PARA 553 et seq);
- 30 (6) the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (see PARAS 530 et seq, 938 et seq);
- 31 (7) the Children Act 1989 Pt I (ss 1-7), Pt III (ss 17-30) and Pt IV (ss 31-42) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 125, 133 et seq, 270 et seq, **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 851 et seq);
- 32 (8) the Human Fertilisation and Embryology Act 1990 s 30 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 106);
- 33 (9) the Adoption and Children Act 2002 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 331 et seq);
- 34 (10) the Civil Partnership Act 2004 Schs 5-7 (see PARA 458 et seq); and
- 35 (11) the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

9 Family Law Act 1996 s 39(2).

10 Ie under the Family Law Act 1996 s 33, 35, 36, 37 or 38 (see PARA 292 et seq).

11 Family Law Act 1996 s 39(3). As to the relevant statutory provisions see note 10.

12 Ie under the Family Law Act 1996 ss 35-38.

13 Family Law Act 1996 s 39(4). For these purposes, 'subsequent proceedings' includes subsequent proceedings under Pt IV (ss 30-63): s 39(4).

14 Family Law Act 1996 s 43(1).

15 Family Law Act 1996 s 43(2).

16 *Chalmers v John* [1999] 2 FCR 110, [1999] 1 FLR 392, CA (a court should be cautious about making a definitive occupation order at an interlocutory stage where a final hearing is imminent); *G v G (occupation order)* [2000] 3 FCR 53, [2000] 2 FLR 36, CA; *Re Y (children) (occupation order)* [2000] 2 FCR 470, CA. Each case will turn on its own particular facts: *B v B (occupation order)* [1999] 2 FCR 251, [1999] 1 FLR 715, CA (spouses lived in council accommodation; husband had treated wife with serious domestic violence and in consequence wife left matrimonial home with young daughter; wife and daughter rehoused in bed and breakfast accommodation; husband stayed in matrimonial home with his minor son; wife applied for occupation order; court had to balance harm to each of the two children; it was held that the son would suffer greater harm if occupation order made).

UPDATE

289 Applications to the court

NOTE 2--SI 2008/1054 Sch 1, Fee 1.3 amended: SI 2008/2856.

NOTE 8--Head (8) substituted so as to refer to the Human Fertilisation and Embryology Act 2008 s 54: Human Fertilisation and Embryology Act 2008 Sch 6 para 37.

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290. Orders without notice.

The court¹ may, in any case where it considers that it is just and convenient to do so, make an occupation order² even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court³. In determining whether to exercise these powers, the court must have regard to all the circumstances including:

- 344 (1) any risk of significant harm⁴ to the applicant or a relevant child⁵, attributable to conduct of the respondent, if the order is not made immediately⁶;
- 345 (2) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately⁷; and
- 346 (3) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved where the court is a magistrates' court, in effecting service of proceedings or in any other case, in effecting substituted service⁸.

If the court makes an order without notice it must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing⁹.

If, at a full hearing, the court makes an occupation order (the 'full order'), then:

- 347 (a) for the purposes of calculating the maximum period for which the full order may be made to have effect, the relevant statutory provision¹⁰ is to apply as if the period for which the full order will have effect began on the date on which the initial order¹¹ first had effect; and
- 348 (b) the provisions relating to the extension of orders¹² are to apply as if the full order and the initial order were a single order¹³.

1 As to the meaning of 'court' see PARA 958.

2 As to the meaning of 'occupation order' see PARA 289.

3 Family Law Act 1996 s 45(1). As to the attachment of a power of arrest to an order made by virtue of s 45(1) see s 47(3); and PARA 988. Where an order has been made under s 45(1) and a power of arrest has been attached by virtue of s 47(3), the court may vary or discharge the order under s 49(1), in so far as that order confers a power of arrest: see s 49(4); and PARA 722. As to enforcement and arrest generally see PARA 988 et seq. As to an appeal against the making of any order by a magistrates' court or any refusal to make such an order see s 61; and PARA 308.

If an order is made without notice, it must be strictly limited in time and operate only until the earliest day on which a hearing with notice can be arranged: *Ansa v Ansa* [1977] Fam 138, [1977] 2 All ER 638, CA; *Masich v Masich* (1977) 7 Fam Law 245, CA; *Practice Note* [1978] 2 All ER 919, sub nom *Practice Direction* [1978] 1 WLR 925; *Loseby v Newman* [1996] 1 FCR 647, [1995] 2 FLR 754, CA. While an ouster order is made without notice, it must be strictly limited in time, and any application to discharge it should be treated as urgent business; if there are listing difficulties, the matter should always be referred to a judicial officer, preferably a judge: *G v G (exclusion order)* [1990] FCR 572, [1990] 1 FLR 395, CA.

4 For these purposes 'harm' means: (1) in relation to a person who has reached the age of 18 years, ill-treatment or the impairment of health; and (2) in relation to a child (ie a person under the age of 18), ill-treatment or the impairment of health or development: Family Law Act 1996 s 63(1). 'Ill-treatment' includes

forms of ill-treatment which are not physical and, in relation to a child, includes sexual abuse; 'health' includes physical or mental health; and 'development' means physical, intellectual, emotional, social or behavioural development: s 63(1). Where the question of whether harm suffered by a child is 'significant' turns on the child's health or development, his health or development is to be compared with that which could reasonably be expected of a similar child: s 63(3). See *Banks v Banks* [1999] 1 FLR 726 (wife suffering from dementia; it was held that presence of wife in matrimonial home would cause additional strain but would not cause husband significant harm).

5 'Relevant child', in relation to any proceedings under the Family Law Act 1996 Pt IV (ss 30-63) means: (1) any child who is living with or might reasonably be expected to live with either party to the proceedings; (2) any child in relation to whom an order under the Adoption Act 1976, the Adoption and Children Act 2002 or the Children Act 1989 is in question in the proceedings; and (3) any other child whose interests the court considers relevant: Family Law Act 1996 ss 62(2), 63(1) (s 62(2) amended by the Adoption and Children Act 2002 Sch 3 paras 85, 86).

6 Family Law Act 1996 s 45(2)(a).

7 Family Law Act 1996 s 45(2)(b).

8 Family Law Act 1996 s 45(2)(c).

9 Family Law Act 1996 s 45(3). For these purposes, 'full hearing' means a hearing of which notice has been given to all the parties in accordance with rules of court: s 45(5).

10 For these purposes, 'relevant statutory provision' means the Family Law Act 1996 s 33(10) (see PARA 292), s 35(10) (see PARA 297), s 36(10) (see PARA 301), s 37(5) (see PARA 305) or s 38(6) (see PARA 305): s 45(5).

11 For these purposes, 'initial order' means an occupation order made by virtue of the Family Law Act 1996 s 45(1): s 45(5).

12 In the Family Law Act 1996 s 36(10) (see PARA 301) or, as the case may be, s 38(6) (see PARA 305).

13 Family Law Act 1996 s 45(4).

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291. Undertakings.

In any case where the court¹ has power to make an occupation order² it may accept an undertaking from any party to the proceedings³; but no power of arrest may be attached to any undertaking so given⁴. The court must not accept such an undertaking in any case where a power of arrest would otherwise be attached to the order⁵. An undertaking so given to a court is enforceable as if the court had made an occupation order in terms corresponding to those of the undertaking⁶.

These provisions have effect without prejudice to the powers of the High Court and the county court apart from those provisions⁷.

1 As to the meaning of 'court' see PARA 958.

2 As to the meaning of 'occupation order' see PARA 289.

3 Family Law Act 1996 s 46(1). An undertaking can be enforced on breach by applying for a committal but there can be no appeal from an undertaking: *McConnell v McConnell* (1980) 10 Fam Law 214, CA.

4 Family Law Act 1996 s 46(2). As to the enforcement of undertakings see PARA 997.

5 Family Law Act 1996 s 46(3) (s 46(3), (4) amended by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 37).

6 Family Law Act 1996 s 46(4) (as amended: see note 5).

7 Family Law Act 1996 s 46(5).

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(ii) Circumstances and Conditions for Orders

A. APPLICANT HAVING ESTATE OR INTEREST OR HOME RIGHTS

292. Right to apply for an occupation order.

If:

349 (1) a person (the 'person entitled'):

4

3. (a) is entitled to occupy a dwelling house¹ by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation²; or

4. (b) has home rights³ in relation to a dwelling house⁴; and

5

350 (2) the dwelling house:

6

5. (a) is or at any time has been the home of the person entitled and of another person with whom he or she is associated⁵; or

6. (b) was at any time intended by the person entitled and any such other person to be their home⁶,

7

the person entitled may apply to the court⁷ for an occupation order⁸ containing any of the provisions which may be specified⁹ in such an order¹⁰.

An occupation order may not be made under these provisions after the death of either of the parties¹¹, and, except in the case of an order made by virtue of the death of the other spouse or civil partner¹², ceases to have effect on the death of either party¹³; and such an order may, in so far as it has continuing effect, be made for a specified period, until the occurrence of a specified event or until further order¹⁴.

1 As to the meaning of 'dwelling house' see PARA 285 note 2.

2 Family Law Act 1996 s 33(1)(a)(i). For a case where there was insufficient evidence to satisfy the court that a father was entitled to occupy the property by virtue of a beneficial interest in it, permitting him to apply for an order under s 33 see *S v F (occupation order)* [2000] 3 FCR 365, [2000] 1 FLR 255; in connection with the contractual rights of a wife see *Moore v Moore* [2004] EWCA Civ 1243, [2004] 3 FCR 461, [2005] 1 FLR 666. As to appeals against the making of any such order by a magistrates' court or any refusal to make such an order see the Family Law Act 1996 s 61; and PARA 308. As to variation and discharge see PARA 309. As to enforcement and arrest see PARA 988 et seq.

3 As to the meaning of 'home rights' see PARA 285.

4 Family Law Act 1996 s 33(1)(a)(ii) (s 33(1)(a)(ii) amended, ss 33(2A), 44(3), (4), 62(3)(aa), (eza) added, s 62(1) amended, by the Civil Partnership Act 2004 Sch 9 paras 4, 10, 13; Family Law Act 1996 s 62(1) amended, s 62(3)(ea) added, by the Domestic Violence, Crime and Victims Act 2004 s 4, Sch 10 paras 40, 41).

5 Family Law Act 1996 s 33(1)(b)(i). A person is 'associated' with another person for the purposes of the Family Law Act 1996 Pt IV (ss 30-63) if:

- 36 (1) they are or have been married to each other (s 62(3)(a));
- 37 (2) they are or have been civil partners of each other (s 62(3)(aa) (as added: see note 4));
- 38 (3) they are cohabitants or former cohabitants (s 62(3)(b));
- 39 (4) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder (s 62(3)(c));
- 40 (5) they are relatives (s 62(3)(d));
- 41 (6) they have agreed to marry one another, whether or not that agreement has been terminated (s 62(3)(e));
- 42 (7) they have entered into a civil partnership agreement (as defined by the Civil Partnership Act 2004 s 73 (see PARA 16)) (whether or not that agreement has been terminated) (s 62(3)(eaa) (as so added));
- 43 (8) they have or have had an intimate personal relationship with each other which is or was of significant duration (s 62(3)(ea));
- 44 (9) in relation to any child, they are both persons who are parents of the child or they have or have had parental responsibility for the child (s 62(3)(f), (4)); or
- 45 (10) they are parties to the same family proceedings (other than proceedings under Pt IV (s 62(3)(g))).

A body corporate and another person are not, by virtue of head (9) or (10), to be regarded for these purposes as associated with each other: s 62(6).

If:

- 46 (a) a child has been adopted (s 62(5));
- 47 (b) an adoption agency within the meaning of the Adoption and Children Act 2002 s 2 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 331, 394-395) has power to place him for adoption under s 19 (placing children with parental consent: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 332-333) or he has become the subject of an order under s 21 (placement orders: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 335-337) (Family Law Act 1996 s 62(5), (7)(a) (s 62(5) amended, s 62(7) added, by the Adoption and Children Act 2002 Sch 3 paras 85-87)); or
- 48 (c) a child is freed for adoption by virtue of an order made under the Adoption Act 1976 s 18 (repealed) or a corresponding Scottish or Northern Irish provision (Family Law Act 1996 62(7)(b) (as so added)),

two persons are also associated with each other if one is a natural parent of the child or a parent of such a natural parent and the other is the child or any person who has become a parent of the child by virtue of an adoption order or has applied for an adoption order or with whom the child has at any time been placed for adoption (s 62(5) (as so amended)).

For these purposes 'cohabitants' are two persons who are neither married to each other nor civil partners of each other but are living together as husband and wife or as if they were civil partners; and 'cohabit' and 'former cohabitants' are to be read accordingly (although 'former cohabitants' does not include cohabitants who have subsequently married each other or become civil partners of each other): ss 62(1), 63(1) (as amended: see note 4). 'Relative', in relation to a person, means: (1) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person's spouse, former spouse, civil partner or former civil partner; or (2) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or of the half blood or by marriage or civil partnership) of that person or of that person's spouse, former spouse, civil partner or former civil partner, and includes, in relation to a person who is cohabiting or has cohabited with another person, any person who would fall within head (1) or (2) if the parties were married to each other or were civil partners of each other: s 63(1) (as so amended).

As to the interpretation of these provisions (in the context of a non-molestation order) see also PARA 717 note 5. As to the meaning of 'child' see PARA 290 note 4. As to the meaning of 'parental responsibility' see the Children Act 1989 s 3; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 134 (definition applied by the Family Law Act 1996 s 63(1)). As to the meaning of 'family proceedings' see PARA 289 note 8.

6 Family Law Act 1996 s 33(1)(b)(ii).

7 As to the meaning of 'court' see PARA 958.

8 As to the meaning of 'occupation order' see PARA 289. As to the provisions that may be included in an order see PARAS 293-294; as to the matters to which the court must have regard see PARA 295. As to the effect of an order where the home rights are a charge on the dwelling house see PARA 296.

9 Ie any of the provisions specified in the Family Law Act 1996 s 33(3)-(5): see PARA 293.

10 Family Law Act 1996 s 33(1). If an agreement to marry or a civil partnership agreement (as defined by the Civil Partnership Act 2004 s 73: see PARA 16) is terminated, no application under s 33 may be made by virtue of s 62(3)(e) or s 62(3)(eza) (see note 5) by reference to that agreement after the end of the period of three years beginning with the day on which it is terminated: s 33(2), (2A) (s 33(2A) as added: see note 4). The court must not make an order under s 33 by virtue of s 62(3)(e) or s 62(3)(eza) unless there is produced to it evidence in writing of the existence of the agreement to marry or the civil partnership agreement (s 44(1), (3) (s 44(3) as so added)), although this does not apply if the court is satisfied that the agreement to marry or the civil partnership agreement was evidenced by the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or a gift by one party to the agreement to the other as a token of the agreement, or a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony (s 44(2), (4) (s 44(4) as so added)).

11 Ie either of the parties mentioned in the Family Law Act 1996 s 33(1).

12 Ie except in the case of an order made by virtue of the Family Law Act 1996 s 33(5)(a): see PARA 293.

13 Family Law Act 1996 s 33(9).

14 Family Law Act 1996 s 33(10).

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293. Provisions that may be included in an order.

An occupation order¹ may:

- 351 (1) enforce the applicant's entitlement to remain in occupation as against the other person (the 'respondent')²;
- 352 (2) require the respondent to permit the applicant to enter and remain in the dwelling house³ or part of the dwelling house⁴;
- 353 (3) regulate the occupation of the dwelling house by either or both parties⁵;
- 354 (4) if the respondent is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving the respondent the right to remain in occupation⁶, prohibit, suspend or restrict the exercise by the respondent of the right to occupy the dwelling house⁷;
- 355 (5) if the respondent has home rights⁸ in relation to the dwelling house and the applicant is the other spouse or civil partner, restrict or terminate those rights⁹;
- 356 (6) require the respondent to leave the dwelling house or part of the dwelling house¹⁰; or
- 357 (7) exclude the respondent from a defined area in which the dwelling house is included¹¹.

An order may also declare that the applicant is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving the applicant the right to remain in occupation¹², or declare that the applicant has home rights¹³.

If the applicant has home rights and the respondent is the other spouse or civil partner, such an order made during the marriage or civil partnership may provide that those rights are not brought to an end by the death of the other spouse or civil partner or the termination, otherwise than by death, of the marriage or civil partnership¹⁴.

1 As to the meaning of 'occupation order' see PARA 289; as to the making of an order see PARA 292. As to the matters to which the court must have regard see PARA 295. As to the effect of an occupation order where the home rights are a charge on the dwelling house see PARA 296.

2 Family Law Act 1996 s 33(3)(a).

3 As to the meaning of 'dwelling house' see PARA 285 note 2.

4 Family Law Act 1996 s 33(3)(b).

5 Family Law Act 1996 s 33(3)(c).

6 If the respondent is entitled as mentioned in the Family Law Act 1996 s 33(1)(a)(i): see PARA 292.

7 Family Law Act 1996 s 33(3)(d).

8 As to the meaning of 'home rights' see PARA 285.

9 Family Law Act 1996 s 33(3)(e) (s 33(3)(e), (4), (5) amended by the Civil Partnership Act 2004 Sch 9 para 4).

10 Family Law Act 1996 s 33(3)(f).

11 Family Law Act 1996 s 33(3)(g).

12 le that the applicant is entitled as mentioned in the Family Law Act 1996 s 33(1)(a)(i) (see PARA 292).

13 Family Law Act 1996 s 33(4) (as amended: see note 9).

14 Family Law Act 1996 s 33(5) (as amended: see note 9). The court may exercise its powers under s 33(5) in any case where it considers that in all the circumstances it is just and reasonable to do so: s 33(8).

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294. Additional obligations etc which may be imposed.

On, or at any time after, making an occupation order¹ where the applicant has an estate or interest or has home rights² the court³ may:

- 358 (1) impose on either party obligations as to the repair and maintenance of the dwelling house⁴ or the discharge of rent, mortgage payments⁵ or other outgoings affecting the dwelling house⁶;
- 359 (2) order a party occupying the dwelling house or any part of it, including a party who is entitled to do so by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving that party the right to remain in occupation, to make periodical payments to the other party in respect of the accommodation, if the other party would, but for the order, be entitled to occupy the dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any such enactment⁷;
- 360 (3) grant either party possession or use of furniture or other contents of the dwelling house⁸;
- 361 (4) order either party to take reasonable care of any furniture or other contents of the dwelling house⁹;
- 362 (5) order either party to take reasonable steps to keep the dwelling house and any furniture or other contents secure¹⁰.

Such an order ceases to have effect when the occupation order to which it relates ceases to have effect¹¹.

1 As to the meaning of 'occupation order' see PARA 289. As to the provisions that may be included in an order see PARA 293; as to the matters to which the court must have regard see PARA 295.

2 Ie an occupation order under the Family Law Act 1996 s 33: see PARAS 292-293.

3 As to the meaning of 'court' see PARA 958.

4 As to the meaning of 'dwelling house' see PARA 285 note 2.

5 As to the meaning of 'mortgage payments' see PARA 285 note 9.

6 Family Law Act 1996 s 40(1)(a). Section 40 confers no power on a court to commit a defaulter to prison for non-payment: *Nwogbe v Nwogbe* [2000] 3 FCR 345, [2000] 2 FLR 744, CA.

7 Family Law Act 1996 s 40(1)(b).

8 Family Law Act 1996 s 40(1)(c).

9 Family Law Act 1996 s 40(1)(d).

10 Family Law Act 1996 s 40(1)(e).

11 Family Law Act 1996 s 40(3).

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295. Matters to which the court must have regard.

In deciding whether so to exercise its powers with regard to the making of an occupation order¹ and, if so, in what manner, the court² must have regard to all the circumstances including:

- 363 (1) the housing needs and housing resources of each of the parties and of any relevant child³;
- 364 (2) the financial resources of each of the parties⁴;
- 365 (3) the likely effect of any order, or of any decision by the court not to exercise such powers, on the health⁵, safety or well-being of the parties and of any relevant child⁶; and
- 366 (4) the conduct of the parties in relation to each other and otherwise⁷.

If it appears to the court that the applicant or any relevant child is likely to suffer significant harm⁸ attributable to conduct of the respondent⁹ if such an order containing one or more of the applicable provisions¹⁰ is not made, the court must make the order unless it appears to it that:

- 367 (a) the respondent or any relevant child is likely to suffer significant harm if the order is made¹¹; and
- 368 (b) the harm likely to be suffered by the respondent or child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made¹².

In deciding whether and, if so, how to exercise its additional powers¹³, the court must have regard to all the circumstances of the case including:

- 369 (i) the financial needs and financial resources of the parties¹⁴; and
- 370 (ii) the financial obligations which they have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child¹⁵.

A court considering whether to make an occupation order must also consider whether to make a non-molestation order¹⁶.

1 le the powers conferred by the Family Law Act 1996 s 33(3) (see PARA 293). As to the meaning of 'occupation order' see PARA 289; as to the making of an order see PARA 292. As to the effect of an order where the home rights are a charge on the dwelling house see PARA 296.

2 As to the meaning of 'court' see PARA 958.

3 Family Law Act 1996 s 33(6)(a). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

4 Family Law Act 1996 s 33(6)(b).

5 As to the meaning of 'health' see PARA 290 note 4.

- 6 Family Law Act 1996 s 33(6)(c).
- 7 Family Law Act 1996 s 33(6)(d).
- 8 As to the meanings of 'harm' and 'significant harm' see PARA 290 note 4.
- 9 The correct approach to the test laid down in the Family Law Act 1996 s 33(7) (see the text and notes 11-12) is to assess the effect of the conduct on the applicant or any relevant child rather than to concentrate on the intention of the respondent: *G v G (occupation order)* [2000] 3 FCR 53, [2000] 2 FLR 36, CA.
- 10 Ie the provisions included in the Family Law Act 1996 s 33(3) (see PARA 293).
- 11 Family Law Act 1996 s 33(7)(a).
- 12 Family Law Act 1996 s 33(7)(b).
- 13 As to these see PARA 294.
- 14 Family Law Act 1996 s 40(2)(a).
- 15 Family Law Act 1996 s 40(2)(b).
- 16 Ie must also consider whether to exercise the power conferred by the Family Law Act 1996 s 42(2)(b) (see PARA 717): s 42(4A) (added by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 36).

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296. Effect of order where rights are charge on dwelling house.

If a spouse or civil partner's home rights¹ are a charge on the estate or interest of the other spouse or civil partner or of trustees for the other spouse or civil partner, an occupation order² against the other spouse or civil partner has, except so far as a contrary intention appears, the same effect against persons deriving title under the other spouse or civil partner or under the trustees and affected by the charge³.

1 As to the meaning of 'home rights' see PARA 285.

2 Ie an order under the Family Law Act 1996 s 33: see PARAS 292-295. As to the meaning of 'occupation order' see PARA 289.

3 Family Law Act 1996 s 34(1)(a) (s 34(1) amended by the Civil Partnership Act 2004 Sch 9 para 5). Sections 30(3)-(6), 33(1), (3), (4), (10) (see PARAS 285, 292-293) apply in relation to any person deriving title under the other spouse or civil partner or under the trustees and affected by the charge as they apply in relation to the other spouse or civil partner: s 34(1)(b) (as so amended). The court may make an order under s 33 by virtue of s 34(1)(b) if it considers that in all the circumstances it is just and reasonable to do so: s 34(2).

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B. ONE FORMER SPOUSE OR CIVIL PARTNER WITH NO EXISTING RIGHT TO OCCUPY

297. Right to apply for an occupation order.

If:

- 371 (1) one former spouse or civil partner is entitled to occupy a dwelling house¹ by virtue of a beneficial estate or interest or contract, or by virtue of any enactment giving him or her the right to remain in occupation²;
- 372 (2) the other former spouse or civil partner is not so entitled³; and
- 373 (3) the dwelling house was at any time their family home⁴ or was at any time intended by them to be their family home⁵,

the former spouse or civil partner not so entitled may apply to the court⁶ for an occupation order⁷ against the other former spouse or civil partner (the 'respondent')⁸.

An order may not be so made after the death of either of the former spouses or civil partners and ceases to have effect on the death of either of them⁹; and it must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one or more occasions for a further specified period not exceeding six months¹⁰.

1 As to the meaning of 'dwelling house' see PARA 285 note 2.

2 Family Law Act 1996 s 35(1)(a) (s 35(1)(a), (b), (2), (9), (11), (12) amended, s 35(1)(c), (13)(a), (b) substituted, by the Civil Partnership Act 2004 Sch 9 para 6). A former spouse or civil partner who has an equitable interest in the dwelling house or in the proceeds of sale of the dwelling house but in whom there is not vested, whether solely or as joint tenant, a legal estate in fee simple or a legal term of years absolute in the dwelling house is to be treated (but only for the purpose of determining whether he or she is eligible to apply under s 35) as not being entitled to occupy the dwelling house by virtue of that interest: s 35(11) (as so amended). This does not prejudice any right of such a former spouse or civil partner to apply for an order under s 33 (see PARA 292): s 35(12) (as so amended).

3 Family Law Act 1996 s 35(1)(b) (as amended: see note 2).

4 As to the test for whether a property is a family home see PARA 285 note 2.

5 Family Law Act 1996 s 35(1)(c) (as substituted: see note 2).

6 As to the meaning of 'court' see PARA 958.

7 As to the meaning of 'occupation order' see PARA 289. As to the provisions that may be included in an order see PARAS 298, 299; as to the matters to which the court must have regard see PARA 300.

8 Family Law Act 1996 s 35(2) (as amended: see note 2). As to appeals against the making of any such order by a magistrates' court or any refusal to make such an order see s 61; and PARA 308. As to variation and discharge see PARA 309. As to enforcement and arrest see PARA 998 et seq. So long as an order under s 35 remains in force, s 30(3)-(6) (see PARA 285) applies in relation to the applicant as if he or she were the person entitled to occupy the dwelling house by virtue of s 30 and as if the respondent were the person entitled as mentioned in s 30(1)(a) (see PARA 285): s 35(13)(a), (b) (as so substituted).

9 Family Law Act 1996 s 35(9) (as amended: see note 2). As to the provisions that must or may be included in such an order see PARA 293; and as to the additional provisions that may be included in such an order see PARA 294.

10 Family Law Act 1996 s 35(10).

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298. Provisions that must or may be included in an order.

If the applicant for an occupation order¹ is in occupation, the order must contain provision giving the applicant the right not to be evicted or excluded from the dwelling house² or any part of it by the respondent³ for the period specified in the order and prohibiting the respondent from evicting or excluding the applicant during that period⁴. If the applicant is not in occupation, an order must contain provision giving the applicant the right to enter into and occupy the dwelling house for the period specified in the order and requiring the respondent to permit the exercise of that right⁵. An order may also:

- 374 (1) regulate the occupation of the dwelling house by either or both of the parties⁶;
- 375 (2) prohibit, suspend or restrict the exercise by the respondent of the right to occupy the dwelling house⁷;
- 376 (3) require the respondent to leave the dwelling house or part of the dwelling house⁸; or
- 377 (4) exclude the respondent from a defined area in which the dwelling house is included⁹.

1 Is an order under the Family Law Act 1996 s 35: see PARA 297. As to the meaning of 'occupation order' see PARA 289. As to the matters to which the court must have regard see PARA 300.

2 As to the meaning of 'dwelling house' see PARA 285 note 2.

3 As to the meaning of 'respondent' see PARA 297.

4 Family Law Act 1996 s 35(3). As to the additional provisions that may be included in such an order see PARA 294.

5 Family Law Act 1996 s 35(4).

6 Family Law Act 1996 s 35(5)(a).

7 Family Law Act 1996 s 35(5)(b).

8 Family Law Act 1996 s 35(5)(c).

9 Family Law Act 1996 s 35(5)(d).

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299. Additional obligations etc which may be imposed.

On, or at any time after, making an occupation order¹ where the applicant is a former spouse or civil partner with no existing right to occupy² the court³ may:

- 378 (1) impose on either party obligations as to the repair and maintenance of the dwelling house⁴ or the discharge of rent, mortgage payments⁵ or other outgoings affecting the dwelling house⁶;
- 379 (2) order a party occupying the dwelling house or any part of it, including a party who is entitled to do so by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving that party the right to remain in occupation, to make periodical payments to the other party in respect of the accommodation, if the other party would, but for the order, be entitled to occupy the dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any such enactment⁷;
- 380 (3) grant either party possession or use of furniture or other contents of the dwelling house⁸;
- 381 (4) order either party to take reasonable care of any furniture or other contents of the dwelling house⁹;
- 382 (5) order either party to take reasonable steps to keep the dwelling house and any furniture or other contents secure¹⁰.

Such an order ceases to have effect when the occupation order to which it relates ceases to have effect¹¹.

1 As to the meaning of 'occupation order' see PARA 289. As to the provisions that may be included in an order see PARA 298; as to the matters to which the court must have regard see PARA 300.

2 Ie an occupation order under the Family Law Act 1996 s 35: see PARAS 297-298.

3 As to the meaning of 'court' see PARA 958.

4 As to the meaning of 'dwelling house' see PARA 285 note 2.

5 As to the meaning of 'mortgage payments' see PARA 285 note 9.

6 Family Law Act 1996 s 40(1)(a). Section 40 confers no power on a court to commit a defaulter to prison for non-payment: *Nwogbe v Nwogbe* [2000] 3 FCR 345, [2000] 2 FLR 744, CA.

7 Family Law Act 1996 s 40(1)(b).

8 Family Law Act 1996 s 40(1)(c).

9 Family Law Act 1996 s 40(1)(d).

10 Family Law Act 1996 s 40(1)(e).

11 Family Law Act 1996 s 40(3).

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300. Matters to which the court must have regard.

In deciding whether to make an occupation order¹ and, if so, in what manner, the court² must have regard to all the circumstances including:

- 383 (1) the housing needs and housing resources of each of the parties and of any relevant child³;
- 384 (2) the financial resources of each of the parties⁴;
- 385 (3) the likely effect of any order, or of any decision by the court not to exercise its powers⁵, on the health⁶, safety or well-being of the parties and of any relevant child⁷;
- 386 (4) the conduct of the parties in relation to each other and otherwise⁸;
- 387 (5) the length of time that has elapsed since the parties ceased to live together⁹;
- 388 (6) the length of time that has elapsed since the marriage or civil partnership was dissolved or annulled¹⁰; and
- 389 (7) the existence of any pending proceedings between the parties for a property adjustment order¹¹, an order for financial relief against parents¹² or relating to the legal or beneficial ownership of the dwelling house¹³.

In deciding whether to exercise its power to regulate the occupation of the dwelling house, to prohibit, suspend or restrict the exercise of a right to occupy, to require the vacation of the dwelling house or a part thereof¹⁴ and, if so, in what manner, the court must have regard to all the circumstances including the matters mentioned in heads (1) to (5) above¹⁵.

If the court decides to make an occupation order¹⁶ and it appears to it that, if the order does not include a relevant provision, the applicant or any relevant child is likely to suffer significant harm¹⁷ attributable to conduct of the respondent¹⁸, the court must include the relevant provision in the order unless it appears to the court that:

- 390 (a) the respondent or any relevant child is likely to suffer significant harm if the provision is included in the order¹⁹; and
- 391 (b) the harm likely to be suffered by the respondent or child in that event is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included²⁰.

In deciding whether and, if so, how to exercise its additional powers²¹, the court must have regard to all the circumstances of the case including:

- 392 (i) the financial needs and financial resources of the parties²²; and
- 393 (ii) the financial obligations which they have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child²³.

1 le an order under the Family Law Act 1996 s 35 (see PARA 297) containing provision of the kind referred to in s 35(3) or (4) (see PARA 298). As to the meaning of 'occupation order' see PARA 289; as to the making of an order see PARA 297.

2 As to the meaning of 'court' see PARA 958.

3 Family Law Act 1996 s 35(6)(a). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4. As to the circumstances set out in s 35(6) see *S v F (occupation order)* [2000] 3 FCR 365, [2000] 1 FLR 255.

4 Family Law Act 1996 s 35(6)(b).

5 le under the Family Law Act 1996 s 35(3) or (4) (see PARA 298).

6 As to the meaning of 'health' see PARA 290 note 4.

7 Family Law Act 1996 s 35(6)(c).

8 Family Law Act 1996 s 35(6)(d).

9 Family Law Act 1996 s 35(6)(e).

10 Family Law Act 1996 s 35(6)(f) (s 35(6)(f), (g) amended by the Civil Partnership Act 2004 Sch 9 para 6).

11 le an order under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (see PARA 499 et seq).

12 le an order under the Children Act 1989 Sch 1 para 1(2)(d) or (e) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 539).

13 Family Law Act 1996 s 35(6)(g) (as amended: see note 10).

14 le in deciding whether to exercise the court's power to include one or more of the provisions referred to in the Family Law Act 1996 s 35(5) (see PARA 298).

15 Family Law Act 1996 s 35(7).

16 See note 1.

17 As to the meanings of 'harm' and 'significant harm' see PARA 290 note 4.

18 Cf PARA 295 note 9.

19 Family Law Act 1996 s 35(8)(a).

20 Family Law Act 1996 s 35(8)(b).

21 As to these see PARA 299.

22 Family Law Act 1996 s 40(2)(a).

23 Family Law Act 1996 s 40(2)(b).

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C. ONE COHABITANT OR FORMER COHABITANT WITH NO EXISTING RIGHT TO OCCUPY

301. Right to apply for an occupation order.

If:

- 394 (1) one cohabitant¹ or former cohabitant² is entitled to occupy a dwelling house³ by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving that cohabitant the right to remain in occupation⁴;
- 395 (2) the other cohabitant or former cohabitant is not so entitled⁵; and
- 396 (3) that dwelling house is the home in which they cohabit or a home in which they at any time cohabited or intended so to cohabit⁶,

the cohabitant or former cohabitant not so entitled may apply to the court⁷ for an occupation order⁸ against the other cohabitant or former cohabitant (the 'respondent')⁹.

Such an order may not be made after the death of either of the parties and ceases to have effect on the death of either of them¹⁰; and it must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one occasion for a further specified period not exceeding six months¹¹.

1 As to the meanings of 'cohabitants' and 'cohabit' see PARA 292 note 5.

2 As to the meaning of 'former cohabitants' see PARA 292 note 5.

3 As to the meaning of 'dwelling house' see PARA 285 note 2.

4 Family Law Act 1996 s 36(1)(a). A person who has an equitable interest in the dwelling house or in the proceeds of sale of the dwelling house but in whom there is not vested, whether solely or as joint tenant, a legal estate in fee simple or a legal term of years absolute in the dwelling house is to be treated (but only for the purpose of determining whether that person is eligible to apply under s 36) as not being entitled to occupy the dwelling house by virtue of that interest (s 36(11)), although this does not prejudice any right of such a person to apply for an order under s 33 (see PARA 292) (s 36(12)).

5 Family Law Act 1996 s 36(1)(b).

6 Family Law Act 1996 s 36(1)(c) (amended by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 34).

7 As to the meaning of 'court' see PARA 958.

8 As to the meaning of 'occupation order' see PARA 289. As to the provisions that may be included in an order see PARAS 302, 303; as to the matters to which the court must have regard see PARA 304.

9 Family Law Act 1996 s 36(2). As to appeals against the making of any such order by a magistrates' court or any refusal to make such an order see PARA 308. As to variation and discharge see PARA 309. As to enforcement and arrest see PARA 988 et seq. Although an order under s 36 is not intended to determine property rights, it is not improper for an applicant to seek such an order for the purpose of obtaining an order for the transfer of a tenancy, provided that the conditions of s 36 are satisfied: *Gay v Sheeran* [1999] 3 All ER 795 at 807, 808, [2000] 1 WLR 673 at 686, CA per Peter Gibson LJ.

10 Family Law Act 1996 s 36(9). So long as an order under s 36 remains in force, the provisions of s 30(3)-(6) (see PARA 285) apply in relation to the applicant as if he were the person entitled to occupy the dwelling house by virtue of s 30 and as if the respondent were the person entitled as mentioned in s 30(1)(a) (see PARA 285); s 36(13) (amended by the Civil Partnership Act 2004 Sch 9 para 7).

11 Family Law Act 1996 s 36(10).

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302. Provisions that must or may be included in an order.

If the applicant is in occupation, an occupation order¹ must contain provision giving the applicant the right not to be evicted or excluded from the dwelling house² or any part of it by the respondent³ for the period specified in the order and prohibiting the respondent from evicting or excluding the applicant during that period⁴. If the applicant is not in occupation, an order must contain provision giving the applicant the right to enter into and occupy the dwelling house for the period specified in the order and requiring the respondent to permit the exercise of that right⁵.

An order may also:

- 397 (1) regulate the occupation of the dwelling house by either or both of the parties⁶;
- 398 (2) prohibit, suspend or restrict the exercise by the respondent of the right to occupy the dwelling house⁷;
- 399 (3) require the respondent to leave the dwelling house or part of the dwelling house⁸; or
- 400 (4) exclude the respondent from a defined area in which the dwelling house is included⁹.

¹ Is an order under the Family Law Act 1996 s 36: see PARA 301. As to the meaning of 'occupation order' see PARA 289. As to the matters to which the court must have regard see PARA 304.

² As to the meaning of 'dwelling house' see PARA 285 note 2.

³ As to the meaning of 'respondent' see PARA 301.

⁴ Family Law Act 1996 s 36(3). As to the additional provisions that may be included in such an order see PARA 303.

⁵ Family Law Act 1996 s 36(4).

⁶ Family Law Act 1996 s 36(5)(a).

⁷ Family Law Act 1996 s 36(5)(b).

⁸ Family Law Act 1996 s 36(5)(c).

⁹ Family Law Act 1996 s 36(5)(d).

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303. Additional obligations etc which may be imposed.

On, or at any time after, making an occupation order¹ where the applicant is a cohabitant or former cohabitant with no existing right to occupy², the court³ may:

- 401 (1) impose on either party obligations as to the repair and maintenance of the dwelling house⁴ or the discharge of rent, mortgage payments⁵ or other outgoings affecting the dwelling house⁶;
- 402 (2) order a party occupying the dwelling house or any part of it, including a party who is entitled to do so by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving that party the right to remain in occupation, to make periodical payments to the other party in respect of the accommodation, if the other party would, but for the order, be entitled to occupy the dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any such enactment⁷;
- 403 (3) grant either party possession or use of furniture or other contents of the dwelling house⁸;
- 404 (4) order either party to take reasonable care of any furniture or other contents of the dwelling house⁹;
- 405 (5) order either party to take reasonable steps to keep the dwelling house and any furniture or other contents secure¹⁰.

Such an order ceases to have effect when the occupation order to which it relates ceases to have effect¹¹.

1 As to the meaning of 'occupation order' see PARA 289. As to the provisions that may be included in an order see PARA 302; as to the matters to which the court must have regard see PARA 304.

2 Ie an occupation order under the Family Law Act 1996 s 36: see PARAS 301-302.

3 As to the meaning of 'court' see PARA 958.

4 As to the meaning of 'dwelling house' see PARA 285 note 2.

5 As to the meaning of 'mortgage payments' see PARA 285 note 9.

6 Family Law Act 1996 s 40(1)(a). Section 40 confers no power on a court to commit a defaulter to prison for non-payment: *Nwogbe v Nwogbe* [2000] 3 FCR 345, [2000] 2 FLR 744, CA.

7 Family Law Act 1996 s 40(1)(b).

8 Family Law Act 1996 s 40(1)(c).

9 Family Law Act 1996 s 40(1)(d).

10 Family Law Act 1996 s 40(1)(e).

11 Family Law Act 1996 s 40(3).

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304. Matters to which the court is to have regard.

In deciding whether to make an occupation order¹ and, if so, in what manner, the court² must have regard to all the circumstances including:

- 406 (1) the housing needs and housing resources of each of the parties and of any relevant child³;
- 407 (2) the financial resources of each of the parties⁴;
- 408 (3) the likely effect of any order, or of any decision by the court not to exercise its powers⁵, on the health⁶, safety or well-being of the parties and of any relevant child⁷;
- 409 (4) the conduct of the parties in relation to each other and otherwise⁸;
- 410 (5) the nature of the parties' relationship and in particular the level of commitment involved in it⁹;
- 411 (6) the length of time during which they have cohabited¹⁰;
- 412 (7) whether there are or have been any children who are children of both parties or for whom both parties have or have had parental responsibility¹¹;
- 413 (8) the length of time that has elapsed since the parties ceased to live together¹²; and
- 414 (9) the existence of any pending proceedings between the parties for an order for financial relief against parents¹³ or relating to the legal or beneficial ownership of the dwelling house¹⁴.

In deciding whether to exercise its power to regulate the occupation of the dwelling house, to prohibit, suspend or restrict the exercise of a right to occupy, to require the vacation of the dwelling house or a part thereof¹⁵ and, if so, in what manner, the court must have regard to all the circumstances including the matters mentioned in heads (1) to (4) above¹⁶ and to the questions of whether the applicant or any relevant child is likely to suffer significant harm¹⁷ attributable to conduct of the respondent¹⁸ if the relevant provision is not included in the order and whether the harm likely to be suffered by the respondent or child if the provision is included is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included¹⁹.

In deciding whether and, if so, how to exercise its additional powers²⁰, the court must have regard to all the circumstances of the case including:

- 415 (a) the financial needs and financial resources of the parties²¹; and
- 416 (b) the financial obligations which they have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child²².

1 le an order under the Family Law Act 1996 s 36 (see PARA 301) containing provision of the kind referred to in s 36(3) or (4) (see PARA 302). As to the meaning of 'occupation order' see PARA 289; as to the making of an order see PARA 301.

2 As to the meaning of 'court' see PARA 958.

3 Family Law Act 1996 s 36(6)(a). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4. As to the circumstances set out in s 36(6) see *S v F (occupation order)* [2000] 3 FCR 365, [2000] 1 FLR 255.

4 Family Law Act 1996 s 36(6)(b).

5 le under the Family Law Act 1996 s 36(3) or (4) (see PARA 302).

6 As to the meaning of 'health' see PARA 290 note 4.

7 Family Law Act 1996 s 36(6)(c).

8 Family Law Act 1996 s 36(6)(d).

9 Family Law Act 1996 s 36(6)(e) (s 36(6)(e), (f) amended by the Domestic Violence, Crime and Victims Act 2004 s 2(2), Sch 10 para 34).

10 Family Law Act 1996 s 36(6)(f) (as amended: see note 9). As to the meaning of 'cohabited' see PARA 292 note 5.

11 Family Law Act 1996 s 36(6)(g).

12 Family Law Act 1996 s 36(6)(h).

13 le an order under the Children Act 1989 Sch 1 para 1(2)(d) or (e) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 539).

14 Family Law Act 1996 s 36(6)(i).

15 le in deciding whether to exercise the court's power to include one or more of the provisions referred to in the Family Law Act 1996 s 36(5) (see PARA 302).

16 Family Law Act 1996 s 36(7).

17 As to the meanings of 'harm' and 'significant harm' see PARA 290 note 4.

18 Cf PARA 295 note 9.

19 Family Law Act 1996 s 36(8).

20 As to these see PARA 303.

21 Family Law Act 1996 s 40(2)(a).

22 Family Law Act 1996 s 40(2)(b).

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D. NEITHER SPOUSE, CIVIL PARTNER, COHABITANT OR FORMER COHABITANT ENTITLED TO OCCUPY

305. Right to apply for an occupation order.

If:

- 417 (1) one spouse, former spouse, civil partner, former civil partner, cohabitant¹ or former cohabitant and the other spouse, former spouse, civil partner, former civil partner, cohabitant or former cohabitant occupy a dwelling house² which is or was the family home³ or, in the case of cohabitants and former cohabitants, is the home in which they cohabit⁴; but
- 418 (2) neither of them is entitled to remain in occupation by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving them the right to remain in occupation⁵,

either of the parties may apply to the court⁶ for an occupation order⁷ against the other⁸.

Such an order must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one or more occasions for a further specified period not exceeding six months⁹.

1 As to the meanings of 'cohabitant' and 'cohabit' see PARA 292 note 5.

2 As to the meaning of 'dwelling house' see PARA 285 note 2.

3 As to the test for whether a property is a family home see PARA 285 note 2.

4 Family Law Act 1996 ss 37(1)(a), (1A)(a), 38(1)(a) (s 37(1A) added by the Civil Partnership Act 2004 Sch 9 para 8; Family Law Act 1996 s 38(1)(a) amended by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 35).

5 Family Law Act 1996 ss 37(1)(b), (1A)(b), 38(1)(b).

6 As to the meaning of 'court' see PARA 958.

7 As to the meaning of 'occupation order' see PARA 289. As to the provisions that may be included in an order see PARA 306; as to the matters to which the court must have regard see PARA 307.

8 Family Law Act 1996 ss 37(2), 38(2). As to appeals against the making of any such order by a magistrates' court or any refusal to make such an order see PARA 308. As to variation and discharge see PARA 309. As to enforcement and arrest see PARA 988 et seq.

9 Family Law Act 1996 ss 37(5), 38(6).

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306. Provisions that may be included in an order.

An occupation order¹ may:

- 419 (1) require the respondent to permit the applicant to enter and remain in the dwelling house² or part of the dwelling house³;
- 420 (2) regulate the occupation of the dwelling house by either or both of the parties⁴;
- 421 (3) require the respondent to leave the dwelling house or part of the dwelling house⁵; or
- 422 (4) exclude the respondent from a defined area in which the dwelling house is included⁶.

1 le an order under the Family Law Act 1996 s 37 or s 38: see PARA 305. As to the meaning of 'occupation order' see PARA 289. As to the matters to which the court must have regard see PARA 307.

2 As to the meaning of 'dwelling house' see PARA 285 note 2.

3 Family Law Act 1996 ss 37(3)(a), 38(3)(a).

4 Family Law Act 1996 ss 37(3)(b), 38(3)(b) (s 37(3)(b) amended by the Civil Partnership Act 2004 Sch 9 para 8).

5 Family Law Act 1996 ss 37(3)(c), 38(3)(c).

6 Family Law Act 1996 ss 37(3)(d), 38(3)(d).

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307. Matters to which the court must have regard.

In deciding whether to exercise its powers with regard to the making of an occupation order where neither spouse, civil partner or cohabitant, or former spouse, civil partner or cohabitant, is entitled to occupy the dwelling house¹ and, if so, in what manner, the court² must have regard to all the circumstances including:

- 423 (1) the housing needs and housing resources of each of the parties and of any relevant child³;
- 424 (2) the financial resources of each of the parties⁴;
- 425 (3) the likely effect of any order, or of any decision by the court not to exercise such powers, on the health⁵, safety or well-being of the parties and of any relevant child⁶;
- 426 (4) the conduct of the parties in relation to each other and otherwise⁷; and
- 427 (5) in the case of cohabitants or former cohabitants, the questions of whether the applicant or any relevant child is likely to suffer significant harm⁸ attributable to conduct of the respondent if the relevant provision is not included in the order and whether the harm likely to be suffered by the respondent or child if the provision is included is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included⁹.

In deciding whether to exercise its powers with regard to the making of an occupation order relating to spouses or civil partners or former spouses or civil partners¹⁰, if it appears to the court that the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent¹¹ if such an order containing one or more of the applicable provisions¹² is not made, the court must make the order unless it appears to it that:

- 428 (a) the respondent or any relevant child is likely to suffer significant harm if the order is made¹³; and
- 429 (b) the harm likely to be suffered by the respondent or child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made¹⁴.

1. The powers conferred by the Family Law Act 1996 ss 37(3), 38(3) (see PARA 306). As to the meaning of 'occupation order' see PARA 289; as to the making of an order see PARA 305.

2. As to the meaning of 'court' see PARA 958.

3. Family Law Act 1996 ss 33(6)(a), 37(4), 38(4)(a). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

4. Family Law Act 1996 ss 33(6)(b), 38(4)(b).

5. As to the meaning of 'health' see PARA 290 note 4.

6. Family Law Act 1996 ss 33(6)(c), 38(4)(c).

7 Family Law Act 1996 ss 33(6)(d), 38(4)(d).

8 As to the meanings of 'harm' and 'significant harm' see PARA 290 note 4.

9 Family Law Act 1996 s 38(4)(e), (5).

10 See note 1.

11 The correct approach to the test laid down in the Family Law Act 1996 s 33(7) (see the text and notes 13-14) is to assess the effect of the conduct on the applicant or any relevant child rather than to concentrate on the intention of the respondent: *G v G (occupation order)* [2000] 3 FCR 53, [2000] 2 FLR 36, CA.

12 Ie the provisions included in the Family Law Act 1996 s 37(3) (see PARA 306).

13 Family Law Act 1996 s 33(7)(a).

14 Family Law Act 1996 s 33(7)(b).

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(iii) Appeals

308. Appeals.

An appeal lies to the High Court against the making by a magistrates' court of an occupation order¹ or any refusal by a magistrates' court to make such an order, but no appeal lies against any exercise by a magistrates' court of the power to decline jurisdiction² if it considers that the case can more conveniently be dealt with by another court³. On such an appeal the High Court may make such orders as may be necessary to give effect to its determination of the appeal⁴; and, where an order is so made, the High Court may also make such incidental or consequential orders as appear to it to be just⁵. Any order of the High Court made on such an appeal, other than one directing that an application be reheard by a magistrates' court, is to be treated, for the purposes of the enforcement of the order and of any power to vary, revive or discharge orders⁶, as if it were an order of the magistrates' court from which the appeal was brought and not an order of the High Court⁷.

¹ As to the meaning of 'occupation order' see PARA 289. As to the jurisdiction of courts for these purposes see PARA 958.

² See under the Family Law Act 1996 s 59(2): see PARA 960.

³ Family Law Act 1996 s 61(1). See further PARA 986.

⁴ Family Law Act 1996 s 61(2).

⁵ Family Law Act 1996 s 61(3).

⁶ As to variation and discharge see PARA 309.

⁷ Family Law Act 1996 s 61(4).

UPDATE

308 Appeals

TEXT AND NOTES--References to the High Court are now to a county court: Family Law Act 1996 s 61 (amended by SI 2009/871).

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(iv) Variation and Discharge

309. Power to vary or discharge.

An occupation order¹ may be varied or discharged by the court² on an application by the respondent or the person on whose application the order was made³. If a person's home rights⁴ are⁵ a charge on the estate or interest of another person or of trustees for the other person, an occupation order in favour of a person who has an estate or interest or home rights⁶ against the other person may also be varied or discharged by the court on an application by any person deriving title under the other person or under the trustees and affected by the charge⁷.

Proceedings to extend, vary or discharge an occupation order, or proceedings the determination of which may have the effect of varying or discharging such an order, must be made to the court which made the order⁸; but a court may⁹ transfer proceedings so made to any other court¹⁰.

1 As to the meaning of 'occupation order' see PARA 289.

2 As to the meaning of 'court' see PARA 958.

3 Family Law Act 1996 s 49(1). An application to vary, extend or discharge an order must be made in accordance with the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL403 (added by SI 1997/1893); and the Family Proceedings Rules 1991, SI 1991/1247, r 3.9 (see PARA 975) applies to the hearing of such an application: r 3.9(8) (substituted by SI 1997/1893).

Where an order is made varying or discharging the relevant provisions of an occupation order the proper officer or the designated officer for the court must immediately inform the officer who received a copy of the form under the Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(1A) (see PARA 975) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(1A) (see PARA 978) and, if the applicant's address has changed, the officer for the time being in charge of the police station for the new address, and deliver a copy of the order to any officer so informed: Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(2) (added by SI 1997/1893; amended by SI 2007/1622); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(2) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(2) amended by SI 2005/617; SI 2007/1628). As to the meaning of 'proper officer' see PARA 461 note 5.

4 As to the meaning of 'home rights' see PARA 285.

5 Ie under the Family Law Act 1996 s 31 (see PARA 286; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638).

6 Ie under the Family Law Act 1996 s 33 (see PARA 292 et seq).

7 Family Law Act 1996 s 49(3) (amended by the Civil Partnership Act 2004 Sch 9 para 11).

8 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 5(1).

9 Ie in accordance with the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, arts 6-14: see PARA 964 et seq.

10 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 5(2).

UPDATE

309 Power to vary or discharge

TEXT AND NOTES 8-10--SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 964A.

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(4) TRANSFER OF TENANCY ORDERS

310. Cases in which the court may make an order.

If one spouse or civil partner is entitled, either in his or her own right or jointly with the other spouse or civil partner, to occupy a dwelling house¹ by virtue of a relevant tenancy², the court³ may make a transfer of tenancy order⁴ either:

- 430 (1) on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute)⁵; or
- 431 (2) at any time when it has power to make a property adjustment order⁶ with respect to the civil partnership⁷;

however, if either spouse or civil partner remarries or forms a subsequent civil partnership⁸ he or she will not be entitled to apply⁹ for a transfer of tenancy order¹⁰.

The court may also make a transfer of tenancy order if one cohabitant¹¹ is entitled, either in his own right or jointly with the other cohabitant, to occupy a dwelling house by virtue of a relevant tenancy and the cohabitants cease to cohabit¹²; the court must not, however, make the order unless the dwelling house is or was the family home¹³ or, in the case of cohabitants, a home in which they cohabited¹⁴.

If:

- 432 (a) a spouse or civil partner is entitled to occupy a dwelling house by virtue of a tenancy, the power to make a transfer of tenancy order does not affect the operation of the statutory provisions relating to the right to occupy the family home¹⁵ in relation to the other spouse or civil partner's home rights¹⁶;
- 433 (b) a spouse, civil partner or cohabitant is entitled to occupy a dwelling house by virtue of a tenancy, the court's powers to make a transfer of tenancy order are additional to the power¹⁷ to make an occupation order¹⁸.

The court may also make a transfer of tenancy order pursuant to an overseas divorce, dissolution, annulment or legal separation¹⁹, on an application by one of the parties to the marriage or civil partnership, if one of the parties is entitled, either in his or her own right or jointly with the other party, to occupy a dwelling house²⁰ situated in England or Wales by virtue of a tenancy which is a relevant tenancy²¹ for these purposes²².

1 As to the meaning of 'dwelling house' see PARA 285 note 2.

2 Family Law Act 1996 Sch 7 para 2(1) (Sch 7 paras 2(1), 15 amended, Sch 7 paras 2(2), 13 substituted, Sch 7 para 4(aa) added, by the Civil Partnership Act 2004 Sch 9 para 16). For these purposes, by virtue of the Family Law Act 1996 Sch 7 para 1 (amended by SI 1997/74), 'relevant tenancy' means:

49 (1) a protected tenancy or statutory tenancy within the meaning of the Rent Act 1977 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 818 et seq);

- 50 (2) a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1134 et seq);
 - 51 (3) a secure tenancy within the meaning of the Housing Act 1985 s 79 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1300);
 - 52 (4) an assured tenancy or assured agricultural occupancy within the meaning of the Housing Act 1988 Pt I (ss 1-45) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 1018, 1183 et seq); or
 - 53 (5) an introductory tenancy within the meaning of the Housing Act 1996 Pt V Chapter I (ss 124-143) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1286 et seq).
- 'Tenancy' includes a subtenancy: Family Law Act 1996 Sch 7 para 1.
- 3 As to the meaning of 'court' see PARA 958. For these purposes, 'court' does not include a magistrates' court: Family Law Act 1996 Sch 7 para 1.
 - 4 Ie an order under the Family Law Act 1996 Sch 7 Pt II (paras 6-9) (see PARA 312 et seq).
 - 5 Family Law Act 1996 Sch 7 para 2(2)(a) (as substituted: see note 2). Rules of court may provide that an application for a transfer of tenancy order by reference to an order or decree may not, without the leave of the court by which that order was made or decree was granted, be made after the expiration of such period from the order or grant as may be prescribed by the rules: Sch 7 para 14(2).
 - 6 Ie under the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9) (see PARA 499 et seq).
 - 7 Family Law Act 1996 Sch 7 para 2(2)(b) (as substituted: see note 2). See note 5.
 - 8 Ie after the grant of a decree dissolving or annulling a marriage or after the making of a nullity order: Family Law Act 1996 Sch 7 para 13(1), (2) (as substituted: see note 2). References to remarrying, marrying and forming a civil partnership include references to cases where the marriage or civil partnership is by law void or voidable: Sch 7 para 13(3) (as so substituted). As to void and voidable marriages and civil partnerships see PARA 326 et seq.
 - 9 Ie by reference to the grant of the relevant decree or the making of the relevant order: Family Law Act 1996 Sch 7 para 13(1), (2) (as substituted: see note 2).
 - 10 Family Law Act 1996 Sch 7 para 13(1), (2) (as substituted: see note 2).
 - 11 As to the meanings of 'cohabitant' and 'cohabit' see PARA 292 note 5.
 - 12 Family Law Act 1996 Sch 7 para 3 (Sch 7 paras 3, 4(b) amended by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 42); and see *Gay v Sheeran* [1999] 3 All ER 795, [2000] 1 WLR 673, CA.
 - 13 Family Law Act 1996 Sch 7 para 4(a), (aa) (Sch 7 para 4(aa) as added: see note 2).
 - 14 Family Law Act 1996 Sch 7 para 4(b) (as amended: see note 12).
 - 15 Ie the Family Law Act 1996 s 30 (see PARA 285) and s 31 (see PARA 286; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638).
 - 16 Family Law Act 1996 Sch 7 para 15(1) (as amended: see note 2).
 - 17 Ie under the Family Law Act 1996 ss 33, 35, 36 (see PARAS 292-304).
 - 18 Family Law Act 1996 Sch 7 para 15(2) (as amended: see note 2).
 - 19 As to financial relief following an overseas divorce, dissolution, annulment or legal separation see PARA 530 et seq.
 - 20 As to a 'dwelling house' for these purposes see PARA 285 note 2.
 - 21 See note 2.
 - 22 Matrimonial and Family Proceedings Act 1984 s 22(1), (2) (s 22 substituted by the Family Law Act 1996 Sch 8 para 52); Civil Partnership Act 2004 Sch 7 para 13. The provisions of the Family Law Act 1996 Sch 7 para 10 (see PARA 314), Sch 7 para 11 (see PARA 315) and Sch 7 para 14(1) (see PARA 311) apply in relation to any

order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act 2004 Sch 7 para 13 as they apply to an order under the Family Law Act 1996 Sch 7 Pt II (paras 6-9): Matrimonial and Family Proceedings Act 1984 s 22(3) (as so substituted); Civil Partnership Act 2004 Sch 7 para 13.

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311. Matters to which the court must have regard.

In determining whether to exercise its powers to make a transfer of tenancy order¹ and, if so, in what manner, the court² must have regard to all the circumstances of the case including (but not limited to³):

- 434 (1) the circumstances in which the tenancy⁴ was granted to either or both of the spouses⁵, civil partners⁶ or cohabitants⁷ or, as the case requires, the circumstances in which either or both of them became tenant under the tenancy⁸;
- 435 (2) the housing needs and housing resources of each of the parties and of any relevant child⁹;
- 436 (3) the financial resources of each of the parties¹⁰;
- 437 (4) the likely effect of any order, or of any decision by the court not to exercise its powers, on the health¹¹, safety or well-being of the parties and of any relevant child¹²; and
- 438 (5) the suitability of the parties as tenants¹³.

Where the parties are cohabitants and only one of them is entitled to occupy the dwelling house¹⁴ by virtue of the relevant tenancy¹⁵, the court must also have regard to:

- 439 (a) the nature of the parties' relationship and in particular the level of commitment involved in it¹⁶;
- 440 (b) the length of time during which they have cohabited¹⁷;
- 441 (c) whether there are or have been any children who are children of both parties or for whom both parties have or have had parental responsibility¹⁸;
- 442 (d) the length of time that has elapsed since the parties ceased to live together¹⁹.

Provision is also made for giving the landlord of the dwelling house to which a transfer of tenancy order will relate an opportunity of being heard²⁰.

1 le under the Family Law Act 1996 Sch 7 Pt II (paras 6-9): see PARA 312 et seq.

2 As to the 'court' see PARA 310 note 3.

3 The matters to which the court may have regard are not limited to those specified by the Family Law Act 1996 Sch 7 para 5 (see the text and notes 4-19), since the court should look at the case in the round and have regard to all relevant circumstances: see *Lake v Lake* [2006] EWCA Civ 1250, [2007] 1 FLR 427, [2006] All ER (D) 297 (Jul).

4 As to the meaning of 'tenancy' see PARA 310 note 2.

5 For these purposes 'spouse' includes, where the context requires, a former spouse: Family Law Act 1996 Sch 7 para 1.

6 For these purposes 'civil partner' includes, where the context requires, a former civil partner: Family Law Act 1996 Sch 7 para 1 (definition 'civil partner' added, Sch 7 para 5(a) amended, by the Civil Partnership Act 2004 Sch 9 para 16).

7 As to the meanings of 'cohabitant' and 'cohabit' see PARA 292 note 5. For these purposes, 'cohabitant' includes, where the context requires, former cohabitant: Family Law Act 1996 Sch 7 para 1.

8 Family Law Act 1996 Sch 7 para 5(a) (as amended: see note 6).

9 Family Law Act 1996 s 33(6)(a), Sch 7 para 5(b). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

10 Family Law Act 1996 s 33(6)(b).

11 As to the meaning of 'health' see PARA 290 note 4.

12 Family Law Act 1996 s 33(6)(c).

13 Family Law Act 1996 Sch 7 para 5(c).

14 As to the meaning of 'dwelling house' see PARA 285 note 2.

15 As to the meaning of 'relevant tenancy' see PARA 310 note 2.

16 Family Law Act 1996 s 36(6)(e), Sch 7 para 5(b) (s 36(6)(e), (f) amended by the Domestic Violence, Crime and Victims Act 2004 s 2(2), Sch 10 para 34).

17 Family Law Act 1996 s 36(6)(f) (as amended: see note 16).

18 Family Law Act 1996 s 36(6)(g).

19 Family Law Act 1996 s 36(6)(h).

20 See the Family Law Act 1996 Sch 7 para 14(1); the Family Proceedings Act 1991, SI 1991/1247, r 3.8(12), (13); and PARA 974. For these purposes 'landlord' includes: (1) any person from time to time deriving title under the original landlord; and (2) in relation to any dwelling house, any person other than the tenant who is, or (but for the Rent Act 1977 Pt VII (ss 98-107) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 942 et seq, 1002 et seq) or the Rent (Agriculture) Act 1976 Pt II (ss 6-19) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1156 et seq)) would be, entitled to possession of the dwelling house: Family Law Act 1996 Sch 7 para 1.

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312. Protected, secure or assured tenancies or assured agricultural tenancies.

If a spouse¹, civil partner² or cohabitant³ is entitled to occupy the dwelling house⁴ by virtue of a protected tenancy⁵, a secure tenancy⁶, an assured tenancy or assured agricultural occupancy⁷ or an introductory tenancy⁸, the court⁹ may by order direct that, as from such date as may be specified in the order, there is, by virtue of the order and without further assurance, to be transferred to, and vested in, the other spouse, civil partner or cohabitant:

- 443 (1) the estate or interest which the spouse, civil partner or cohabitant so entitled had in the dwelling house immediately before that date by virtue of the lease or agreement creating the tenancy¹⁰ and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject¹¹; and
- 444 (2) where the spouse, civil partner or cohabitant so entitled is an assignee of such lease or agreement, the liability of that spouse, civil partner or cohabitant under any covenant of indemnity by the assignee express or implied in the assignment of the lease or agreement to that spouse, civil partner or cohabitant¹².

If an order is so made, any liability or obligation to which the spouse, civil partner or cohabitant so entitled is subject under any covenant having reference to the dwelling house in the lease or agreement, being a liability or obligation falling due to be discharged or performed on or after the date so specified, is not enforceable against that spouse, civil partner or cohabitant¹³.

If the spouse, civil partner or cohabitant so entitled is a successor¹⁴, his former spouse or civil partner or former cohabitant (or, in the case of judicial separation or a separation order, his spouse or civil partner) is deemed also to be¹⁵ a successor¹⁶.

1 As to the meaning of 'spouse' see PARA 311 note 5.

2 As to the meaning of 'civil partner' see PARA 311 note 6.

3 As to the meaning of 'cohabitant' see PARA 311 note 7.

4 As to the meaning of 'dwelling house' see PARA 285 note 2. For these purposes, references to a spouse, civil partner or a cohabitant being entitled to occupy a dwelling house by virtue of a relevant tenancy apply whether that entitlement is in that person's own right or jointly with the other spouse or cohabitant: Family Law Act 1996 Sch 7 para 6 (Sch 7 para 7(1) amended, Sch 7 para 7(3), (3A) added, by SI 1997/74; Family Law Act 1996 Sch 7 paras 6, 7(1)-(3), (5) amended, Sch 7 para 7(3), (3A), (4) substituted, by the Civil Partnership Act 2004 Sch 9 para 16). As to the meaning of 'relevant tenancy' see PARA 310 note 2.

The court cannot make a transfer order under these provisions unless all the requirements of a relevant tenancy are satisfied at the relevant time. Thus, where an applicant relies on the cohabitant's entitlement to occupy a dwelling house by virtue of a secure tenancy, it is not sufficient that the cohabitant's tenancy would be a secure tenancy if he or she were to exercise his or her entitlement to occupy. Such a conclusion would give effect to the ordinary and natural meaning of Sch 7 para 3(1) (see PARA 310) whose language is of present entitlement. Moreover, the time when cohabitation ceases is not the relevant time for the purposes of Sch 7 paras 3(1), 7(1), and Sch 7 para 3(2) (see PARA 310) merely states a precondition for making the order. In any event the court cannot make an order under these provisions if the estate or interest to be transferred is that of a cohabitant who is a joint tenant with a person other than the intended transferee. Such a conclusion flows from the words 'in his own right or jointly with the other cohabitant' in Sch 7 para 3(1) which are words of

limitation and must be construed as meaning a sole entitlement or a joint entitlement with the other cohabitant: *Gay v Sheeran* [1999] 3 All ER 795, [2000] 1 WLR 673, CA.

5 le within the meaning of the Rent Act 1977: see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 818 et seq.

6 le within the meaning of the Housing Act 1985: see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1300.

7 le within the meaning of the Housing Act 1988 Pt I (ss 1-45): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 1018, 1183 et seq. If the transfer under these provisions is of an assured agricultural occupancy, then, for the purposes of the Housing Act 1988 Pt I Ch III (ss 24, 25) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1183 et seq): (1) the agricultural worker condition is fulfilled with respect to the dwelling house while the spouse, civil partner or cohabitant to whom the assured agricultural occupancy is transferred continues to be the occupier under that occupancy; and (2) that condition is to be treated as so fulfilled by virtue of the same provision of Sch 3 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1184) as was applicable before the transfer: Family Law Act 1996 Sch 7 para 7(5) (as amended: see note 4).

8 le within the meaning of the Housing Act 1988 Pt V Chapter I (ss 124-143): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1286 et seq.

9 As to the 'court' see PARA 310 note 3.

10 As to the meaning of 'tenancy' see PARA 310 note 2.

11 Family Law Act 1996 Sch 7 para 7(1)(a) (as amended: see note 4; also amended by SI 1997/74).

12 Family Law Act 1996 Sch 7 para 7(1)(b) (as amended: see note 4).

13 Family Law Act 1996 Sch 7 para 7(2) (as amended: see note 4).

14 le within the meaning of the Housing Act 1985 Pt IV (ss 79-117) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1300 et seq), the Housing Act 1996 s 132 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1290) or for the purposes of the Housing Act 1988 s 17 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1084): Family Law Act 1996 Sch 7 para 7(3), (3A), (4) (as amended, added and substituted: see note 4).

15 le within the meaning of the provisions listed in note 14, as applicable.

16 Family Law Act 1996 Sch 7 para 7(3), (3A), (4) (as amended, added and substituted: see note 4).

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313. Statutory tenancies.

If the spouse¹, civil partner² or cohabitant³ is entitled to occupy the dwelling house⁴ by virtue of a statutory tenancy⁵, the court⁶ may by order direct that, as from the date specified in the order:

- 445 (1) that spouse, civil partner or cohabitant is to cease to be entitled to occupy the dwelling house⁷; and
- 446 (2) the other spouse, civil partner or cohabitant is to be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy⁸.

1 As to the meaning of 'spouse' see PARA 311 note 5.

2 As to the meaning of 'civil partner' see PARA 311 note 6.

3 As to the meaning of 'cohabitant' see PARA 311 note 7.

4 As to the meaning of 'dwelling house' see PARA 285 note 2.

5 In the meaning of the Rent Act 1977 or the Rent (Agriculture) Act 1976 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 818 et seq, 1134 et seq).

6 As to the 'court' see PARA 310 note 3.

7 Family Law Act 1996 Sch 7 paras 8(1), (2)(a), 9(1), (2)(a) (Sch 7 paras 8, 9 amended by the Civil Partnership Act 2004 Sch 9 para 16).

8 Family Law Act 1996 Sch 7 paras 8(2)(b), 9(2)(b) (as amended: see note 7). The question whether the statutory provisions of the Rent Act 1977 as to the succession by the surviving spouse or civil partner of a deceased tenant, or by a member of the deceased tenant's family, to the right to retain possession (ie Sch 1 paras 1-3 or, as the case may be, Sch 1 paras 5-7 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 843-844)) are capable of having effect in the event of the death of the person deemed by an order under these provisions to be the tenant or sole tenant under the statutory tenancy is to be determined according as those provisions have or have not already had effect in relation to the statutory tenancy: Family Law Act 1996 Sch 7 para 8(3) (as amended: see note 7). A spouse, civil partner or cohabitant who pursuant to these provisions is deemed to be the tenant under a statutory tenancy under the Rent (Agriculture) Act 1976 is a statutory tenant in his or her own right, or a statutory tenant by succession, according as the other spouse, civil partner or cohabitant was a statutory tenant in his or her own right or a statutory tenant by succession: Sch 7 para 9(3) (as so amended).

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314. Compensation.

If the court¹ makes a transfer of tenancy order² it may by the order direct the making of a payment by the spouse³, civil partner⁴ or cohabitant⁵ to whom the tenancy⁶ is transferred (the 'transferee') to the other spouse, civil partner or cohabitant (the 'transferor')⁷. On making an order for the payment of such a sum, the court may⁸:

- 447 (1) direct that payment of that sum or any part of it is to be deferred until a specified date or until the occurrence of a specified event⁹; or
- 448 (2) direct that that sum or any part of it is to be paid by instalments¹⁰,

but the court must not give any such direction unless it appears to it that immediate payment of the sum required by the order would cause the transferee financial hardship which is greater than any financial hardship that would be caused to the transferor if the direction were given¹¹.

Where an order has been so made¹², the court may, on the application of the transferee or the transferor exercise its powers under heads (1) and (2) above, or vary any direction previously given under heads (1) and (2) above, at any time before the sum whose payment is required by the order is paid in full¹³.

In deciding whether to exercise its powers under these provisions and, if so, in what manner, the court must have regard to all the circumstances including:

- 449 (a) the financial loss that would otherwise be suffered by the transferor as a result of the order¹⁴;
- 450 (b) the financial needs and financial resources of the parties¹⁵; and
- 451 (c) the financial obligations which the parties have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child¹⁶.

1 As to the 'court' see PARA 310 note 3.

2 As to the cases in which a court may make a transfer of tenancy order see PARA 310.

3 As to the meaning of 'spouse' see PARA 311 note 5.

4 As to the meaning of 'civil partner' see PARA 311 note 6.

5 As to the meaning of 'cohabitant' see PARA 311 note 7.

6 As to the meaning of 'tenancy' see PARA 310 note 2.

7 Family Law Act 1996 Sch 7 para 10(1) (amended by the Civil Partnership Act 2004 Sch 9 para 16).

8 Ie without prejudice to the Family Law Act 1996 Sch 7 para 10(1): see the text and notes 1-7.

9 Family Law Act 1996 Sch 7 para 10(2)(a).

10 Family Law Act 1996 Sch 7 para 10(2)(b).

11 Family Law Act 1996 Sch 7 para 10(5).

12 le by virtue of the Family Law Act 1996 Sch 7 para 10(1): see the text and notes 1-7.

13 Family Law Act 1996 Sch 7 para 10(3).

14 Family Law Act 1996 Sch 7 para 10(4)(a).

15 Family Law Act 1996 Sch 7 para 10(4)(b).

16 Family Law Act 1996 Sch 7 para 10(4)(c). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

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315. Liabilities and obligations in respect of the dwelling house.

If the court¹ makes a transfer of tenancy order², it may by the order direct that both of the spouses³, civil partners⁴ or cohabitants⁵ are to be jointly and severally liable to discharge or perform any or all of the liabilities and obligations in respect of the dwelling house⁶, whether arising under the tenancy⁷ or otherwise, which:

- 452 (1) have at the date of the order fallen due to be discharged or performed by one only of them⁸; or
- 453 (2) but for the direction, would before the date specified as the date on which the order is to take effect⁹ fall due to be discharged or performed by one only of them¹⁰.

If the court gives such a direction, it may further direct that either spouse, civil partner or cohabitant is to be liable to indemnify the other in whole or in part against any payment made or expenses incurred by the other in discharging or performing any such liability or obligation¹¹.

1 As to the 'court' see PARA 310 note 3.

2 As to the cases in which a court may make a transfer of tenancy order see PARA 310.

3 As to the meaning of 'spouse' see PARA 311 note 5.

4 As to the meaning of 'civil partner' see PARA 311 note 6.

5 As to the meaning of 'cohabitant' see PARA 311 note 7.

6 As to the meaning of 'dwelling house' see PARA 285 note 2.

7 As to the meaning of 'tenancy' see PARA 310 note 2.

8 Family Law Act 1996 Sch 7 para 11(1)(a) (Sch 7 para 11(1), (2) amended, Sch 7 para 12 substituted, by the Civil Partnership Act 2004 Sch 9 para 16).

9 In the case of a marriage in respect of which a decree of divorce or nullity has been granted, the date specified in a transfer of tenancy order as the date on which the order is to take effect must not be earlier than the date on which the decree is made absolute, and in the case of a civil partnership in respect of which a dissolution or nullity order has been made, the date specified in a transfer of tenancy order as the date on which the order is to take effect must not be earlier than the date on which the order is made final: Family Law Act 1996 Sch 7 para 12 (as substituted: see note 8).

10 Family Law Act 1996 Sch 7 para 11(1)(b) (as amended: see note 8).

11 Family Law Act 1996 Sch 7 para 11(2) (as amended: see note 8).

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(5) MESHER AND MARTIN ORDERS

316. Making and terms of orders.

Mesher¹ and Martin² orders are orders made originally in respect of matrimonial proceedings, but which are presumably also applicable in respect of civil partnership proceedings, which take effect as trusts under which the sale of a property is deferred until certain events occur or by way of charges over the property, where the realisation of the charge is postponed until the happening of those events. Under the terms of a Mesher order the sale is postponed, or realisation of the charge is deferred, until the death or remarriage of the party in occupation, the youngest child of the family attaining a certain age or ceasing full-time secondary or tertiary education, whichever is the later, or further order of the court³; and under the terms of a Martin order the sale is postponed, or realisation of the charge is deferred, until the death or remarriage of the party in occupation, such earlier date as he or she ceases to live at the property, or further order of the court⁴.

There are a number of possible variations to such orders, such as:

- 454 (1) the insertion of a provision whereby the property is sold, or the charge is realised, on the party in occupation cohabiting⁵;
- 455 (2) the insertion of a provision whereby the party in occupation is permitted to sell the former home and transfer the relevant trust or charge to a substitute property⁶;
- 456 (3) orders whereby the parties' respective interests in the property are varied from their existing equitable interests⁷;
- 457 (4) the insertion of provision for the sale of the property to occur when the children attain a later age than that stated above⁸;
- 458 (5) the insertion of provision for the adjournment of the determination of the parties' shares in the property at the end of the period of deferment⁹; and
- 459 (6) the insertion of provision for the party in occupation to pay an occupational rent to the other party¹⁰.

It was recognised that Mesher orders had distinct disadvantages¹¹ and that the effect of a Mesher order may be simply to avoid facing the facts as they exist¹². In particular, a Mesher order may render the party in occupation unable to rehouse himself or herself at the end of the period of deferment¹³. Further, it has been recognised that children do not simply cease to be dependent on attaining the age of majority or when ceasing education¹⁴. A party in occupation cannot apply for an extension of the period of deferment provided by a Mesher or Martin order¹⁵. The provision in a Mesher or Martin order that the sale or charge is deferred on various conditions including until 'further order' does not permit the court on a subsequent application to make an order extending the term or varying the provisions of the order, save to the extent that the subsequent order is consistent with the clear intention of the original order¹⁶.

1 le so called after the decision in *Mesher v Mesher and Hall* (1973) [1980] 1 All ER 126n, CA.

2 le so called after the decision in *Martin v Martin* [1978] Fam 12, [1977] 3 All ER 762, CA.

- 3 *Mesher v Mesher and Hall* (1973) [1980] 1 All ER 126n, CA. See eg *Alonso v Alonso* (1974) 4 Fam Law 164, 118 Sol Jo 660, CA; *Browne (formerly Pritchard) v Pritchard* [1975] 3 All ER 721, [1975] 1 WLR 1366, CA; *Drinkwater v Drinkwater* [1984] FLR 627, [1984] Fam Law 245, CA.
- 4 *Martin v Martin* [1978] Fam 12, [1977] 3 All ER 762, CA.
- 5 *Chadwick v Chadwick* [1985] FLR 606, [1985] Fam Law 96, CA.
- 6 *T v T (financial provision)* [1990] FCR 169, sub nom *Re T (divorce: interim maintenance: discovery)* [1990] 1 FLR 1.
- 7 *Chamberlain v Chamberlain* [1974] 1 All ER 33, [1973] 1 WLR 1557, CA (wife's interest increased to two-thirds).
- 8 *Harnett v Harnett* [1973] Fam 156, [1973] 2 All ER 593; affd [1974] 1 All ER 764, [1974] 1 WLR 219, CA.
- 9 *Sakkas v Sakkas* [1987] Fam Law 414.
- 10 *Harvey v Harvey* [1982] Fam 83, [1983] 1 All ER 693, CA.
- 11 See *Martin v Martin* [1978] Fam 12 at 21, [1977] 3 All ER 762 at 769, CA per Ormrod LJ.
- 12 *Harvey v Harvey* [1982] Fam 83, [1983] 1 All ER 693, CA.
- 13 *Clutton v Clutton* [1991] 1 All ER 340, [1991] 1 WLR 359, CA.
- 14 *Harvey v Harvey* [1982] Fam 83, [1983] 1 All ER 693, CA; *Harnett v Harnett* [1973] Fam 156, [1973] 2 All ER 593; affd [1974] 1 All ER 764, [1974] 1 WLR 219, CA.
- 15 *Omielan v Omielan* [1996] 3 FCR 329, [1996] 2 FLR 306; *Thompson v Thompson* [1986] Fam 38, [1985] 2 All ER 243, CA; *Knibb v Knibb* [1987] 2 FLR 396, [1987] Fam Law 346, CA.
- 16 *Thompson v Thompson* [1986] Fam 38, [1985] 2 All ER 243, CA.

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6. MATRIMONIAL AND CIVIL PARTNERSHIP CAUSES

(1) THE CAUSES

317. Matrimonial and civil partnership causes.

A 'matrimonial cause' is an action for divorce¹, nullity of marriage², or judicial separation³; and a 'civil partnership cause' is an action for the dissolution⁴ or annulment⁵ of a civil partnership or for the legal separation of civil partners⁶. Proceedings may be brought for:

- 460 (1) the annulment of a marriage or civil partnership which is void or voidable⁷;
- 461 (2) divorce, or the dissolution of a civil partnership, where a marriage or civil partnership has broken down irretrievably⁸;
- 462 (3) an order which provides for the separation of spouses or civil partners where any fact which may prove irretrievable breakdown exists⁹; and
- 463 (4) a decree or order of presumption of death pertaining to a spouse or civil partner¹⁰.

There are also a number of related and subsidiary causes which may be brought¹¹.

1 As to actions for divorce see PARAS 346-414.

2 As to actions for nullity see PARAS 319-345.

3 As to judicial separation see PARAS 346-414.

4 As to the dissolution of a civil partnership see PARAS 346-414.

5 As to the annulment of a civil partnership see PARAS 319-345.

6 Matrimonial and Family Proceedings Act 1984 s 32 (amended by the Civil Partnership Act 2004 Sch 27 para 91). As to the meaning of 'civil partner' see PARA 2 note 1. As to the legal separation of civil partners see PARAS 346-414.

7 See PARAS 319-345.

8 See PARAS 346-449.

9 See PARAS 346-449.

10 See PARAS 415-417.

11 See PARA 318.

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318. Related and subsidiary causes.

In addition to the matrimonial and civil partnership causes which may be brought¹, a petition may be brought by a party to a marriage or a civil partnership for a declaration of marital or civil partnership status², reasonable maintenance³ and financial provision and relief⁴. These causes are not matrimonial or civil partnership causes for the purposes of the provisions relating to the distribution and transfer of family business⁵, but are often brought in connection with such causes.

1 As to the matrimonial and civil partnership causes which may be brought see PARA 317.

2 As to declarations of marital or civil partnership status see PARAS 421-422.

3 As to applications for maintenance see PARA 542 et seq.

4 As to financial provision and relief see PARA 419 et seq.

5 Ie for the purposes of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-42). As to the meanings of 'matrimonial cause' and 'civil partnership cause' for those purposes see PARA 317.

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(2) NULLITY

(i) Powers of Annulment

319. The applicable law.

Provision is made by statute for the annulment of marriages and civil partnerships¹. The provisions for each are broadly the same, requiring the establishment of one or more grounds the nature of which will determine whether the marriage or civil partnership is void² or is voidable³. A void marriage or civil partnership is regarded as never having taken place at all, while a voidable marriage or civil partnership may be annulled only as respects any time after the decree or order of nullity has been made absolute or final⁴.

1 See the Matrimonial Causes Act 1973 ss 11-16; the Civil Partnership Act 2004 ss 49-54; and PARA 320 et seq.

2 As to void marriages and civil partnerships see PARAS 326-330.

3 As to voidable marriages and civil partnerships see PARAS 331-343.

4 See PARA 320.

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 MATRIMONIAL AND CIVIL PARTNERSHIP CAUSES/(2) NULLITY/ (i) Powers of Annulment/320.
 Nature and effect of annulment.

320. Nature and effect of annulment.

A void marriage or civil partnership is void ipso jure, the decree or order being merely declaratory¹. Where a marriage or civil partnership is void in law, the purpose of a nullity suit is to place the fact on record by a judgment equivalent to a judgment in rem², but there is no need for such a decree or order³.

A voidable marriage or civil partnership is regarded as valid and subsisting until a decree of nullity or a nullity order has been obtained⁴ during the lifetime of the parties⁵. A decree of nullity granted in respect of a voidable marriage, or a nullity order made where a civil partnership is voidable, operates to annul the marriage or civil partnership only as respects any time after the decree has been made absolute or the order has been made final, the marriage or civil partnership being treated (despite the decree or order) as if it had existed up to that time⁶.

1 Where a marriage or civil partnership is void, the courts regard the marriage or civil partnership as never having taken place and no matrimonial or civil partnership status as ever having been conferred: see *R v Algar* [1954] 1 QB 279 at 287, [1953] 2 All ER 1381 at 1383, CCA. As to the grounds on which marriages and civil partnerships are considered void see PARAS 326-330. Void marriages (and, presumably, civil partnerships) may be impeached after the deaths of the parties to the marriage or civil partnership: see PARA 322.

2 See *Salvesen (or von Lorang) v Administrator of Austrian Property* [1927] AC 641, HL.

3 *De Reneville v De Reneville* [1948] P 100 at 110, 111, [1948] 1 All ER 56 at 59, 60, CA. Nothing in the provisions of the Matrimonial Causes Act 1973 restating additional grounds for a decree of nullity in respect of voidable marriages celebrated before 1 August 1971 (as to which see PARA 345) is to be construed as validating any marriage which is by law void but with respect to which a decree of nullity has not been granted: Sch 1 para 11(4).

4 As to who may institute proceedings for a decree of nullity see PARAS 322, 323. A 'nullity order' is an order of the court which annuls a civil partnership which is void or voidable: Civil Partnership Act 2004 s 37(1)(b).

5 See *R v Algar* [1954] 1 QB 279, [1953] 2 All ER 1381, CCA (former wife's evidence inadmissible in criminal proceedings against husband for a crime committed during coverture but prosecuted after decree of nullity on ground of impotence); *Wiggins v Wiggins (otherwise Brooks) and Ingram* [1958] 2 All ER 555, [1958] 1 WLR 1013.

6 Matrimonial Causes Act 1973 s 16; Civil Partnership Act 2004 s 37(3); and see *Re Roberts, Roberts v Roberts* [1978] 3 All ER 225, [1978] 1 WLR 653, CA; *Ward v Secretary of State for Social Services* [1990] FCR 361, sub nom *R v Secretary of State for Social Services, ex p Ward* [1990] 1 FLR 119, DC; *P v P (ouster: decree nisi of nullity)* [1995] 1 FCR 47, [1994] 2 FLR 400, CA. Different provisions apply in respect of marriages celebrated before 1 August 1971: see PARAS 344-345.

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321. Bars to relief.

The court must not grant a decree of nullity on the ground that a marriage is voidable, or a nullity order on the ground that a civil partnership is voidable, if the respondent satisfies the court:

- 464 (1) that the petitioner¹, with knowledge that it was open to him to have the marriage avoided or obtain the nullity order, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so²; and
- 465 (2) that it would be unjust to the respondent to grant the decree or make the order³.

Without prejudice to these provisions, the court must not grant a decree or order of nullity where want of consent, mental disorder, pregnancy or, in the case of a marriage, venereal disease is alleged, or where the respondent is a person whose gender at the time of the marriage or civil partnership had become⁴ an acquired gender⁵, unless:

- 466 (a) it is satisfied that proceedings were instituted within three years from the date of the marriage or the formation of the civil partnership⁶; or
- 467 (b) leave for the institution of proceedings after the expiration of that period has been granted⁷;

and the court may not grant such a decree or order on the grounds that an interim gender recognition certificate⁸ has, after the time of the marriage or civil partnership, been issued to either party to the marriage or civil partnership⁹ unless it is satisfied that proceedings were instituted within the period of six months from the date of issue of the certificate¹⁰.

Without prejudice to any of these provisions, the court must not grant a decree or order of nullity in cases where pregnancy or (in the case of a marriage) venereal disease is alleged, or on the grounds that the respondent is a person whose gender at the time of the marriage had become¹¹ an acquired gender¹², unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged¹³.

In cases of void marriages (or, presumably, civil partnerships) a plea of conduct or of unjustness does not constitute a bar¹⁴ for there can be no estoppel in the case of a void marriage¹⁵.

1 Every cause must be begun by petition: see the Family Proceedings Rules 1991, SI 1991/1247, r 2.2(1); and PARA 755 et seq. 'Cause' means a matrimonial or civil partnership cause (see PARA 317) or proceedings for presumption of death and dissolution under the Matrimonial Causes Act 1973 s 19 or the Civil Partnership Act 2004 s 55 (see PARAS 415-416): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (definition substituted by SI 2005/2922). Although the Civil Partnership Act 2004 uses the expressions 'application' and 'applicant', the corresponding provisions of the Matrimonial Causes Act 1973 and the Family Proceedings Rules 1991, SI 1991/1247, refer to 'petition' and 'petitioners', and that terminology has generally been adopted throughout this title where the context is of initiating a cause.

2 Matrimonial Causes Act 1973 s 13(1)(a); Civil Partnership Act 2004 s 51(1)(a). As to the circumstances in which the period for bringing proceedings may be extended see PARA 323. As to the meaning of 'nullity order' see PARA 320 note 4.

References to the old cases of insincerity, collateral motives and delay may be of some assistance: see *Anon* (1857) Dea & Sw 295 at 299 per Dr Lushington; *H (falsely called C) v C* (1859) 1 Sw & Tr 605 (husband's impotence not proved; financial reasons and long delay by wife, dismissal of petition); affd on appeal in *Castleden v Castleden* (1861) 9 HL Cas 186; *E- v T- (falsely called E-)* (1863) 3 Sw & Tr 312 (11 years' delay; man's forbearance); *M- (falsely called B-) v B-* (1864) 3 Sw & Tr 550 (long delay, though apparently no finding as to husband's capacity or incapacity); *T (falsely called D) v D* (1866) LR 1 P & D 127 (wife left after eight years because of cruelty, husband's impotence not proved; petition dismissed); *Mansfield (falsely called Cuno) v Cuno* (1873) 42 LJP & M 65, HL (objection of delay may be overcome when proof of impotence complete, but not otherwise; delay indicates want of sense of injury); *B-n v B-n* (1854) 1 Ecc & Ad 248, PC (distinguishing such a suit from one on account of adultery); but see dictum of Sir W Scott in *Guest v Shipley (falsely called Guest)* (1820) 2 Hag Con 321 at 323; *W (falsely called R) v R* (1876) 1 PD 405 at 408 (suit brought after 16 years' separation; collateral motive; the maxim that the law helps those who are watchful and not those who sleep directly applicable); *G v M* (1885) 10 App Cas 171, HL; *M (otherwise D) v D* (1885) 10 PD 75; *L (otherwise B) v B* [1895] P 274 (seven years' delay by wife); *Moss v Moss* [1897] P 263 (wife pregnant by another man at time of marriage); *S v B (falsely called S)* (1905) 21 TLR 219 (17 years' delay by clergyman owing to the nature of his office); *M v M (otherwise H)* (1906) 22 TLR 719 (deed executed in ignorance of remedy); *T v T (otherwise J)* (1931) 47 TLR 629 (14 years' delay by husband petitioner); *Nash (otherwise Lister) v Nash* [1940] P 60, [1940] 1 All ER 206 (insincerity not concerned with petitioner's character or conduct before marriage); *Clarke (otherwise Talbott) v Clarke* [1943] 2 All ER 540 (15 years' delay; decree granted); *Dredge v Dredge (otherwise Harrison)* [1947] 1 All ER 29 (17 years' delay; reasons for delay; decree granted); *Clifford v Clifford* [1948] P 187, [1948] 1 All ER 394, CA (27 years' delay; decree granted); *REL (otherwise R) v EL* [1949] P 211, sub nom *L v L* [1949] 1 All ER 141 (artificial insemination with husband's seed); *W v W* [1952] P 152 at 157, [1952] 1 All ER 858 at 860, CA (a desire, by itself, to get rid of a financial responsibility is not insincerity); *Tindall v Tindall* [1953] P 63, [1953] 1 All ER 139, CA (wife, without knowledge of facts and law, applied for relief in magistrates' court; marriage approbated); *Slater v Slater* [1953] P 235, [1953] 1 All ER 246, CA (adoption; petitioner unaware of legal position; no other act of approbation); *L v L* [1954] NZLR 386, distinguishing on the facts *Slater v Slater* [1953] P 235, [1953] 1 All ER 246, CA; *Allardyce v Allardyce* 1954 SC 419 (24 years' delay; decree granted); *Scott v Scott (otherwise Fone)* [1959] P 103n, [1959] 1 All ER 531; *Copham (otherwise Dobbin) v Copham* (1959) Times, 15 January (eight years' delay; misinformation by Roman Catholic priest that marriage had been consummated); *Dicker v Dicker (otherwise Parris)* (1959) Times, 10 November (23 years' delay); *Notley v Notley (otherwise Roberts)* (1960) Times, 4 November (33 years' delay; ignorance of the law of nullity); *Bullock v Bullock* [1960] 2 All ER 307, [1960] 1 WLR 975, DC (bigamous marriage approbated); *Q v V* (1960) Times, 12 May (AID; no approbation); *G v G (otherwise H)* [1961] P 87, [1960] 3 All ER 56 (bigamous marriage); *Hayward v Hayward (otherwise Prestwood)* [1961] P 152, [1961] 1 All ER 236; *D v D (nullity: statutory bar)* [1979] Fam 70, sub nom *D v D (nullity)* [1979] 3 All ER 337.

3 Matrimonial Causes Act 1973 s 13(1)(b); Civil Partnership Act 2004 s 51(1)(b). See the cases cited in note 2.

4 Ie under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5 Ie where proceedings are brought by virtue of the Matrimonial Causes Act 1973 s 12(c), (d), (e), (f) or (h) or the Civil Partnership Act 2004 s 50(1)(a), (b), (c), or (e) (see PARAS 331, 332, 333, 334, 343).

6 Matrimonial Causes Act 1973 s 13(2)(a) (s 13(2) substituted by the Matrimonial and Family Proceedings Act 1984 s 2(1), (2); Matrimonial Causes Act 1973 s 13(2)-(4) amended, s 13(2A) added, by the Gender Recognition Act 2004 Sch 4 paras 4, 6); Civil Partnership Act 2004 s 51(2)(a).

7 Matrimonial Causes Act 1973 s 13(2)(b); Civil Partnership Act 2004 s 51(2)(b). As to the granting of leave after the expiration of the specified period see PARA 323.

8 Ie under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

9 Ie where proceedings are brought by virtue of the Matrimonial Causes Act 1973 s 12(g) or the Civil Partnership Act 2004 s 50(1)(d) (see PARA 334).

10 Matrimonial Causes Act 1973 s 13(2A) (as added: see note 6); Civil Partnership Act 2004 s 51(5).

11 See note 4.

12 Ie where proceedings are brought by virtue of the Matrimonial Causes Act 1973 s 12(e), (f) or (h) or the Civil Partnership Act 2004 s 50(1)(c), or (e) (see PARAS 333, 334, 343).

13 Matrimonial Causes Act 1973 s 13(3) (as amended: see note 6); Civil Partnership Act 2004 s 51(6).

14 *Grant (falsely called Giannetti) v Giannetti* [1913] P 137; *Andrews (falsely called Ross) v Ross* (1888) 14 PD 15; *Wilkins v Wilkins* [1896] P 108, CA; *Miles v Chilton (falsely called Miles)* (1849) 1 Rob Eccl 684. See also *Hayward v Hayward (otherwise Prestwood)* [1961] P 152, [1961] 1 All ER 236, not following *Woodland v Woodland (otherwise Belin or Barton)* [1928] P 169; *Guest v Shipley (falsely called Guest)* (1820) 2 Hag Con 321 (absence of estoppel where marriage not denied in previous suit); *Corbett v Corbett (otherwise Ashley)* [1971] P 83 at 108, 109, [1970] 2 All ER 33 at 50, 51.

15 *Hayward v Hayward (otherwise Prestwood)* [1961] P 152, [1961] 1 All ER 236; *Vervaeke v Smith (Messina and A-G intervening)* [1983] 1 AC 145, [1982] 2 All ER 144, HL.

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322. Who may institute proceedings.

Suits for annulling void, as distinct from voidable, marriages¹ may be instituted not only by the parties but also by persons having a financial interest in the matter² and even after both parties are dead³. A marriage voidable⁴ for impotence or for any other cause may only be put in issue by a party to it and during the lifetime of both parties⁵. A party may petition on the ground of his own impotence⁶.

1 As to the distinction between void and voidable marriages and civil partnerships see PARA 319 et seq.

2 *Faremouth v Watson* (1811) 1 Phillim 355 (brought by sisters of man who married deceased wife's sister, who were interested in the question of his leaving lawful issue; such marriages were then only voidable); *Wells v Cottam (falsely called Wells)* (1863) 3 Sw & Tr 364; *Ray v Sherwood and Ray* (1836) 1 Curt 193; affd sub nom *Sherwood v Ray* (1837) 1 Moo PCC 353 (father's petition on grounds of affinity); *Bevan v McMahon and Bevan (falsely called McMahon)* (1859) 2 Sw & Tr 58 (mother's petition; no jurisdiction); *Choppy v Bibi (otherwise Choppy)* [1967] AC 158, [1966] 1 All ER 203, PC. A 'slight interest' is sufficient: see *Faremouth v Watson* per Sir John Nicholl. Anyone whose title to property would be affected, or on whom a legal liability would be cast, though contingently, by the natural result of a marriage, ie the birth of issue, should have a right to contest its validity: *Sherwood v Ray* at 399 per Parke B.

3 *Elliott v Gurr* (1812) 2 Phillim 16 at 19; *Ray v Sherwood and Ray* (1836) 1 Curt 193 at 199 (affd sub nom *Sherwood v Ray* (1837) 1 Moo PCC 353); *A v B* (1868) LR 1 P & D 559; *Fowke v Fowke* [1938] Ch 774 at 781, 782, [1938] 2 All ER 638 at 646, 647; *De Reneville v De Reneville* [1948] P 100 at 110, [1948] 1 All ER 56 at 59, CA per Lord Greene MR; *Harthan v Harthan* [1949] P 115 at 131, 132, [1948] 2 All ER 639 at 645, CA per Lord Merriman P.

4 A voidable marriage remains a marriage until one of the spouses seeks to get rid of the tie: *Inverclyde (otherwise Tripp) v Inverclyde* [1931] P 29 at 41. Whether, as between the parties to them, marriages duly solemnised but unconsummated may or may not be treated as absolutely null and void, it is certainly not open to a third person to make an objection on the ground of impotence, when neither of the parties concerned has done any act to raise the question or to signify an election to treat the contract as void: see *Cavell v Prince* (1866) LR 1 Exch 246.

5 *A v B* (1868) LR 1 P & D 559 (suit by next of kin of deceased wife).

6 *Harthan v Harthan* [1949] P 115, [1948] 2 All ER 639, CA; but see PARA 341.

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323. Persons suffering mental disorder.

In the case of proceedings for the grant of a decree or order of nullity where the grounds are want of consent, mental disorder, pregnancy or, in the case of a marriage, venereal disease, or where the respondent is a person whose gender at the time of the marriage had become¹ an acquired gender², a judge may, on an application made to him, grant leave for the institution of proceedings after the expiration of the period of three years from the date of the marriage or civil partnership if:

- 468 (1) he is satisfied that the applicant has at some time during that period suffered from mental disorder³; and
- 469 (2) he considers that in all the circumstances of the case it would be just to grant leave for the institution of proceedings⁴.

Such an application for leave may be made after the expiration of the period of three years from the date of the marriage⁵.

1 Ie under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 Ie where proceedings are brought by virtue of the Matrimonial Causes Act 1973 s 12(c), (d), (e), (f) or (h) or the Civil Partnership Act 2004 s 50(1)(a), (b), (c), or (e) (see PARAS 331, 332, 333, 334, 343).

3 Matrimonial Causes Act 1973 s 13(4)(a) (s 13(4), (5) added by the Matrimonial and Family Proceedings Act 1984 s 2; Matrimonial Causes Act 1973 s 13(4) amended by the Gender Recognition Act 2004 Sch 4 paras 4, 6); Civil Partnership Act 2004 s 51(3)(a).

4 Matrimonial Causes Act 1973 s 13(4)(b) (as amended: see note 3); Civil Partnership Act 2004 s 51(3)(b).

5 Matrimonial Causes Act 1973 s 13(5) (as added: see note 3); Civil Partnership Act 2004 s 51(4).

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324. Marriages and civil partnerships governed by foreign law or celebrated abroad under English law.

Where, apart from the Matrimonial Causes Act 1973¹, any matter affecting the validity of a marriage would fall to be determined, in accordance with the rules of private international law, by reference to the law of a country outside England and Wales, nothing in the provisions of that Act setting out the grounds on which a marriage is void² or voidable³ or setting out the bars to relief⁴ precludes the determination of the matter as aforesaid or requires the application to the marriage of the grounds or bar there mentioned, except so far as applicable in accordance with those rules⁵. However, no marriage is to be treated as valid by virtue of these provisions if, at the time when it purports to have been celebrated, either party was already a civil partner⁶.

In the case of a marriage which purports to have been celebrated under the Foreign Marriage Acts 1892 to 1947⁷, or has taken place outside England and Wales and purports to be marriage under common law, the provisions of the Matrimonial Causes Act 1973 setting out the grounds on which a marriage is void⁸ are without prejudice to any ground on which the marriage may be void under those Acts or, as the case may be, by virtue of the rules governing the celebration of marriages outside England and Wales under common law⁹.

Where two people register as civil partners in Scotland or Northern Ireland the civil partnership will be void if it would be void under the applicable Scottish or Northern Irish provisions and will be voidable if it would be voidable under applicable England and Wales provisions¹⁰. Where two people register as civil partners overseas¹¹ the civil partnership is void if neither is a United Kingdom national or part of Her Majesty's forces, if they would be ineligible to register as civil partners in the United Kingdom¹², or if a requirement prescribed for these purposes by an Order in Council under the relevant provision is not complied with¹³ and is voidable if it would be voidable under the applicable provision¹⁴. Where two people have registered an apparent or alleged overseas relationship¹⁵ the civil partnership is void if the relationship is not an overseas relationship or even though the relationship is an overseas relationship the parties are not treated¹⁶ as having formed a civil partnership¹⁷ and is voidable if the overseas relationship is voidable under the relevant domestic or overseas law¹⁸.

1 Cf the Domicile and Matrimonial Proceedings Act 1973 s 5(3); and PARA 750.

2 See PARAS 326-330.

3 See PARAS 331-343.

4 See PARA 321.

5 Matrimonial Causes Act 1973 s 14(1) (s 14(1) amended, s 14(3) added, by the Civil Partnership Act 2004 Sch 27 para 41).

6 Matrimonial Causes Act 1973 s 14(3) (as added: see note 5). As to the meaning of 'civil partner' see PARA 2 note 1.

7 See PARAS 119-128.

8 See PARAS 326-330.

9 Matrimonial Causes Act 1973 s 14(2).

10 Civil Partnership Act 2004 s 54(1), (2). The applicable provisions are s 123 (void in Scotland), s 173 (void in Northern Ireland) and s 50(1) (see PARAS 331-334) (Scottish and Northern Irish civil partnerships will be voidable in these circumstances, although in the case of a Scottish civil partnership only in the circumstances described in s 50(1)(d)): s 54(1), (2). Section 51 (bars to relief where civil partnership is voidable: see PARAS 321, 323) applies for these purposes: s 54(9)(a), (11).

11 Ie under an Order in Council under the Civil Partnership Act 2004 s 210 (registration at British consulates etc) (see PARA 145) or s 211 (registration by armed forces personnel) (see PARA 153).

12 Ie if the condition in the Civil Partnership Act 2004 s 210(2)(a) or (b) (see PARA 145) or s 211(2)(a) or (b) (see PARA 153) is not met.

13 Civil Partnership Act 2004 s 54(3), (4)(a).

14 Civil Partnership Act 2004 s 54(4)(b)(i), (5). The applicable provision for the purposes of England and Wales is s 50(1) (see PARAS 331-334): s 54(4)(b)(i). Section 51 (bars to relief where civil partnership is voidable: see PARAS 321, 323) applies for these purposes: s 54(9)(a), (11).

15 As to the meaning of 'overseas relationship' see PARA 2 note 4.

16 Ie under the Civil Partnership Act 2004 Pt 5 Chapter 2 (ss 212-218) (see PARA 19).

17 Civil Partnership Act 2004 s 54(6), (7).

18 Civil Partnership Act 2004 s 54(8). The civil partnership is voidable under the relevant domestic law if the circumstances fall within s 50(1)(d) or, where either of the parties was domiciled in England and Wales or Northern Ireland at the time when the overseas relationship was registered, the circumstances fall within s 50(1)(a), (b), (c) or (e), and the relevant overseas law is the law of the country or territory where the overseas relationship was registered (including its rules of private international law): s 54(8)(b), (c), (10). Section 51 (bars to relief where civil partnership is voidable: see PARAS 321, 323) applies for these purposes: s 54(9)(b), (c), (11).

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325. Legitimacy of children of voidable marriages.

Since a decree of nullity operates to annul a marriage only as respects any time after the decree has been made absolute, and the marriage is treated as if it had existed up to that time, it is to be inferred that children of the marriage will remain legitimate¹.

¹ See the Matrimonial Causes Act 1973 s 16; and PARA 320. Where a decree of nullity was granted on or before 31 July 1971 (ie the day before the day on which the Nullity of Marriage Act 1971 came into force) in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved, instead of being annulled, is deemed to be their legitimate child: Matrimonial Causes Act 1973 Sch 1 para 12. As to voidable marriages before 1 August 1971 see PARA 345.

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(ii) Void Marriages and Civil Partnerships

326. Grounds on which marriage is void.

A marriage celebrated after 31 July 1971¹ is void² if:

- 470 (1) the parties are within the prohibited degrees of relationship³;
- 471 (2) either party is under the age of 16⁴;
- 472 (3) the parties have intermarried in disregard of certain requirements as to the formation of marriage⁵;
- 473 (4) at the time of the marriage either party was already lawfully married or a civil partner⁶;
- 474 (5) the parties are not respectively male and female⁷; or
- 475 (6) in the case of a polygamous marriage⁸ entered into outside England and Wales, either party was at the time of the marriage domiciled⁹ in England and Wales¹⁰.

These are the only grounds on which a marriage celebrated after 31 July 1971 is void¹¹.

1 The day before the day on which the Nullity of Marriage Act 1971 came into force. As to void marriages before 1 August 1971 see PARA 344.

2 As to the nature and effect of void marriages see PARA 320.

3 Matrimonial Causes Act 1973 s 11(a)(i) (s 11(a) amended by the Marriage Act 1983 s 2(4); and the Marriage (Prohibited Degrees of Relationship) Act 1986 s 6(4)). As to the prohibited degrees of relationship see PARAS 35-40. The grounds specified in the Matrimonial Causes Act 1973 s 11(a) (see the text and notes 4-5) render a marriage void on the ground that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986: s 11(a) (as so amended).

4 Matrimonial Causes Act 1973 s 11(a)(ii) (as amended: see note 3). As to the minimum age for marriage see PARAS 32, 41.

5 Matrimonial Causes Act 1973 s 11(a)(ii) (as amended: see note 3). See *A-M v A-M (divorce: jurisdiction: validity of marriage)* [2001] 2 FLR 6. As to such requirements see PARAS 328-330.

6 Matrimonial Causes Act 1973 s 11(b) (amended by the Civil Partnership Act 2004 Sch 27 para 40). As to the meaning of 'civil partner' see PARA 2 note 1. As to the standard of proof where an issue arises as to the authenticity and effect of a document purporting to dissolve an earlier marriage see *Wicken v Wicken* [1999] Fam 224, [1999] 2 WLR 1166.

7 Matrimonial Causes Act 1973 s 11(c). The criteria are biological: see the cases cited in PARA 1 note 2. A person whose sex had been correctly classified as birth cannot later become, or come to be regarded as, a person of the opposite sex for the purposes of s 11(c): see *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, [2003] 2 All ER 593 (in which the House of Lords declared that the non-recognition of gender reassignment for the purposes of marriage was not compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) arts 8, 12 (right to respect for private and family life; right to marry and found a family: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 150 et seq, 162), a situation which has been subsequently addressed by legislation (see the Matrimonial Causes Act 1973 s 12(g), (h); and PARA 334)).

8 For these purposes, a marriage is not polygamous if at its inception neither party has any spouse additional to the other: Matrimonial Causes Act 1973 s 11 (amended by the Private International Law (Miscellaneous Provisions) Act 1995 Schedule para 2(1), (2)). A potentially polygamous marriage is not void: see the Private International Law (Miscellaneous Provisions) Act 1995 s 5(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 240.

9 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

10 Matrimonial Causes Act 1973 s 11(d), rectifying the anomaly created by *Hussain v Hussain* [1983] Fam 26, [1982] 3 All ER 369, CA. As to polygamous marriages generally see PARA 9.

11 Matrimonial Causes Act 1973 s 11.

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327. Grounds on which civil partnership is void.

Where two people register as civil partners¹ of each other in England and Wales the civil partnership is void² if:

- 476 (1) at the time when they do so, they are not eligible³ to register as civil partners of each other⁴;
- 477 (2) at the time when they do so they both know:
 - 8
 - 7. (a) that due notice of proposed civil partnership has not been given⁵;
 - 8. (b) that the civil partnership document⁶ has not been duly issued⁷;
 - 9. (c) that the civil partnership document is void⁸ owing to failure to register within the specified period⁹;
 - 10. (d) that the place of registration is a place other than that specified in the notices (or notice) of proposed civil partnership and the civil partnership document¹⁰;
 - 11. (e) that a civil partnership registrar¹¹ is not present¹²; or
 - 12. (f) that the place of registration is on premises that are not approved premises¹³ although the registration is purportedly in accordance with the provisions¹⁴ governing the place of registration¹⁵; or
 - 9
- 478 (3) the civil partnership document is void¹⁶ because the civil partnership is between a child and another person in circumstances where any person whose consent is required before the child can register has given written notice to the registration authority that he forbids the registration of the civil partnership¹⁷.

1 As to the meaning of 'civil partner' see PARA 2 note 1. As to registration see PARA 132 et seq.

2 As to the requisites of a civil partnership see PARAS 2, 4.

3 Ie under the Civil Partnership Act 2004 s 3 (see PARAS 2, 4).

4 Civil Partnership Act 2004 s 49(a).

5 Civil Partnership Act 2004 s 49(b)(i). As to the giving of notice see PARA 133.

6 As to the meaning of 'civil partnership document' see PARA 56 note 7.

7 Civil Partnership Act 2004 s 49(b)(ii). As to the issuing of the civil partnership document see PARA 150.

8 Ie under the Civil Partnership Act 2004 s 17(3) (see PARA 139) or s 27(2) (see PARA 144).

9 Civil Partnership Act 2004 s 49(b)(iii).

10 Civil Partnership Act 2004 s 49(b)(iv).

11 As to the meaning of 'civil partnership registrar' see PARA 139 note 8.

12 Civil Partnership Act 2004 s 49(b)(v).

13 As to the approval of premises see PARA 190 et seq.

14 Ie the Civil Partnership Act 2004 s 6(3A)(a) (see PARA 56).

- 15 Civil Partnership Act 2004 s 49(b)(vi) (added by SI 2005/2000).
- 16 le under the Civil Partnership Act 2004 Sch 2 para 6(2), (5) (see PARA 137).
- 17 Civil Partnership Act 2004 s 49(c).

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328. Marriages according to rites of the Church of England.

If any persons knowingly and wilfully intermarry according to the rites of the Church of England¹, otherwise than by special licence²:

- 479 (1) except in the case of a marriage of a person who is housebound or a detained person³, in any place other than a church or other building in which banns may be published⁴;
- 480 (2) without banns having been duly published⁵, a common licence having been obtained⁶, or certificates having been duly issued⁷ by a superintendent registrar⁸ to whom due notice of marriage has been given⁹;
- 481 (3) on the authority of a publication of banns which is void¹⁰, a common licence which is void¹¹ or certificates of a superintendent registrar which are¹² void¹³; or
- 482 (4) in the case of a marriage on the authority of a superintendent registrar's certificates, in any place other than the church building or other place specified in the notices of marriage and certificates as the place where the marriage is to be solemnised¹⁴,

or if they knowingly and wilfully consent to or acquiesce in the solemnisation of the marriage by any person who is not in Holy Orders¹⁵, the marriage is void¹⁶.

Guilty knowledge and wilfulness on the part of one of the parties will not invalidate the marriage unless the other participates in it¹⁷. If a party is described by a false name and the banns are, in consequence, incorrectly published, the marriage is valid if the wrong name has been given by mistake or where the name given has been assumed and is generally accredited¹⁸, or where there was no intention of concealing identity¹⁹ and, even if the false name has been given fraudulently, the marriage is nevertheless valid if one party marries without knowledge of the falsity²⁰. If, however, both parties are cognisant of the fraud or intend concealment by the use of the false name, there is no due publication, and the marriage is void²¹.

1 As to references to the Church of England see PARA 53 note 6.

2 As to marriage by special licence see PARA 58.

3 Ie except in the case of a marriage in pursuance of the Marriage Act 1949 s 26(1)(dd) (see PARA 54).

4 Marriage Act 1949 s 25(a) (amended by the Marriage Act 1983 Sch 1 para 3). As to the buildings in which banns may be published see PARA 65 et seq.

5 As to the publication of banns see PARA 65 et seq. As to parties 'knowingly and wilfully' marrying without due publication of banns see *Hooper (otherwise Harrison) v Hooper* [1959] 2 All ER 575, [1959] 1 WLR 1021.

6 As to the granting of a common licence see PARA 76 et seq.

7 Ie under the Marriage Act 1949 Pt III (ss 26-52) (see PARA 54 et seq).

8 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

9 Marriage Act 1949 s 25(b) (s 25(b)-(d) amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 7).

10 Is void by virtue of the Marriage Act 1949 s 3(3) (declaration of dissent from marriage of minor: see PARA 52) or s 12(2) (marriage not solemnised within three months of publication of banns: see PARA 71).

11 Is void by virtue of the Marriage Act 1949 s 16(3) (marriage not solemnised within three months after grant of licence: see PARA 79).

12 Is by virtue of the Marriage Act 1949 s 33(2) (marriage not solemnised within the applicable period: see PARA 101).

13 Marriage Act 1949 s 25(c) (as amended: see note 9).

14 Marriage Act 1949 s 25(d) (as amended: see note 9).

15 As to who may solemnise a marriage according to the rites of the Church of England see PARA 80.

16 Marriage Act 1949 s 25. As to the effect of a void marriage see PARA 320. As to criminal liability for solemnising a marriage according to the rites of the Church of England without due publication of banns or at an unauthorised place or under false pretence of Holy Orders see PARAS 59, 65, 80.

17 *R v Wroxton Inhabitants* (1833) 4 B & Ad 640 at 646; *Wright v Elwood* (1835) 1 Curt 49; *Wright v Elwood* (1837) 1 Curt 662; *Dormer (falsely called Williams) v Williams* (1838) 1 Curt 870; *Holmes v Simmons (falsely called Holmes)* (1868) LR 1 P & D 523; *Templeton v Tyree* (1872) LR 2 P & D 420; *Greaves v Greaves* (1872) LR 2 P & D 423; *R v Rea* (1872) LR 1 CCR 365. The marriage of a minor actually solemnised without the necessary parental consent is valid: *R v Birmingham Inhabitants* (1828) 8 B & C 29.

18 *Dancer v Dancer* [1949] P 147, [1948] 2 All ER 731. See further PARA 69.

19 *Chipchase v Chipchase* [1939] P 391, [1939] 3 All ER 895; for subsequent proceedings see *Chipchase v Chipchase (otherwise Leetch, otherwise Matthews)* [1942] P 37, [1941] 1 All ER 560.

20 *R v Wroxton Inhabitants* (1833) 4 B & Ad 640; *Wright v Elwood* (1835) 1 Curt 49; *Wright v Elwood* (1837) 1 Curt 662; *Gompertz v Kensit* (1872) LR 13 Eq 369; *Templeton v Tyree* (1872) LR 2 P & D 420.

21 See the Marriage Act 1949 s 25(b) (as amended: see note 9); and the test stated in *Dancer v Dancer* [1949] P 147 at 150, [1948] 2 All ER 731 at 734, citing *Chipchase v Chipchase* [1939] P 391 at 397, [1939] 3 All ER 895 at 899, 900. See also *Midgeley (falsely called Wood) v Wood* (1859) 30 LJP & A 57; *Wormald v Neale and Wormald (falsely called Neale)* (1868) 19 LT 93; *Small v Small and Furber* (1923) 67 Sol Jo 277; and see PARA 69.

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329. Marriages under Registrar General's licence.

If any persons knowingly and wilfully intermarry under the authority of a Registrar General's licence¹:

- 483 (1) without having given due notice of marriage to the superintendent registrar²;
- 484 (2) without a Registrar General's licence³;
- 485 (3) on the authority of a licence which is⁴ void⁵;
- 486 (4) in any place other than the place specified in the notice of marriage and the Registrar General's licence⁶;
- 487 (5) in the absence of a registrar⁷, or, where the marriage is by civil ceremony, of a superintendent registrar⁸, except where the marriage is solemnised according to the usages of the Society of Friends or is a marriage between two persons professing the Jewish religion according to the usages of the Jews⁹,

the marriage is void¹⁰.

1 As to a Registrar General's licence see PARA 161 et seq. As to the meaning of 'Registrar General' see PARA 46 note 5.

2 Marriage Act 1949 s 49(a); Marriage (Registrar General's Licence) Act 1970 s 13. As to the giving of notice of marriage see PARA 87 et seq.

3 Marriage Act 1949 s 49(b) (amended by the Immigration and Asylum Act 1999 Sch 14 para 27); Marriage (Registrar General's Licence) Act 1970 s 13(a) (amended by the Immigration and Asylum Act 1999 Sch 14 paras 38, 42).

4 Ie by virtue of the Marriage (Registrar General's Licence) Act 1970 s 8(2) (see PARA 165).

5 Marriage Act 1949 s 49(d); Marriage (Registrar General's Licence) Act 1970 s 13(c).

6 Marriage Act 1949 s 49(e); Marriage (Registrar General's Licence) Act 1970 s 13(d).

7 As to the meaning of 'registrar' see PARA 88 note 1.

8 As to the meaning of 'superintendent registrar' see PARA 22 note 1.

9 Marriage Act 1949 s 49(f), (g); Marriage (Registrar General's Licence) Act 1970 s 13(e).

10 Marriage Act 1949 s 49; Marriage (Registrar General's Licence) Act 1970 s 13. As to the criminal liability for improper solemnisation of such a marriage see PARA 180.

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330. Marriages under superintendent registrar's certificates.

If any persons knowingly and wilfully intermarry under the provisions relating to marriage under superintendent registrar's certificates¹:

- 488 (1) without having given due notice of marriage to the superintendent registrar²;
- 489 (2) without a certificate for marriage having been duly issued, in respect of each of the persons to be married, by the superintendent registrar to whom notice of marriage was given³;
- 490 (3) on the authority of certificates which are⁴ void⁵;
- 491 (4) in any place other than the church, chapel, registered building⁶, office or other place specified in the notices of marriage and certificates of the superintendent registrar⁷;
- 492 (5) in the case of a marriage purporting to be a marriage on approved premises⁸, on any premises that at the time the marriage is solemnised are not approved premises⁹;
- 493 (6) in the case of a marriage in a registered building, not being a marriage in the presence of an authorised person¹⁰, in the absence of a registrar¹¹ of the registration district¹² in which the registered building is situated¹³;
- 494 (7) in the case of a marriage in the office of a superintendent registrar, in the absence of the superintendent registrar or of a registrar of the registration district of that superintendent registrar¹⁴;
- 495 (8) in the case of a marriage on approved premises, in the absence of the superintendent registrar of the registration district in which the premises are situated or in the absence of a registrar of that district¹⁵; or
- 496 (9) in the case of a marriage solemnised, otherwise than according to the rites of the Church of England, at the place where a person usually resides¹⁶, in the absence of any superintendent registrar or registrar whose presence at that marriage is¹⁷ required¹⁸,

the marriage is void¹⁹.

1 Ie under the Marriage Act 1949 Pt III (ss 26-52) (see PARA 54 et seq).

2 Marriage Act 1949 s 49(a). As to the meaning of 'superintendent registrar' see PARA 22 note 1. As to notice of marriage generally see PARA 87 et seq. As to the giving of notice of marriage by an officer, seaman or marine on one of Her Majesty's ships at sea see PARA 131.

3 Marriage Act 1949 s 49(b) (s 49(b), (c), (d), (e) amended by the Immigration and Asylum Act 1999 Sch 14 paras 3, 27). As to the issue of certificates of marriage generally see PARA 54; and as to the issue of certificates on board Her Majesty's ships see PARA 131.

4 Ie by virtue of the Marriage Act 1949 s 33(2) (marriage not solemnised within the applicable period: see PARA 101).

5 Marriage Act 1949 s 49(d) (as amended: see note 3).

6 As to the meaning of 'registered building' see PARA 54 note 3.

7 Marriage Act 1949 s 49(e) (as amended: see note 3).

8 Ie in the case of a marriage purporting to be in pursuance of the Marriage Act 1949 s 26(1)(bb) (see PARA 54). As to the meaning of 'approved premises' see PARA 54 note 6.

9 Marriage Act 1949 s 49(ee) (s 49(ee), (gg) added, s 49(f) amended, by the Marriage Act 1994 Schedule paras 1, 3).

10 As to the meaning of 'authorised person' see PARA 107.

11 As to the meaning of 'registrar' see PARA 88 note 1.

12 As to the meaning of 'registration district' see PARA 87 note 4.

13 Marriage Act 1949 s 49(f) (as amended: see note 9). As to the persons required to be present see PARA 106.

14 Marriage Act 1949 s 49(g). As to the persons required to be present see PARA 102.

15 Marriage Act 1949 s 49(gg) (as added: see note 9).

16 Ie in the case of a marriage to which the Marriage Act 1949 s 45A applies (see PARA 173).

17 Ie as required by the Marriage Act 1949 s 45A.

18 Marriage Act 1949 s 49(h) (added by the Marriage Act 1983 Sch 1 para 13).

19 Marriage Act 1949 s 49. As to the nature and effect of void marriages see PARA 320; and as to the criminal liability for solemnising a marriage at an unauthorised place, or out of time or in the absence of a registrar, see PARA 180 et seq.

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(iii) Voidable Marriages and Civil Partnerships

A. CONSENT, MENTAL DISORDER, PREGNANCY AND GENDER REASSIGNMENT

331. Failure to give valid consent.

A marriage¹ or civil partnership is voidable on the ground that either party did not validly consent to it, whether in consequence of duress², mistake³, unsoundness of mind⁴ or otherwise⁵.

1 le a marriage celebrated after 31 July 1971 (the day before the date on which the Nullity of Marriage Act 1971 (repealed) came into force). As to voidable marriages before 1 August 1971 see PARA 345.

2 As to duress see PARA 43.

3 As to mistake see PARA 44.

4 As to unsoundness of mind see PARAS 45, 332.

5 Matrimonial Causes Act 1973 s 12(c); Civil Partnership Act 2004 s 50(1)(a). See *Re Roberts, Roberts v Roberts* [1978] 3 All ER 225, [1978] 1 WLR 653, CA. The grounds specified in the Matrimonial Causes Act 1973 s 12 are the only grounds on which a marriage celebrated after 31 July 1971 is voidable (s 12); no corresponding restriction is explicitly imposed in respect of civil partnerships, but it may be inferred in relation to the grounds specified in the Civil Partnership Act 2004 s 50.

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332. Mental disorder.

A marriage¹ or civil partnership is voidable on the ground that at the time of the marriage or civil partnership either party, though capable of giving a valid consent, was suffering, whether continuously or intermittently, from mental disorder² of such a kind or to such an extent as to be unfitted for marriage or civil partnership³. A party may maintain his own past mental incapacity as a ground for annulment⁴.

1 le a marriage celebrated after 31 July 1971 (the day before the date on which the Nullity of Marriage Act 1971 (repealed) came into force). As to voidable marriages before 1 August 1971 see PARA 345.

2 le within the meaning of the Mental Health Act 1983: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402.

3 Matrimonial Causes Act 1973 s 12(d); Civil Partnership Act 2004 s 50(1)(b), (2). As to the exclusivity of these grounds see PARA 331 note 5. As to the burden of proving the existence of mental disorder see PARA 45. See also *Bennett v Bennett* [1969] 1 All ER 539, [1969] 1 WLR 430 (where it was held that in order to succeed a petitioner had to establish mental disorder within the meaning of Mental Health Act 1959 s 4 (repealed), and had to go on to show that, as a result thereof, the respondent was incapable of living in a married state and of carrying out the ordinary duties and obligations of marriage); cf *Re Roberts, Roberts v Roberts* [1978] 3 All ER 225, [1978] 1 WLR 653, CA.

4 *Turner v Meyers* (1808) 1 Hag Con 414. See also *Parnell v Parnell* (1814) 2 Hag Con 169; *Morison v Morison* (1745) cited 2 Hag Con 169 at 170; *Fust v Bowerman* (1790) cited 2 Hag Con 171, 2 Add 402; *Baldwin v Baldwin* (1919) Times, 30 and 31 July (marriage during escape from asylum); *Paspati v Paspati* [1914] P 110.

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333. Pregnancy by some other person.

A marriage¹ or civil partnership is voidable on the ground that at the time of the marriage or civil partnership the respondent was pregnant by some person other than the petitioner².

¹ If a marriage celebrated after 31 July 1971 (the day before the date on which the Nullity of Marriage Act 1971 (repealed) came into force). As to voidable marriages before 1 August 1971 see PARA 345.

² Matrimonial Causes Act 1973 s 12(f); Civil Partnership Act 2004 s 50(1)(c). As to the exclusivity of these grounds see PARA 331 note 5. See *Jackson v Jackson (otherwise Prudom)* [1939] P 172, [1939] 1 All ER 471; *Smith v Smith* [1948] P 77, [1947] 2 All ER 741, CA; *W v W* (1965) 109 Sol Jo 920 (could not be proved husband was not the father; petition dismissed).

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334. Gender reassignment.

A marriage¹ or civil partnership is voidable on the ground that an interim gender recognition certificate² has, after the time of the marriage or the formation of the civil partnership, been issued to either party to the marriage or civil partnership³, or on the ground that the respondent is a person whose gender at the time of the marriage or civil partnership had become⁴ the acquired gender⁵ and the court is satisfied that the applicant was at the time of the marriage or civil partnership ignorant of this⁶.

1 le a marriage celebrated after 31 July 1971 (the day before the date on which the Nullity of Marriage Act 1971 (repealed) came into force). As to voidable marriages before 1 August 1971 see PARA 345.

2 le under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. All documents in family proceedings brought under these provisions must, while they are in the custody of the court, be kept in a place of special security: Family Proceedings Rules 1991, SI 1991/1247, r 10.21B (added by SI 2005/559; amended by SI 2005/2922). As to the annulment of marriages and civil partnerships on gender reassignment grounds see further the Gender Recognition Act 2004 ss 5, 5A, 6; the Family Proceedings Rules 1991, SI 1991/1247, r 2.51C.

3 Matrimonial Causes Act 1973 s 12(g) (s 12(g), (h) added, s 13(3) amended, by the Gender Recognition Act 2004 Sch 2 paras 1, 2, Sch 4 paras 4-6); Civil Partnership Act 2004 s 50(1)(d). As to the exclusivity of these grounds see PARA 331 note 5.

4 See note 2.

5 Matrimonial Causes Act 1973 s 12(h) (as added: see note 3); Civil Partnership Act 2004 s 50(1)(e).

6 Matrimonial Causes Act 1973 s 13(3) (as amended: see note 3); Civil Partnership Act 2004 s 51(6).

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B. FAILURE TO CONSUMMATE MARRIAGE

335. Test of consummation.

The test of consummation is penetration¹, but penetration for a brief period without emission inside or outside the wife might in particular circumstances not amount to ordinary and complete intercourse². The possibility of incipient or imperfect coitus is not enough to establish consummation³, but, once coitus is established⁴, it is not affected by the use of contraceptives⁵, nor, it would appear, is the coitus affected by its being coitus interruptus⁶.

The cause of non-consummation may be wilful refusal, even where the spouse at fault is incapable⁷, but, where both incapacity and wilful refusal are alleged, the court must still ascertain the cause of the non-consummation⁸.

1 See *R v R (otherwise F)* [1952] 1 All ER 1194; and note 4. See also *Baxter v Baxter* [1948] AC 274 at 290, [1947] 2 All ER 886 at 892, HL per Lord Jowitt LC ('In [the Matrimonial Causes Act 1973 s 12] Parliament used the word 'consummate' as that word is understood in common parlance and in the light of social conditions known to exist').

2 *W (otherwise K) v W* [1967] 3 All ER 178n, [1967] 1 WLR 1554.

3 *D-e v A-g* (1845) 1 Rob Eccl 279 at 299 per Dr Lushington; *B v B* [1955] P 42, sub nom *D v D* [1954] 2 All ER 598. For cases on fecundatio ab extra and artificial insemination see PARA 340 notes 1, 2.

4 As to what constitutes coitus see *R v R (otherwise F)* [1952] 1 All ER 1194 (where it was held that a marriage can be consummated by erectio and intromissio without emissio).

5 *Baxter v Baxter* [1948] AC 274, [1947] 2 All ER 886, HL, overruling *Cowen v Cowen* [1946] P 36, [1945] 2 All ER 197, CA, and disapproving *J (otherwise S) v J* [1947] P 158, [1947] 2 All ER 43, CA.

6 See *White (otherwise Berry) v White* [1948] P 330, [1948] 2 All ER 151, followed in *Cackett (otherwise Trice) v Cackett* [1950] P 253, [1950] 1 All ER 677; and not following *Grimes (otherwise Edwards) v Grimes* [1948] P 323, [1948] 2 All ER 147 (where it was held that coitus interruptus did not amount to consummation). Cf *R v R (otherwise F)* [1952] 1 All ER 1194 (cited in note 4).

7 *S v S (otherwise C)* [1956] P 1 at 10, [1954] 3 All ER 736 at 740, not following obiter dictum in *Morgan v Morgan* [1949] WN 250, CA.

8 See PARA 863.

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336. Incapacity to consummate marriage.

A marriage¹ is voidable on the ground that the marriage has not been consummated² owing to the incapacity of either party to consummate it³. A party is incapable of consummating a marriage if his or her mental health or physical condition makes consummation of the marriage a practical impossibility⁴. The condition must be one which existed at the time of the marriage⁵.

1 le a marriage celebrated after 31 July 1971 (the day before the date on which the Nullity of Marriage Act 1971 (repealed) came into force). As to voidable marriages before 1 August 1971 see PARA 345.

2 As to the test for consummation see PARA 335.

3 Matrimonial Causes Act 1973 s 12(a). As to the exclusivity of these grounds see PARA 331 note 5.

4 *G- v G-* (1871) LR 2 P & D 287; *S v S (otherwise C)* [1956] P 1, [1954] 3 All ER 736. See also *M v M (otherwise B)* [1957] P 139, [1956] 3 All ER 769 (wife took no steps to have operation to cure incapacity); *B (otherwise S) v B* [1958] 2 All ER 76, [1958] 1 WLR 619; *S v S (otherwise W)* [1963] P 162, [1962] 2 All ER 816, CA; *Corbett v Corbett (otherwise Ashley)* [1971] P 83, [1970] 2 All ER 33. In any proceedings for nullity of marriage, evidence on the question of sexual capacity must be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court: Matrimonial Causes Act 1973 s 48(2).

5 A defect arising subsequently is not a ground for annulment: *Brown v Brown* (1828) 1 Hag Ecc 523. As to the practice of the ecclesiastical courts on this point see *Napier v Napier (otherwise Goodban)* [1915] P 184 at 190, CA per Pickford LJ.

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337. Opportunity of cure.

If there is some physical defect which can be cured without danger to the party suffering from it, the court is entitled to require that opportunity for cure is to be given to that party before proceeding to a decree¹. A spouse is to be regarded as incurable, and consummation, therefore, a practical impossibility, if the condition could only be remedied by an operation attended by danger² or if the spouse is at fault by refusing to submit to an operation³. In deciding whether a state of impotence at the date of the marriage and continuing to the date of the action is remediable, the court must take into consideration further medical or surgical treatment which might remove the cause of the disability⁴.

1 *Brown v Brown* (1828) 1 Hag Ecc 523; and see *Welde (alias Aston) v Welde* (1731) 2 Lee 580 at 586; *S- (falsely called E-) v E-* (1863) 3 Sw & Tr 240. Cf *L v L (falsely called W)* (1882) 7 PD 16 (operation involving no great risk to life; decree granted). The former practice of the court of adjourning a suit for further attempts when it deemed fit is obsolete: see *T v M (falsely called T)* (1865) LR 1 P & D 31; *M- (falsely called H-) v H-* (1864) 3 Sw & Tr 517 at 523.

2 In *W- v H- (falsely called W-)* (1861) 2 Sw & Tr 240 at 244, 245, it was said that, where a congenital malformation could be removed only at considerable risk to life, it would not be proper for a petitioner to propose that the respondent's life be placed in danger.

3 *S v S (otherwise C)* [1956] P 1, [1954] 3 All ER 736, applying observations of Lord Penzance in *G- v G-* (1871) LR 2 P & D 287 at 291, and citing *H v H* (31 March 1954, unreported), CA.

4 *WY v AY* 1946 SC 27, applied in *S v S (otherwise C)* [1956] P 1, [1954] 3 All ER 736 (where the husband was held to have failed to prove that his marriage was unconsummated through his wife's incapacity, for, though at the date of the presentation of the petition the wife was incapable, at the date of hearing she was willing to undergo, and during an adjournment (not for that purpose: see note 1) did undergo, an operation which removed the impediment); *S v S (otherwise W)* [1963] P 162, [1962] 3 All ER 816, CA; *Corbett v Corbett (otherwise Ashley)* [1971] P 83, [1970] 2 All ER 33.

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338. Refusal of medical examination or treatment.

A refusal by a respondent in a suit for nullity on the ground of impotence to undergo examination or treatment raises an inference¹ of incapacity on which the court may grant a decree, on affirmative evidence by or on behalf of the petitioner².

¹ In *W v S (otherwise W)* [1905] P 231, Sir Gorell Barnes P expressly refrained from inferring impotence from the wife's refusal to submit to medical examination, although he conceded that there were some cases where such an inference should be made.

² *Sparrow (falsely called Harrison) v Harrison* (1841) 3 Curt 16 (affd sub nom *Harrison v Harrison* (1848) 4 Moo PCC 96), PC; *W- v H- (falsely called W-)* (1861) 2 Sw & Tr 240; *E v E (otherwise T)* (1902) 50 WR 607; *B (otherwise H) v B* [1901] P 39; *S v B (falsely called S)* (1905) 21 TLR 219 (decree granted; inference drawn notwithstanding delay of 17 years); *W v S (otherwise W)* [1905] P 231; *G v G (falsely called K)* (1908) 25 TLR 328, CA (wife petitioner's refusal to undergo minor operation); *W v W (otherwise L)* [1912] P 78; *Re L (an infant)* [1968] P 119, [1967] 2 All ER 1110 (affd [1968] P 119 at 144, [1968] 1 All ER 20, CA). Cf, however, *Intract v Intract (otherwise Jacobs)* [1933] P 190 (woman respondent of unsound mind; order for inspection); and see *T v M (falsely called T)* (1865) LR 1 P & D 31. As to procedure on medical inspection see PARA 803 et seq.

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339. Sterility and contraception.

Proof that a wife is incapable of becoming a mother is not a sufficient ground for a decree of nullity, if she is capable of having sexual intercourse¹. The sterility of a husband, whether natural or artificial, as by the use of contraceptives, is also no ground for annulment².

1 *B-n v B-n* (1854) 1 Ecc & Ad 248, PC; *Baxter v Baxter* [1948] AC 274, [1947] 2 All ER 886, HL; cf *D-e v A-g (falsely calling herself D-e)* (1845) 1 Rob Eccl 279 (where there were further defects); *L- v L- (otherwise D-)* (1922) 38 TLR 697.

2 *Baxter v Baxter* [1948] AC 274, [1947] 2 All ER 886, HL, disapproving *J (otherwise S) v J* [1947] P 158, [1947] 2 All ER 43, CA; *R v R (otherwise F)* [1952] 1 All ER 1194 (penetration, but no ejaculation).

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340. Malformation etc.

It is open to a husband¹ or wife² to petition the court as soon as he or she discovers that the other, from malformation or other defect, is incapable of sexual intercourse.

1 Decrees were granted to husbands in *D-e v A-g (falsely calling herself D-e)* (1845) 1 Rob Eccl 279 (wife with no uterus and a vagina forming a cul-de-sac; complete coitus impossible); *W- v H- (falsely called W-)* (1861) 2 Sw & Tr 240 (congenital malformation of wife, rendering consummation impossible, only removable at considerable risk to her); *B v B* [1955] P 42, sub nom *D v D* [1954] 2 All ER 598 (wife with no vagina, artificial vagina created but defect not curable and proper intercourse impossible); *G- v G-* (1871) LR 2 P & D 287 (a middle-aged wife successfully resisted intercourse for nearly three years; no malformation; refusal to submit to remedies, because dangerous); *P v L (falsely called P)* (1873) 3 PD 73n (wife, aged 18, hysterical, struck husband when he attempted intercourse; threats to drown herself; refused remedies; said no sexual desire); *H v P (falsely called H)* (1873) LR 3 P & D 126 (three years' cohabitation; husband's attempts excited hysteria and flight; wife, aged 25, refused examination; cf the remarks of Hannen P in *S v A (otherwise S)* (1878) 3 PD 72 as to incapacity being inferred from persistent refusal); *L v L (falsely called W)* (1882) 7 PD 16 (wife aged 23; vaginismus; slept with husband occasionally for three years; refused slightly dangerous operation); *F v P (falsely called F)* (1896) 75 LT 192 (widow, no children, not a virgin, slept with second husband for five months; no defect in either; she admitted non-consummation; decree granted on ground of latent incapacity arising from hysteria); *E v E (otherwise T)* (1902) 50 WR 607 (wife resisted full intercourse for six months; declined to have children; refused inspection); *P v P (otherwise G)* (1909) 25 TLR 638 (respondent's declaration of incapacity); *C v C (otherwise H)* (1911) 27 TLR 421 (invincible repugnance; no cohabitation); *F v P (otherwise F)* (1911) 27 TLR 429 (one day's cohabitation, resistance and hysteria); *W v W (otherwise L)* [1912] P 78 (no cohabitation; respondent wrote, 'I can never be a wife to you'); *Vickery v Vickery (otherwise Cox)* (1920) 37 TLR 332 (prolonged resistance and hysteria over seven years); *G v G* [1924] AC 349, HL (invincible repugnance; incapacity inferred); *Clarke (otherwise Talbott) v Clarke* [1943] 2 All ER 540 (wife refused intercourse for 14 years, though she conceived a child by the husband through fecundatio ab extra, ie she had conceived without penetration actually occurring); cf *Snowman v Snowman* [1934] P 186 (two miscarriages through fecundatio ab extra); *M v M (otherwise B)* [1957] P 139, [1956] 3 All ER 769 (vaginismus; wife had not bothered to have an operation); *G v G (otherwise H)* [1961] P 87, [1960] 3 All ER 56 (wife's offer to undergo operation not genuine); *Corbett v Corbett (otherwise Ashley)* [1971] P 83, [1970] 2 All ER 33.

Decrees were refused in *Briggs v Morgan* (1820) 3 Phillim 325 (second marriage of wife of advanced age); *Brown v Brown* (1828) 1 Hag Ecc 523 (man 60, woman 52; court not satisfied impediment in wife had not been removed, but observed that he ought to take her tanquam soror, ie live with her as if she were his sister); *S v A (otherwise S)* (1878) 3 PD 72 (parties lived together nine years; court not satisfied as to husband's attempts); *Napier v Napier (otherwise Goodban)* [1915] P 65; affd [1915] P 184, CA (wife's refusal; incapacity not inferred); *Finegan v Finegan (otherwise McHardy)* (1917) 33 TLR 173 (wife's stipulation before marriage for no intercourse; incapacity not inferred); *Hudston v Hudston (otherwise Newbigging)* (1922) 39 TLR 108 (persistent refusal: see PARA 342); *T v T (otherwise J)* (1931) 47 TLR 629 (husband's allegation of non-consummation not accepted); *SY v SY (otherwise W)* [1963] P 37, sub nom *S v S (otherwise W) (No 2)* [1962] 3 All ER 55, CA (incapacity curable by operation).

2 Decrees were granted to wives in *Pollard (falsely called Wybourn) v Wybourn* (1828) 1 Hag Ecc 725 (husband 41, wife 17; 11 years later she was virgo intacta; he, having confessed his impotence, left the country); *N-r (falsely called M-e) v M-e* (1853) 2 Rob Eccl 625 (husband 45, wife 30; slept together for nearly two years; wife virgo intacta; husband impotent quoad hanc; per curiam, if both appear capable, the impotence must be attributed to the husband, unless the woman resists; but see PARA 863); *G-s (falsely called T-e) v T-e* (1854) 1 Ecc & Ad 389 (separation at end of three months; no perfect signs of virginity or of connection; husband, although no visible defect, believed to be incurably impotent); *Lewis (falsely called Hayward) v Hayward* (1866) 35 LJP & M 105, HL (virgo intacta after 14 years; onus on husband); *B (otherwise H) v B* [1901] P 39 (separate beds, eight months after marriage, against wife's wish; afterwards same bed and attempts; deed of separation unwillingly executed by wife; husband refused examination); *R (otherwise K) v R* (1907) 24 TLR 65 (wife seduced by another before marriage; husband admitted impotence); *J (otherwise K) v J* (1908) 24 TLR 622 (man's masturbation); *C (otherwise H) v C* [1921] P 399 (petitioner's evidence of man's impotence accepted, medical evidence inconclusive); *Kay v Kay* (1934) 152 LT 264 (wife virgin after three years; husband's

incapacity inferred); *REL (otherwise R) v EL* [1949] P 211, sub nom *L v L* [1949] 1 All ER 141 (wife had child by artificial insemination using husband's seed).

Decrees were refused in *U (falsely called J) v J* (1867) LR 1 P & D 460 (doctor's evidence uncertain and husband denied; wife's assertion not accepted), commented on in *C (otherwise H) v C* [1921] P 399; *S- (falsely called E-) v E-* (1863) 3 Sw & Tr 240 (court refused to assume permanent incapacity where, during a cohabitation of under three months, two attempts were made, unsuccessful owing to the husband's habit of masturbation (possibly curable), and the wife's health was affected); but cf *J (otherwise K) v J*.

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341. Petitioner's own incapacity.

A nullity suit is maintainable on the ground of the petitioner's own incapacity¹, provided that he or she was not aware of the incapacity at the time of the marriage, unless it is unjust in all the circumstances². The spouse whose defect or misfortune is the cause of the non-consummation is not entitled as of right in all circumstances to insist on a decree, regardless of the wishes, rights and interests of the spouse against whom no defect can be alleged³.

An averment of impotency quoad hunc or quoad hanc⁴ is sufficient to support a decree of nullity⁵.

1 *Harthan v Harthan* [1949] P 115, [1948] 2 All ER 639, CA. See also *Hodgkins v Hodgkins* [1950] P 183, [1950] 1 All ER 619, CA; *A v A (sued as B)* (1887) 19 LR Ir 403, CA; *G v G (falsely called K)* (1908) 25 TLR 328, CA (where the wife petitioner could have been cured by a slight operation; Cozens-Hardy MR at 329 said that it was a matter for the court's discretion, which it would exercise sparingly). Cf *Norton v Seton (falsely called Norton)* (1819) 3 Phillim 147; *Halfen (otherwise Boddington) v Boddington* (1881) 6 PD 13.

2 *Harthan v Harthan* [1949] P 115, [1948] 2 All ER 639, CA.

3 *Pettit v Pettit* [1963] P 177 at 186, 190, [1962] 3 All ER 37 at 40, 41, 44, CA; *Morgan v Morgan (otherwise Ransom)* [1959] P 92, [1959] 1 All ER 539; *Mogridge v Mogridge* (1965) 109 Sol Jo 814, CA.

4 I.e. impotency in respect of that particular man or woman.

5 *C (otherwise H) v C* [1921] P 399; and see *G v G (falsely called K)* (1908) 25 TLR 328, CA; *G v G* [1912] P 173; *N-r (falsely called M-e) v M-e* (1853) 2 Rob Eccl 625. See *The Countess of Essex's Case* (1613) 2 State Tr 785 at 858 (where the doctrine was first accepted).

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342. Wilful refusal to consummate.

A marriage¹ is voidable on the ground that the marriage has not been consummated² owing to the wilful refusal of the respondent to consummate it³. 'Wilful refusal' means a settled and definite decision come to without just excuse; but in order to determine whether there has been a refusal regard must be had to the whole history of the marriage⁴. The number of refused proposals for consummation required to establish wilful refusal will, therefore, vary with the circumstances of each case⁵. In some cases parties marry on the understanding that there will be no sexual intercourse⁶. The manner in which the proposals were made is to be considered, in particular whether they were made with the necessary tact, persuasion and encouragement which an ordinary spouse would use in the circumstances⁷. Wilful refusal must have persisted up to the date of the presentation of the petition⁸. The burden of proving affirmatively that the marriage has not been consummated is on the petitioner⁹.

1 le a marriage celebrated after 31 July 1971 (the day before the date on which the Nullity of Marriage Act 1971 (repealed) came into force). As to voidable marriages before 1 August 1971 see PARA 345.

2 As to the test for consummation see PARA 335.

3 Matrimonial Causes Act 1973 s 12(b). As to the exclusivity of these grounds see PARA 331 note 5.

4 *Horton v Horton* [1947] 2 All ER 871, HL; *S v S (otherwise C)* [1956] P 1, [1954] 3 All ER 736 (mere neglect to comply with a request is not necessarily the same as a refusal (see at 16 and at 744); whether refusal to have treatment amounts to wilful refusal depends on the history of the marriage as a whole (see at 15, 16 and at 743, 744)); *Jodla v Jodla (otherwise Czarnomska)* [1960] 1 All ER 625, [1960] 1 WLR 236 (Roman Catholics were married in a register office, it being agreed that a church ceremony should follow; failure by the husband to arrange for that ceremony, in spite of repeated requests by the wife for him to do so; amounted to wilful refusal on his part), followed in *Kaur v Singh* [1972] 1 All ER 292, [1972] 1 WLR 105, CA (failure to arrange Sikh religious ceremony). In a Canadian case it was held that refusal to consummate may be inferred where one spouse refuses to live with the other: see *G v G* [1974] 1 WWR 79, Man SC. See also *A v J (nullity proceedings)* [1989] 1 FLR 110, [1989] Fam Law 63.

5 See *Morgan v Morgan* [1949] WN 250, CA (parties lived together four days in all) (for comment on observations in that case see *S v S (otherwise C)* [1956] P 1 at 10, [1954] 3 All ER 736 at 740); *Way v Way* [1950] P 71, [1949] 2 All ER 959 ('Russian marriage' case; consummation proposed on two nights only); *Brown (otherwise Nuttall) v Brown* (1955) Times, 15 February (two nights; wife glad to get rid of husband who was incapable in respect of former marriage; it was held that there was no wilful refusal and no incapacity in respect of present marriage).

6 As to the effect of companionship agreements see *Scott v Scott (otherwise Fone)* [1959] P 103n, [1959] 1 All ER 531; *Morgan v Morgan (otherwise Ransom)* [1959] P 92, [1959] 1 All ER 539.

7 *Baxter v Baxter* [1947] 1 All ER 387 at 388, CA; on appeal [1948] AC 274, [1947] 2 All ER 886, HL; *Tudzinski v Tudzinska (otherwise Rusin)* (1960) Times, 9 November.

8 *S v S (otherwise C)* [1956] P 1 at 15, [1954] 3 All ER 736 at 743; *W v W (child of the family)* [1984] FLR 796 at 799, CA.

9 *Harthan v Harthan* as reported in [1948] 2 All ER 639 at 642, CA; *Potter v Potter* (1975) 5 Fam Law 161, CA; *A v J (nullity proceedings)* [1989] 1 FLR 110, [1989] Fam Law 63.

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C. VENEREAL DISEASE

343. Venereal disease.

A marriage¹ is voidable on the ground that at the time of the marriage the respondent was suffering from venereal disease² in a communicable³ form⁴.

1 le a marriage celebrated after 31 July 1971 (the day before the date on which the Nullity of Marriage Act 1971 (repealed) came into force). As to voidable marriages before 1 August 1971 see PARA 345.

2 le presumably whether innocently contracted or not: cf *Butler v Butler* [1917] P 244.

3 See *Lawrence v Lawrence* (2 June 1954, unreported) ('communicable' meant 'communicable to any person', so that, where the wife's syphilis was communicable to a child of the marriage but not to the husband, the husband was entitled to a decree).

4 Matrimonial Causes Act 1973 s 12(e); and see *C v C* (1962) 106 Sol Jo 959 (syphilis; decree granted). As to the exclusivity of these grounds see PARA 331 note 5.

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(iv) Marriages Celebrated before 1 August 1971

344. Void marriages.

A marriage celebrated before 1 August 1971¹ is void:

- 497 (1) where the marriage is bigamous²;
- 498 (2) where there is a mistake as to identity of the person with whom the contract of marriage is made or as to the nature, but not the effect of, the ceremony³;
- 499 (3) where the parties to the marriage are within the prohibited degrees of consanguinity and affinity⁴;
- 500 (4) where the due forms and ceremonies are not observed in the marriage⁵;
- 501 (5) where either party is not of age⁶;
- 502 (6) where the marriage is a sham⁷;
- 503 (7) where the parties are not respectively male and female⁸.

¹ I.e. the date on which the Nullity of Marriage Act 1971 came into force. As to void marriages celebrated after that date see PARA 326 et seq.

² I.e. where at the time of the ceremony of marriage one spouse was already married and the other party to the previous marriage was still alive and the marriage still subsisting: see PARA 10; *Dalrymple v Dalrymple* (1811) 2 Hag Con 54 (on appeal (1814) 2 Hag Con 137n); *Hayes (falsely called Watts) v Watts* (1819) 3 Phillim 43. A decree of nullity follows as of right: *Miles v Chilton (falsely called Miles)* (1849) 1 Rob Eccl 684; *Andrews (falsely called Ross) v Ross* (1888) 14 PD 15; cf *Turner v Meyers* (1808) 1 Hag Con 414 at 418. The presumption of law that a person, who has not been seen or heard of for not less than seven years, is dead is rebuttable, and the onus of proving death at any particular date is on the person to whose title that fact is essential: see *Lal Chand Marwari v Mahant Ramrup Gir* (1925) 42 TLR 159, PC; *Ivett v Ivett* (1930) 94 JP 237; *Spurgeon v Spurgeon* (1940) 46 TLR 396 (husband's disappearance 22 years previously); *Parkinson v Parkinson* [1939] P 346, [1939] 3 All ER 108 (separation deed; absence of over seven years; facts disclosed left matter of wife's death one of pure speculation; husband held to be entitled to decree); *Tweney v Tweney* [1946] P 180, [1946] 1 All ER 564 (husband disappeared; after ten years, the wife who had made all reasonable attempts to trace him, without success, remarried; she was held to be entitled to pray for a decree dissolving her second marriage, for the second marriage had been properly celebrated, and no evidence had been given to lead the court to doubt that fact); *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721; *Bradshaw v Bradshaw* [1956] P 274n, DC; *Bullock v Bullock* [1960] 2 All ER 307, [1960] 1 WLR 975, DC; *Bennett v Bennett* (1961) 105 Sol Jo 885, CA; cf *Re Peete, Peete v Crompton* [1952] 2 All ER 599; and *Re Watkins, Watkins v Watkins* [1953] 2 All ER 1113, [1953] 1 WLR 1323 (cases under the Inheritance (Family Provision) Act 1938 s 1 as to who could be described as a widow). See also *Bowzer v Ricketts (falsely calling herself Bowzer)* (1795) 1 Hag Con 213; *Bruce v Burke* (1825) 2 Add 471; *Miles v Chilton (falsely called Miles)* (1849) 1 Rob Eccl 684 (misconduct no bar); *Chichester v Mure (falsely called Chichester)* (1863) 3 Sw & Tr 223; *Rogers (otherwise Briscoe, falsely called Halmshaw) v Halmshaw* (1864) 3 Sw & Tr 509; *Noble v Noble and Godman* (1869) LR 1 P & D 691 (marriage between decree nisi and decree absolute bigamous); *Wickham v Wickham* (1880) 6 PD 11; *Bateman v Bateman (otherwise Harrison)* (1898) 78 LT 472; *Trew v Trew (otherwise Lineham)* (1953) Times, 13 February (wife's first marriage in 1922; newspaper report of husband's death 1936; remarriage 1938, but husband in fact living); *Kassim (otherwise Widmann) v Kassim (otherwise Hassim)* [1962] P 224, [1962] 3 All ER 426.

³ See eg *Mehta (otherwise Kohn) v Mehta* [1945] 2 All ER 690 (Hindu ceremony of marriage mistaken for betrothal ceremony). The law in respect of marriage celebrated after 31 July 1971 is different: see PARA 326 et seq.

⁴ See PARAS 35-37.

⁵ See PARA 53 et seq.

6 See PARA 41.

7 Eg a mock marriage in a masquerade: see *Moss v Moss* [1897] P 263 at 269. See also *Dunn v Dunn's Trustees* 1930 SC 131 at 135, 141, 146; but cf *Dalrymple v Dalrymple* (1811) 2 Hag Con 54 at 105 (on appeal (1814) 2 Hag Con 137n); *M'Adam v Walker* (1813) 1 Dow 148 at 190; *Bell v Graham* (1859) 13 Moo PCC 242; *Dysart Peerage Case* (1881) 6 App Cas 489 at 537, HL; *H v H* [1954] P 258 at 267, [1953] 2 All ER 1229 at 1233.

8 *Corbett v Corbett (otherwise Ashley)* [1971] P 83, [1970] 2 All ER 33 (the test is a biological one); *Talbot (otherwise Poyntz) v Talbot (otherwise Talbot)* (1967) 111 Sol Jo 213.

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345. Voidable marriages.

A marriage celebrated before 1 August 1971¹ is voidable where either party is impotent², where the marriage has been induced by threats, fear or duress³, or where one spouse was intoxicated at the time of the ceremony⁴.

Without prejudice to any other grounds on which a marriage celebrated before 1 August 1971 is by law void⁵ or voidable, a marriage celebrated before that date is voidable on the ground:

- 504 (1) that the marriage has not been consummated owing to the wilful refusal of the respondent spouse to consummate it⁶;
- 505 (2) that, at the time of the marriage either party to the marriage:
 - 10
 - 13. (a) was of unsound mind⁷;
 - 14. (b) was suffering from mental disorder⁸ of such a kind or to such an extent as to be unfitted for marriage and the procreation of children⁹; or
 - 15. (c) was subject to recurrent attacks¹⁰ of insanity or epilepsy¹¹;
 - 11
- 506 (3) that at the time of the marriage the respondent was suffering from venereal disease¹² in a communicable form¹³;
- 507 (4) that at the time of the marriage the respondent was pregnant by some person other than the petitioner¹⁴; or
- 508 (5) that an interim gender recognition certificate¹⁵ has been issued to either party to the marriage¹⁶.

In cases falling under heads (2)-(4) above the court¹⁷ must not grant a decree unless it is satisfied that:

- 509 (i) the petitioner was, at the time of the marriage, ignorant of the facts alleged¹⁸;
- 510 (ii) proceedings were instituted within a year from the date of the marriage¹⁹; and
- 511 (iii) marital intercourse with the consent of the petitioner has not taken place since the petitioner discovered²⁰ the existence of the grounds for a decree²¹,

and in a case falling within head (5) above the court must not grant a decree of nullity unless it is satisfied that proceedings were instituted within six months from the date of issue of the interim gender recognition certificate²².

1 le the date on which the Nullity of Marriage Act 1971 came into force. As to voidable marriages celebrated after that date see PARA 331 et seq.

2 le where there is practical impossibility, subsisting at the time of the marriage, of consummating the marriage: see *Greenstreet (falsely called Cumyngs) v Cumyngs* (1612) 2 Hag Con 332; *Brown v Brown* (1828) 1 Hag Ecc 523 (impotency must subsist at the time of marriage); *A v B* (1868) LR 1 P & D 559 (marriage rendered voidable); *G- v G-* (1871) LR 2 P & D 287 (practical impossibility of consummation); *Turner v Thompson* (1888) 13 PD 37; *S v S (otherwise C)* [1956] P 1 at 14, [1954] 3 All ER 736 at 741, applying *G- v G-* and *H v H* (31 March 1954, unreported), CA. See generally PARA 336.

3 See *H v H* [1954] P 258 at 266, [1953] 2 All ER 1229 at 1232 (consent to marriage negated by fear of remaining in a particular country; marriage to obtain a foreign passport; no valid marriage in absence of consent); *Silver (otherwise Kraft) v Silver* [1955] 2 All ER 614, [1955] 1 WLR 728 (ceremony of marriage to enable parties to represent themselves as man and wife; valid marriage where no element of duress); *Parojcic (otherwise Ivetic) v Parojcic* [1959] 1 All ER 1 at 3, 4, [1958] 1 WLR 1280 at 1283; *Buckland v Buckland (otherwise Camilleri)* [1968] P 296, [1967] 2 All ER 300; *Singh v Singh* [1971] P 226, [1971] 2 All ER 828, CA; *Szechter (otherwise Karsov) v Szechter* [1971] P 286, [1970] 3 All ER 905; and PARAS 42, 43.

4 *Sullivan v Sullivan (falsely called Oldacre)* (1818) 2 Hag Con 238 at 246; affd sub nom *Sullivan v Oldacre (falsely called Sullivan)* (1819) 3 Phillim 45; cf *Johnston v Brown* 1823 2 Sh (Ct of Sess) 495 at 495, 496 (in both these cases such a marriage appears to have been considered void). See contra *Roblin v Roblin* (1881) 28 Gr 439; and see *Reid v Aull* (1914) 32 OLR 68, Ont HC.

5 See also PARA 320.

6 Matrimonial Causes Act 1973 Sch 1 para 11(1)(a).

7 Matrimonial Causes Act 1973 Sch 1 para 11(1)(b)(i).

8 Ie within the meaning of the Mental Health Act 1959 (repealed): see now the Mental Health Act 1983 s 1(2); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402. In relation to a marriage celebrated before 1 November 1960, the marriage is voidable if, at the time of the marriage, either party was a mental defective within the meaning of the Mental Deficiency Acts 1913 to 1938 (repealed): Matrimonial Causes Act 1973 Sch 1 para 11(2).

9 Matrimonial Causes Act 1973 Sch 1 para 11(1)(b)(ii).

10 In relation to a marriage celebrated before 1 November 1960, the word 'fits' is to be substituted for the word 'attacks': Matrimonial Causes Act 1973 Sch 1 para 11(2). See also *Robinson v Robinson (by his guardian)* [1965] P 192, [1964] 3 All ER 232; *Woolley v Woolley (by her guardian)* [1968] P 29, [1968] 3 All ER 855.

11 Matrimonial Causes Act 1973 Sch 1 para 11(1)(b)(iii). See *Bennett v Bennett* [1969] 1 All ER 539, [1969] 1 WLR 430; *Speller (otherwise Spearman) v Speller* (1952) Times, 25 November (wife petitioner appearing in person successfully pleaded her own insanity at the time of the marriage). Where the court is satisfied on this ground, it will not investigate a charge of wilful refusal to consummate the marriage: *Iddenden (otherwise Brians) v Iddenden* [1958] 3 All ER 241, [1958] 1 WLR 1041.

12 See *C v C* (1962) 106 Sol Jo 959.

13 Matrimonial Causes Act 1973 Sch 1 para 11(1)(c).

14 Matrimonial Causes Act 1973 Sch 1 para 11(1)(d). See *Jackson v Jackson (otherwise Prudom)* [1939] P 172, [1939] 1 All ER 471; *Smith v Smith* [1948] P 77, [1947] 2 All ER 741, CA. In *Liff v Liff (otherwise Rigby)* [1948] WN 128, evidence as to blood groups of the spouses and the child was admitted.

15 Ie under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

16 Matrimonial Causes Act 1973 Sch 1 para 11(1)(e) (Sch 1 para 11(1)(e), (3A) added by the Gender Recognition Act 2004 Sch 2 paras 1, 4).

17 As to the meaning of 'court' see PARA 346 note 2.

18 Matrimonial Causes Act 1973 Sch 111 para 11(3)(a). See *W v W* (1965) 109 Sol Jo 920.

19 Matrimonial Causes Act 1973 Sch 111 para 11(3)(b). See *Chaplin v Chaplin* [1949] P 72, [1948] 2 All ER 408, CA (time limitation absolute; not affected by equitable principle of granting relief for fraudulent concealment, in this case of pregnancy per alium).

20 See *Smith v Smith* [1948] P 77, [1947] 2 All ER 741, CA (pregnancy per alium; marital intercourse with knowledge of facts on which a reasonable person would have drawn such a conclusion, although petitioner did not).

21 Matrimonial Causes Act 1973 Sch 111 para 11(3)(c). Where the proceedings in respect of the marriage are instituted after 31 July 1971, the application of s 13(1) (see PARA 321) in relation to the marriage is without prejudice to Sch 1 para 11(1)-(3)(a)-(c): Sch 1 para 11(3). See also *Watts v Watts* (1968) 112 Sol Jo 964.

22 Matrimonial Causes Act 1973 Sch 1 para 11(3A) (as added: see note 16).

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(3) DIVORCE, DISSOLUTION AND JUDICIAL AND LEGAL SEPARATION

(i) Grounds

346. Irretrievable breakdown sole ground for divorce, dissolution or separation.

The sole ground on which a petition for divorce or an application for a dissolution order¹ may be presented or made to the court² by either party to a marriage or civil partnership is that the marriage or civil partnership has broken down irretrievably³.

A petition for judicial separation or a separation order⁴ may be presented or made to the court by either party to a marriage or civil partnership on the ground that any such fact as may prove irretrievable breakdown⁵ exists⁶.

1 A dissolution order is an order of the court which dissolves a civil partnership on the ground that it has broken down irretrievably: Civil Partnership Act 2004 s 37(1)(a).

2 For the purposes of matrimonial and civil partnership proceedings generally 'court', except where the context otherwise requires, means the High Court or, where a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-44) (see PARA 731 et seq), a county court: Matrimonial Causes Act 1973 s 52(1) (amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 16); Matrimonial and Family Proceedings Act 1984 s 27; Civil Partnership Act 2004 s 37(4), Sch 5 para 80(3), Sch 7 para 19. For the purposes of relevant provisions of the Family Law Act 1986 'court' means the High Court or a county court: s 63.

A petition for divorce or an application for the dissolution of a civil partnership is a civil and not a criminal proceeding: see *Galler v Galler* [1954] P 252 at 257, [1954] 1 All ER 536 at 540, CA (following the speech of Lord MacDermott in *Preston-Jones v Preston-Jones* [1951] AC 391 at 417, [1951] 1 All ER 124 at 138, HL); *Mordaunt v Moncreiffe* (1874) LR 2 Sc & Div 374, HL; *Branford v Branford* (1879) 4 PD 72; *Davis v Davis* [1950] P 125 at 128, [1950] 1 All ER 40 at 42, CA; *Gower v Gower* [1950] 1 All ER 804 at 806, CA; *Bater v Bater* [1951] P 35 at 38, [1950] 2 All ER 458 at 460, CA; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 All ER 970, CA. It has been held that marriage, whether solemnised in a church or a register office, whether contracted between Christians or between those who have no religious belief, must in each case have the same legal consequences, and that the solution to the questions which arise for determination in divorce cases must be found on the true construction of the relevant Acts of Parliament, not from a consideration of the Christian doctrine of marriage as laid down in the Book of Common Prayer: *Weatherley v Weatherley* [1947] AC 628 at 633, [1947] 1 All ER 563 at 565, HL per Lord Jowitt LC; and see *Baxter v Baxter* [1948] AC 274 at 286, [1947] 2 All ER 886 at 890, HL per Lord Jowitt LC. The law of the land cannot be co-extensive with the law of morals; nor can the civil consequences of marriage be identical with the religious consequences: *Weatherley v Weatherley*; see also *Buchler v Buchler* [1947] P 25 at 41-42, [1947] 1 All ER 319 at 324, CA per Lord Greene MR.

3 Matrimonial Causes Act 1973 s 1(1); Civil Partnership Act 2004 s 44(1). As to the bar on petitions and applications in first year of a marriage or civil partnership see PARA 757; as to proof of breakdown see PARA 347; and as to the duty of the court on a petition or application see PARA 348.

These requirements are to be read disjunctively, the two separate requirements being, first, that the marriage or civil partnership has irretrievably broken down and, secondly, that the court is satisfied of one or more of the facts proving such irretrievable breakdown (see PARA 347): *Buffery v Buffery* [1988] FCR 465, [1988] 2 FLR 365, CA, approving *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47 at 54, [1974] 2 All ER 766 at 771 per Dunn J and *O'Neill v O'Neill* [1975] 3 All ER 289 at 292, [1975] 1 WLR 1118 at 1121, CA per Cairns LJ.

4 A separation order is an order of the court which provides for the separation of the civil partners: Civil Partnership Act 2004 s 37(1)(b). As to the meaning of 'civil partner' see PARA 2 note 1.

5 le any such fact as is mentioned in the Matrimonial Causes Act 1973 s 1(2) or the Civil Partnership Act 2004 s 44(5) (see PARA 347).

6 Matrimonial Causes Act 1973 s 17(1); Civil Partnership Act 2004 s 56(1). The provisions of the Matrimonial Causes Act 1973 s 2 and the Civil Partnership Act 2004 s 45 apply for the purposes of a petition for judicial separation or a separation order as they apply in relation to a petition for divorce or dissolution: Matrimonial Causes Act 1973 s 17(1); Civil Partnership Act 2004 s 56(4).

A decree or order for separation does not in general constitute a bar to a suit for divorce, dissolution or separation: see *Yeatman v Yeatman and Rummell* (1870) 21 LT 733; *Brown v Brown and Shelton* (1874) LR 3 P & D 202; but see *Besant v Wood* (1879) 12 ChD 605; *Gandy v Gandy* (1882) 7 PD 168, CA. See also *Kunski v Kunski and Josephs* (1907) 23 TLR 615; *Matthews v Matthews* (1860) 3 Sw & Tr 161 (dismissal of petition brought six years after alleged cruelty and desertion on ground of a collateral purpose); *Flower v Flower* (1873) LR 3 P & D 132 (judicial separation). As to the need to plead any objections see also *Williams v Williams* (1866) LR 1 P & D 178. Cf *Stone v Stone and Osborne* [1917] P 125 (husband granted divorce despite his statutory desertion). As to the extent to which agreements for separation may be a bar to petitions founded on desertion see PARA 371 et seq.

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347. Proof of irretrievable breakdown.

The court¹ must not hold that a marriage or civil partnership has broken down irretrievably² unless the petitioner³ satisfies⁴ the court of one or more of the following facts⁵, that is to say:

- 512 (1) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent⁶;
- 513 (2) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition or the making of the application⁷;
- 514 (3) that the parties have lived apart⁸ for a continuous period of at least two years immediately preceding the presentation of the petition or the making of the application ('two years' separation') and the respondent consents to a decree being granted or a dissolution order being made⁹;
- 515 (4) that the parties have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition or the making of the application ('five years' separation')¹⁰; and
- 516 (5) in the case of marriages only, that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent¹¹.

If in any proceedings for divorce or dissolution the respondent alleges and proves any of these facts, treating the respondent as the petitioner and the petitioner as the respondent for that purpose, the court may give to the respondent the relief to which he would have been entitled if he had presented a petition seeking that relief¹².

1 As to the meaning of 'court' see PARA 346 note 2.

2 See PARA 346. The date at which the breakdown must be proved to be irretrievable is the date of the hearing of the suit: *Pheasant v Pheasant* [1972] Fam 202, [1972] 1 All ER 587.

3 As to petitions and applications see PARA 321 note 1.

4 As to the standard of proof required see PARAS 352, 369, 393. A simple assertion by one party of irretrievable breakdown is not sufficient on its own to satisfy the court: *Ash v Ash* [1972] Fam 135, [1972] 1 All ER 582.

5 Matrimonial Causes Act 1973 s 1(2); Civil Partnership Act 2004 s 44(3); and see *Buffery v Buffery* [1988] FCR 465, [1988] 2 FLR 365, CA (cited in PARA 346 note 3). See also *Morley v Morley* (1972) 117 Sol Jo 69 (wife alleged two facts, one of which the husband admitted; he was not seeking to rely on conduct in any proceedings by the wife for financial provision; the court declined to investigate the unadmitted fact and granted a decree on the admitted one); cf *Mustafa v Mustafa* [1975] 3 All ER 355, [1975] 1 WLR 1277 (husband alleged adultery which wife denied but cross-prayed on the grounds that the marriage had irretrievably broken down and also alleged adultery by husband which he admitted; it was held that, in order to understand the underlying matters which would affect the ancillary issues, all the allegations must be investigated). Where there are facts sufficient to enable a court to grant a decree of dissolution, it is in general wrong to permit a party to have other allegations investigated: *Grenfell v Grenfell* [1978] Fam 128, [1978] 1 All ER 561, CA.

6 Matrimonial Causes Act 1973 s 1(2)(b); Civil Partnership Act 2004 s 44(5)(a). See PARA 359.

7 Matrimonial Causes Act 1973 s 1(2)(c); Civil Partnership Act 2004 s 44(5)(d). See PARA 363. The court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing

the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that the desertion continued at that time: Matrimonial Causes Act 1973 s 2(4); Civil Partnership Act 2004 s 45(5).

8 For the purposes of the Matrimonial Causes Act 1973 ss 1(2)(d), (e), 2 and the Civil Partnership Act 2004 ss 44(5)(b), (c), 45 a husband and wife or civil partners are to be treated as living apart unless they are living with each other in the same household, and references in these provisions to the parties to a marriage or civil partnership living with each other are construed as references to their living with each other in the same household: Matrimonial Causes Act 1973 s 2(6); Civil Partnership Act 2004 s 45(8). See *Mouncer v Mouncer* [1972] 1 All ER 289, [1972] 1 WLR 321 (parties living in the same household and not living apart); *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA ('living apart' does not mean the same as 'has deserted', nor does 'living apart' impute any fault). The legislation does not use the word 'house', which relates to something physical, but 'household', which has an abstract meaning, and the word 'household' essentially refers to people held together by a particular kind of tie, even if temporarily separated: see *Santos v Santos* (preferring *Smith v Smith* [1940] P 49, [1939] 4 All ER 533 to *Evans v Evans* [1948] 1 KB 175, [1947] 2 All ER 656, DC); *Fuller (otherwise Penfold) v Fuller* [1973] 2 All ER 650, [1973] 1 WLR 730, CA (parties living in the same household but nevertheless living apart); and PARA 368.

9 Matrimonial Causes Act 1973 s 1(2)(d); Civil Partnership Act 2004 s 44(5)(b). See PARA 407. As to the meaning of 'dissolution order' see PARA 346 note 1.

10 Matrimonial Causes Act 1973 s 1(2)(e); Civil Partnership Act 2004 s 44(5)(c). See PARA 410 et seq.

11 Matrimonial Causes Act 1973 s 1(2)(a). See PARA 350 et seq. The absence of adultery from the list of 'facts' which may establish the irretrievable breakdown of a civil partnership under the Civil Partnership Act 2004 s 44(5) is the only difference between that list and the list of 'facts' which may establish the irretrievable breakdown of a marriage under the Matrimonial Causes Act 1973 s 1(2); however, since adultery as a fact leading to divorce additionally requires that the petitioner finds it intolerable to live with the respondent, a situation which is already covered by the Matrimonial Causes Act 1973 s 1(2)(b) and the Civil Partnership Act 2004 s 44(5)(a) (see the text and note 6), it may be argued that the inclusion of adultery as a 'fact' for the purposes of the Matrimonial Causes Act 1973 is otiose and that for this reason adultery has been deliberately omitted from the Civil Partnership Act 2004.

12 Matrimonial Causes Act 1973 s 20; Civil Partnership Act 2004 s 62.

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348. Inquiry into facts and making of order or decree.

On a petition for divorce or judicial separation or an application for a dissolution or separation order¹ it is the duty of the court² to inquire, so far as it reasonably can, into the facts³ alleged by the petitioner or applicant and into any facts alleged by the respondent⁴. If the court is satisfied on the evidence of any such fact, then (unless the proceedings are for divorce or dissolution and it is satisfied on all the evidence that the marriage or civil partnership has not broken down irretrievably), it must grant the decree or order sought⁵.

1 As to the meanings of 'dissolution order' and 'separation order' see PARA 346 notes 1, 4.

2 As to the meaning of 'court' see PARA 346 note 2.

3 As to the facts which are proof of irretrievable breakdown see PARA 347.

4 Matrimonial Causes Act 1973 ss 1(3), 17(2); Civil Partnership Act 2004 ss 44(2), 56(2). As to the position in undefended causes see PARAS 814, 816. Once the judge has certified that the petitioner or applicant has proved the contents of the petition or application and is entitled to the decree or order sought, the court is bound to grant the decree or order: see *Day v Day* [1980] Fam 29, [1979] 2 All ER 187, CA.

5 Matrimonial Causes Act 1973 ss 1(4), 17(2) (s 1(4) amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 10); Civil Partnership Act 2004 ss 44(4), 56(3). This is subject to the Matrimonial Causes Act 1973 s 5 and the Civil Partnership Act 2004 s 47 (refusal of divorce or dissolution in five-year separation cases on grounds of grave hardship: see PARA 411) and to the Matrimonial Causes Act 1973 s 41 or, as the case may be, the Civil Partnership Act 2004 s 63 (restriction on making orders affecting children: see PARA 884). The provisions of the Matrimonial Causes Act 1973 ss 6, 7 (see PARAS 414, 859) also apply for the purpose of encouraging the reconciliation of parties to separation proceedings and of enabling the parties to a marriage to refer to the court for its opinion an agreement or arrangement relevant to actual or contemplated separation proceedings as they apply in relation to a petition for divorce: Matrimonial Causes Act 1973 s 17(3).

Where a respondent seeks to rely on the Matrimonial Causes Act 1973 s 1(4) (or, presumably, the Civil Partnership Act 2004 s 44(4)) it is desirable that the submission (that the marriage or civil partnership has not broken down irretrievably) together with particulars of the positive case in support of that submission should be pleaded in the answer: *Kisala v Kisala* (1973) 117 Sol Jo 664.

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(ii) Adultery

349. Meaning of 'adultery'.

For the purposes of a petition for divorce¹, 'adultery' means voluntary² sexual intercourse³ between a married person and a person of the opposite sex⁴, who is not the other spouse⁵, during the subsistence⁶ of the marriage⁷. In the case of a polygamous marriage permitted by the appropriate personal law or laws⁸, it would appear that one wife is not entitled to rely on her husband's sexual intercourse with the other wife (or with a concubine whose status is legally recognised⁹) as adultery¹⁰.

It is immaterial that the marriage has not been consummated¹¹, unless, perhaps, the offender seeks, in answer, to avoid the marriage on that ground¹². One act of adultery may be sufficient¹³. When sexual intercourse¹⁴ is proved to have taken place between the respondent and someone other than the petitioner, that intercourse is deemed to have been voluntary, and it is for the respondent to show that it was not so¹⁵. The motive for the respondent's adultery is irrelevant¹⁶.

1 Adultery is a 'fact' for the purposes of divorce but not for the purposes of the dissolution of a civil partnership: see the Matrimonial Causes Act 1973 s 1(2); the Civil Partnership Act 2004 s 44(5); and PARA 347.

2 If a wife is raped by another man, it is not adultery by her: *Redpath v Redpath and Milligan* [1950] 1 All ER 600, CA; *Clarkson v Clarkson* (1930) 46 TLR 623; *Coffey v Coffey* [1898] P 169. Thus, where intercourse was not voluntary, it was held that the wife had not committed adultery, but that the co-respondent had (*Long v Long and Johnson* (1890) 15 PD 218; *Clark v Clark* (1954) Times, 3 June, CA (rape not proved by wife; inference of adultery properly drawn)). It is not adultery if the spouse is unable to understand the nature of the sexual act (*Yarrow v Yarrow* [1892] P 92). Adultery is not a criminal offence (*Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, [1942] 2 All ER 187, CA; *Tilley v Tilley* [1949] P 240 at 258, [1948] 2 All ER 1113 at 1122, CA); it has been described as a 'quasi-criminal offence' (*Ginesi v Ginesi* [1948] P 179 at 181, [1948] 1 All ER 373 at 374, CA; *Fairman v Fairman* [1949] P 341 at 344, [1949] 1 All ER 938 at 940, DC), but this description was condemned in *Gower v Gower* [1950] 1 All ER 804 at 805, 806, CA; and in *Bater v Bater* [1951] P 35, [1950] 2 All ER 458, CA; and see *Branford v Branford* (1879) 4 PD 72 at 73; *Lewis v Lewis* [1958] P 193, [1958] 1 All ER 859, CA.

3 To constitute adultery as a ground of divorce, some penetration of the woman by the man must be found to have taken place, but it is not necessary that such penetration should constitute a complete act of intercourse; cf the meaning of 'consummation' in nullity cases (see PARA 335). The act of sexual intercourse need not be complete, but an attempt without penetration is insufficient: *Dennis v Dennis (Spillet cited)* [1955] P 153, [1955] 2 All ER 51, CA. See also *Sapsford v Sapsford and Furtado* [1954] P 394, [1954] 2 All ER 373 (masturbation of the co-respondent by the respondent does not amount to adultery), following the dicta in *Rutherford v Richardson* [1923] AC 1 at 11, HL, and in *Thompson (otherwise Hulton) v Thompson* [1938] P 162 at 173, [1938] 2 All ER 727 at 732; affd [1939] P 1, [1938] 4 All ER 1, CA. Hence artificial insemination of a wife by a donor who is not the husband will not constitute adultery, since there is no penetration of the woman by the man: see *MacLennan v MacLennan* 1958 SC 105. As to the evidence from which adultery may be inferred see PARA 353 et seq.

4 As to the principles to be applied in the determination of the sexual condition of an individual see PARA 1 note 2.

5 Sexual intercourse between two unmarried persons is not adultery (*Chorlton v Chorlton* [1952] P 169, [1952] 1 All ER 611, DC (proceedings for discharge of maintenance order on ground of adultery by divorced wife); cf *Abson v Abson* [1952] P 55, [1952] 1 All ER 370 (application for discharge of maintenance order on ground of adultery; intercourse between divorced wife and married man; held by Karminski J that wife had committed adultery, Lord Merriman P leaving the question undecided whether wife's conduct amounted to adultery for the particular purpose of the application in question; but it was held that order should be

discharged as wife's right to maintenance should be dealt with by High Court)). See also *Dennis v Dennis (Spillet cited)* [1955] P 153, [1955] 2 All ER 51, CA; *Styles v Styles and Jackson* (1890) 62 LT 613; *Mawford v Mawford* (1866) 14 WR 516; *Weatherley v Weatherley* (1854) 1 Ecc & Ad 193 as criticised in *Fitzgerald v Fitzgerald* (1862) 32 LJP & A 12; *Graves v Graves* (1842) 3 Curt 235; *Dillon v Dillon* (1842) 3 Curt 86; *Perrin v Perrin* (1822) 1 Add 1; *Reeves v Reeves* (1813) 2 Phillim 125; and cf *Best v Best* (1823) 1 Add 411.

6 The adultery alleged must take place prior to the presentation of the petition, but evidence of adultery after the date is admissible to assist the court in determining the nature of former acts of familiarity: see *Wales v Wales* [1900] P 63; *Boddy v Boddy and Grover* (1860) 30 LJP & A 23; cf *Duke of Norfolk's Case* (1692) 12 State Tr 927 at 945. Evidence of ante-nuptial intercourse is usually inadmissible, but it is otherwise where the adultery is charged with a person with whom there had been ante-nuptial intercourse: see *Goode v Goode and Hamson* (1861) 2 Sw & Tr 253 at 258; *Weatherley v Weatherley* (1854) 1 Ecc & Ad 193; *Graves v Graves* (1842) 3 Curt 235; *Dillon v Dillon* (1842) 3 Curt 86; *Sullivan v Sullivan* (1824) 2 Add 299 at 306; *Perrin v Perrin* (1822) 1 Add 1; *Ewing v Wheatley* (1814) 2 Hag Con 175 at 183; cf *Fitzgerald v Fitzgerald* (1862) 32 LJP & A 12.

7 The marriage must be proved: see *Evans v Evans and Robinson* (1859) 1 Sw & Tr 328; *Guest v Shipley (falsely called Guest)* (1820) 2 Hag Con 321 at 322. Both parties to the marriage must be alive: see *Stanhope v Stanhope* (1886) 11 PD 103; *Grant v Grant and Bowles and Pattison* (1862) 2 Sw & Tr 522.

8 See PARA 9; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 234-240.

9 Cf *Lee v Lau* [1967] P 14, [1964] 2 All ER 248.

10 See PARA 9; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 234-240; Law Com No 42 (Family Law Report on Polygamous Marriages) para 50; *Onobrauche v Onobrauche* (1978) 8 Fam Law 107.

11 *Waters v Waters and Gentel* (1875) 33 LT 579; *Ousey v Ousey and Atkinson* (1874) LR 3 P & D 223; *Graves v Graves* (1864) 3 Sw & Tr 350; *Patrick v Patrick* (1810) 3 Phillim 496.

12 See PARA 331 et seq. In such a case the question of annulment must be tried first: *S (otherwise P) v S* [1970] P 208, [1970] 2 All ER 251.

13 *Douglas v Douglas* [1951] P 85 at 96, [1950] 2 All ER 748 at 753, CA; *Churchman v Churchman* [1945] P 44 at 50, [1945] 2 All ER 190 at 194, CA; *Conradi v Conradi, Worrall and Way* (1868) LR 1 P & D 514 at 522; *Gipps v Gipps and Hume* (1864) 11 HL Cas 1 at 28. See, however, PARA 350.

14 *le coitus* is established: see PARA 335 note 4. As to proof see PARA 352 et seq.

15 *Redpath v Redpath and Milligan* [1950] 1 All ER 600, CA. As to the effect of drink or drugs see *Goshawk v Goshawk* (1965) 109 Sol Jo 290 (wife had committed adultery, although her memory of what had occurred was destroyed by drink); *Benton v Benton* [1958] P 12, [1957] 3 All ER 544, CA (tranquillising drug did not affect husband's reasoning powers; intercourse was voluntary and adulterous); *Prior v Prior and Strong* (1929) 73 Sol Jo 441. As to insanity see *N v N (C (by her guardian) intervening)* (1963) 107 Sol Jo 1025; *S v S (O otherwise P (by her guardian) intervening)* [1962] P 133, [1961] 3 All ER 133; *Hanbury v Hanbury* [1892] P 222; affd 8 TLR 559. Cf *Morton v Morton, Daly and McNaught* [1937] P 151, [1937] 2 All ER 470 (no defence for co-respondent to prove that he was seduced by respondent). As to inferring adultery from proof of inclination, association or opportunity see PARA 353.

16 *Woolf v Woolf* [1931] P 134 at 145, CA.

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350. Adultery as proof of irretrievable breakdown.

The mere fact that the respondent has committed adultery is not enough to satisfy the test of irretrievable breakdown of marriage; the petitioner must also find it intolerable to live with the respondent¹.

¹ See the Matrimonial Causes Act 1973 s 1(2)(a); and PARA 347. As to the requirement of intolerability see *Cleary v Cleary* [1974] 1 All ER 498, [1974] 1 WLR 73, CA, followed with some misgivings in *Carr v Carr* [1974] 1 All ER 1193, [1974] 1 WLR 1534, CA; *Pheasant v Pheasant* [1972] Fam 202 at 207, [1972] 1 All ER 587 at 589. The test is an objective one: *Goodrich v Goodrich* [1971] 2 All ER 1340, [1971] 1 WLR 1142. As to the effect of living together after adultery see PARA 351. See also *Anderson v Anderson* (1972) 117 Sol Jo 33 (it is necessary only to prove the adultery and that the petitioner finds it intolerable to live with the respondent; the allegation that adultery did not cause the irretrievable breakdown is irrelevant, since it is not a matter in issue between the parties).

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351. Living with each other after knowledge of adultery.

The petitioner is not entitled to rely on the respondent's adultery if, after it has become known to the petitioner, the parties have lived with each other¹ for a period exceeding, or periods together exceeding, six months². Where the parties to a marriage have lived with each other for a lesser period than that stated above after it became known to one party that the other had committed adultery, then, in any proceedings for divorce in which the petitioner relies on that adultery, the fact that the parties have lived with each other after that time is to be disregarded in determining whether the petitioner finds it intolerable to live with the respondent³.

1 As to living together see PARA 347 note 7.

2 Matrimonial Causes Act 1973 s 2(1); and see *Biggs v Biggs and Wheatley* [1977] Fam 1, [1977] 1 All ER 20 (parties lived with each other for a period exceeding six months after grant of decree nisi and before decree absolute; decree nisi rescinded).

3 Matrimonial Causes Act 1973 s 2(2).

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352. Burden and standard of proof.

The burden of proof of adultery is throughout¹ on the person who alleges it², for there is a presumption of innocence³. Adultery must be proved to the satisfaction⁴ of the court⁵, that is on a preponderance of probability⁶; but the degree of probability depends on the subject matter, and, in proportion as the offence is grave, so ought the proof to be clear⁷. Divorce is a civil proceeding and the analogies of criminal law are not apt⁸.

¹ *Marczuk v Marczuk* [1956] P 217 at 226, [1955] 3 All ER 758 at 761; revsd on another point [1956] P 217 at 238, [1956] 1 All ER 657, CA.

² *Gliksten v Gliksten and Deane* (1917) 116 LT 543; and see *Fairman v Fairman* [1949] P 341 at 344, [1949] 1 All ER 938 at 940, DC, approved in *Galler v Galler* [1954] P 252, [1954] 1 All ER 536, CA; cf *Davis v Davis* [1950] P 125 at 128, 129, [1950] 1 All ER 40 at 42, 43, CA.

³ *Owen v Owen* (1831) 4 Hag Ecc 261; *Redpath v Redpath and Milligan* [1950] 1 All ER 600, CA; and see *Storey v Storey and Laycock* (1954) Times, 3 March, CA.

⁴ See the Matrimonial Causes Act 1973 s 1(4); and PARA 348. See also *Allen v Allen* (1 February 1951, unreported), CA per Sir Raymond Evershed MR, as referred to in *Davis v Davis* [1950] P 125, [1950] 1 All ER 40, CA.

⁵ le of the trial judge, who is sole arbiter of the facts, unless he misdirects himself; see *Watt (or Thomas) v Thomas* [1947] AC 484, [1947] 1 All ER 582, HL, applied in *Ginesi v Ginesi* [1948] P 179, [1948] 1 All ER 373, CA; *Fairman v Fairman* [1949] P 341, [1949] 1 All ER 938, DC; *Simpson v Simpson* [1951] P 320, [1951] 1 All ER 955, DC. As to the practice see PARA 776.

⁶ *Blyth v Blyth* [1966] AC 643, [1966] 1 All ER 524, HL. See also *F v F* [1968] P 506, [1968] 1 All ER 242; *Bastable v Bastable and Sanders* [1968] 3 All ER 701, [1968] 1 WLR 1684, CA; *Galler v Galler* [1954] P 252, [1954] 1 All ER 536, CA; *England v England* [1953] P 16 at 22, [1952] 2 All ER 784 at 787, DC; *Preston-Jones v Preston-Jones* [1951] AC 391 at 400, 401, [1951] 1 All ER 124 at 127, HL (a case where a child could be illegitimate by a finding of adultery; proof beyond reasonable doubt demanded); *Gower v Gower* [1950] 1 All ER 804 at 805, 806, CA; *Ginesi v Ginesi* [1948] P 179, [1948] 1 All ER 373, CA; *Churchman v Churchman* [1945] P 44 at 51, [1945] 2 All ER 190 at 195, CA; cf *Davis v Davis* [1950] P 125 at 126, [1950] 1 All ER 40 at 42, CA (cruelty); *Bater v Bater* [1951] P 35 at 38, [1950] 2 All ER 458 at 460, CA (cruelty).

⁷ *Blyth v Blyth* [1966] AC 643 at 669, [1966] 1 All ER 524 at 536, HL per Lord Denning; and see *Miller v Minister of Pensions* [1947] 2 All ER 372; *Preston-Jones v Preston-Jones* [1951] AC 391 at 400, 401, [1951] 1 All ER 124 at 127, HL per Lord Simonds; *Judd v Minister of Pensions and National Insurance* [1966] 2 QB 580, [1965] 3 All ER 642; cf *Serio v Serio* (1983) 4 FLR 756, 765, CA (presumption of legitimacy); *H v H (minor) (child abuse: evidence)* [1990] Fam 86, sub nom *H v H and C (Kent County Council intervening) (child abuse: evidence)* [1989] 3 All ER 740, CA (allegation of sexual abuse).

⁸ See PARA 346 note 2.

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353. Direct and circumstantial evidence.

In nearly every case the fact of adultery¹ is proved by confessions² or is inferred from circumstances which by fair inference lead to that necessary conclusion³. There must be proof of disposition or inclination and opportunity for committing adultery⁴, but the conjunction of strong inclination with evidence of opportunity does not lead to an irrebuttable presumption that adultery has been committed⁵, nor is the court bound to infer adultery from evidence of opportunity alone⁶.

Unless the court is suspicious that a true case is not being disclosed to it, in which case it would closely scrutinise the facts, the evidence of a single witness or of paid detectives will be accepted⁷.

1 Direct evidence of adultery is rare. It may, indeed, be disbelieved because it purports to be direct evidence (see *Sopwith v Sopwith* (1859) 4 Sw & Tr 243; *Alexander v Alexander and Amos* (1860) 2 Sw & Tr 95), but it is otherwise where, suspicions having been aroused, the innocent party watches for proof of adultery (*Douglas v Douglas* [1951] P 85, [1950] 2 All ER 748, CA; *Mudge v Mudge and Honeysett* [1950] P 173, [1950] 1 All ER 607; cf *Manning v Manning* [1950] 1 All ER 602, CA. See also *Woodward v Woodward and Curd* [1959] 1 All ER 641, [1959] 1 WLR 493).

2 See PARA 354. As to the practice see PARA 776.

3 See *Allen v Allen and Bell* [1894] P 248 at 251, 252, CA, approving *Loveden v Loveden* (1810) 2 Hag Con 1 at 2 per Sir William Scott. See also *Davidson v Davidson* (1856) Dea & Sw 132; *Grant v Grant* (1839) 2 Curt 16 (affd by Judicial Committee of the Privy Council); *Chambers v Chambers* (1810) 1 Hag Con 439; *Alexander v Alexander and Amos* (1860) 2 Sw & Tr 95 (where the court refused to believe a wife guilty of a flagrant act when she had behaved with propriety for 20 years); *Blum v Blum* (1963) 107 Sol Jo 512, CA (husband booked double room at hotel, went there with woman not his wife; husband's explanation not accepted; adultery proved); *Gould v Gould* (1963) 107 Sol Jo 831, DC. See also note 6.

4 *Farnham v Farnham* (1925) 133 LT 320 at 321; and see *Raspin v Raspin* [1953] P 230, [1953] 2 All ER 349n; *Storey v Storey and Laycock* (1954) Times, 3 March, CA (opportunity but inclination not proved); *Corke v Corke and Cook* [1958] P 93, [1958] 1 All ER 224, CA; *Cox v Cox* [1958] 1 All ER 569, [1958] 1 WLR 340, DC (inclination but no opportunity); *Greville-Bell v Greville-Bell and Primo De Rivera* (1958) Times, 21 November (daily association, kissing, diary entries, oral confession by wife; inclination and opportunity; adultery found).

Although evidence as to certain acts of familiarity may be insufficient in itself to prove charges of adultery made in a petition, the court will pay regard to evidence that the man and woman charged have lived together as husband and wife: see *Wales v Wales* [1900] P 63; *Boddy v Boddy and Grover* (1860) 30 LJPM & A 23.

5 *England v England* [1953] P 16 at 19, 20, [1952] 2 All ER 784 at 786, DC, distinguishing *Woollf v Woollf* [1931] P 134; *Raspin v Raspin* [1953] P 230, [1953] 2 All ER 349n; cf *Sapsford v Sapsford and Furtado* [1954] P 394, [1954] 2 All ER 373.

6 See *Farnham v Farnham* (1925) 133 LT 320. 'From opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties prior, contemporaneous or subsequent justifies the inference that such feelings existed between the parties that opportunities if given would be used for misconduct': *Ross v Ellison (or Ross)* [1930] AC 1 at 21, HL per Lord Atkin, applied in *Tyndale v Tyndale* (1958) unreported. Indecencies and familiarities short of adultery constitute, however, a strong presumption of the complete offence: see *Elwes v Elwes* (1794) 1 Hag Con 269 at 276; *Chettle v Chettle* (1821) 3 Phillim 507; *Hamerton v Hamerton* (1828) 2 Hag Ecc 8 at 14 (on appeal (1829) 2 Hag Ecc 618); *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362 at 276 per Cockburn CJ. See also *Thompson (otherwise Hulton) v Thompson* [1939] P 1, [1938] 4 All ER 1, CA; *Chalmers v Chalmers* [1930] P 154 at 156, 46 TLR 269 at 270; *Hallam v Hallam* (1930) 47 TLR 207 (virginity throwing doubt on petitioner's story); *Russell v Russell and Mayer* (1923) 39 TLR 287 (on appeal [1924] P 1, CA; [1924] AC 687, HL); *Rutherford v Richardson* [1923] AC 1 at 11, HL; *Russell v Russell* (1922) Times, 22 July; *Harry v Harry* (1919) Times, 4, 5 April; *Jolly v Jolly and Fryer* (1919) 63 Sol Jo 777 (wife virgo

intacta; adultery proved); *Hunt v Hunt* (1856) Dea & Sw 121. As to the requirement of penetration see PARA 349 note 3.

7 As to corroboration see PARA 354.

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354. Corroboration and confessions.

The evidence of the petitioner alone was seldom accepted without corroboration, either by a witness, or at least strong surrounding circumstances, but the modern practice is generally to accept such evidence, unless the facts arouse the suspicion of the court that a true case is not being disclosed in the sense that adultery may not in fact have been committed¹. It is permissible to administer requests for information as to whether or not a party has committed adultery in order to obtain an admission or a denial². Until the enactment of the Civil Evidence Act 1968 an unsworn admission out of court was evidence against the person making it, but not against the other person implicated by it³. The result was that the court, accepting that admission, could hold that the respondent wife had committed adultery with the co-respondent, but that the case against the co-respondent had not been proved⁴. In such a case a decree nisi was pronounced against the respondent but the co-respondent or other accused party was, on application, dismissed from the suit⁵. Such a result may well still occur, but in certain circumstances out-of-court statements are admissible as evidence whether made orally or in a document⁶. In undefended proceedings for divorce in which it is alleged that the respondent has committed adultery, the respondent's signature on a statement in writing admitting the adultery can be identified by the petitioner⁷. Although a confession of adultery by a respondent spouse with a named person may⁸ be admissible evidence against that person, the trial judge has to decide what weight is to be attached to it⁹. The evidence of a respondent wife or husband on oath in the proceedings was always and still is evidence against the other man or woman¹⁰. In cases where one party admits to adultery and the other contests it, corroboration is desirable, since such evidence is the evidence of an accomplice¹¹. In the case of all supposed confessions, one must look at the words used and their context¹². Although adultery can be proved by admissions tending to show that it had been committed, it cannot be disproved by statements tending to show it was not committed, made afterwards to third parties by the person charged¹³. Admissions by a minor, made before proceedings, that he or she had committed adultery, are admissible as evidence in matrimonial proceedings¹⁴. Absence of a prior caution does not render inadmissible a confession of adultery¹⁵.

1 It used to be said that strong supporting evidence was required: see *White v White and Jerome* (1890) 62 LT 663; *Curtis v Curtis* (1905) 21 TLR 676; *Getty v Getty* [1907] P 334; cf *Warwick v Warwick and Giovanni* (1907) Times, 25 July (cruelty); *Riches v Riches and Clinch* (1918) 35 TLR 141 (petitioner's evidence only). As to what is corroboration see *Senat v Senat* [1965] P 172, [1965] 2 All ER 505.

2 *Nast v Nast and Walker* [1972] Fam 142, [1972] 1 All ER 1171, CA; *C v C* [1973] 3 All ER 770, [1973] 1 WLR 568.

3 *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362 at 365; *Rutherford v Richardson* [1923] AC 1 at 6, HL; and see the cases cited in note 11.

4 *Crawford v Crawford and Dilke* (1886) 11 PD 150, CA (wife found guilty on her own confession and co-respondent dismissed from suit because no evidence against him).

5 *Rutherford v Richardson* [1923] AC 1, HL.

6 See the Civil Evidence Act 1995 s 1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 808.

7 See the Civil Evidence Act 1995 s 7(2); and **CIVIL PROCEDURE** vol 11 (2009) PARAS 820-822.

8 le under the Civil Evidence Act 1995 s 1; see **CIVIL PROCEDURE** vol 11 (2009) PARA 808.

9 See the Civil Evidence Act 1995 s 4; and **CIVIL PROCEDURE** vol 11 (2009) PARA 815.

10 *Spring v Spring and Jiggins* [1947] 1 All ER 886 at 888, criticised on the question of corroboration in *Fairman v Fairman* [1949] P 341, [1949] 1 All ER 938, which was approved in *Galler v Galler* [1954] P 252, [1954] 1 All ER 536, CA.

11 *Best v Best* (1823) 1 Add 411; *Fairman v Fairman* [1949] P 341 at 346, [1949] 1 All ER 938, approved in *Galler v Galler* [1954] P 252, [1954] 1 All ER 536, CA. See also *Ciocci v Ciocci* (1854) 1 Ecc & Ad 121 at 133; *R v Rudd* (1948) 64 TLR 240; *Lawson v Lawson* [1955] 1 All ER 341, [1955] 1 WLR 200, CA; *Senat v Senat* [1965] P 172, [1965] 2 All ER 505 (corroboration of evidence of woman named desirable); cf *Davis v Davis* [1950] P 125 at 126, [1950] 1 All ER 40 at 43, CA.

12 *Smith v Smith* [1957] 2 All ER 397 at 399, DC.

13 *Corke v Corke and Cook* [1958] P 93, [1958] 1 All ER 224, CA.

14 *Alderman v Alderman and Dunn* [1958] 1 All ER 391, [1958] 1 WLR 177.

15 *Hathaway v Hathaway* [1970] 2 All ER 701, [1970] 1 WLR 1156n, DC.

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355. Birth of a child as evidence of adultery.

The evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period¹. If it is proved by admissible evidence² that a wife has given birth to a child of whom the husband cannot have been the father, that is proof of the wife's adultery³. The presumption of legitimacy need not be rebutted by proof beyond reasonable doubt⁴. Where the alleged period of gestation diverges largely from the normal, the burden of proof is a light one and is easily discharged⁵.

1 Matrimonial Causes Act 1973 s 48(1). The evidence need not be in oral form: *Re Jenion, Jenion v Wynne* [1952] Ch 454, [1952] 1 All ER 1228, CA.

2 As to blood and other scientific tests see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 113 et seq.

3 A child born in wedlock is presumed to be the issue of the married couple, but the presumption can be rebutted if the court is satisfied that, in the nature of things, the wife could not have conceived the child through the agency of her husband: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 94.

4 See the Family Law Reform Act 1969 s 26; **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 95; *Preston-Jones v Preston-Jones* [1951] AC 391 at 401, [1951] 1 All ER 124 at 128, HL per Lord Simonds LC, at 414 and at 136 per Lord Morton, at 417 and at 138 per Lord MacDermott. Cf *S v S, W v Official Solicitor* [1972] AC 24, [1970] 3 All ER 107, HL. Sexual intercourse with contraceptives will not satisfy the burden of proving adultery: *Watson v Watson* [1954] P 48, sub nom *W v W* [1953] 2 All ER 1013 (evidence of abstention from intercourse at the time of conception is required).

5 *Preston-Jones v Preston-Jones* [1951] AC 391 at 403, [1951] 1 All ER 124 at 128, HL per Lord Simonds LC (360 days' period of gestation not impossible, but child normal at birth; decree on grounds of adultery).

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356. Previous decree or order.

Where either party to a divorce has at any time on the same or substantially the same facts as those in the petition or answer been granted a decree of judicial separation or an order made, or having effect as if made, under, the Matrimonial Proceedings (Magistrates' Courts) Act 1960 or the Domestic Proceedings and Magistrates' Courts Act 1978 or any corresponding enactments in force in Northern Ireland, the Isle of Man or any of the Channel Islands, the court may treat the decree or order as sufficient proof of any adultery or other fact by reference to which it was granted; but it must not grant a decree of divorce without receiving evidence from the petitioner¹.

1 See the Matrimonial Causes Act 1973 s 4(1), (2); and PARA 830.

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357. Decree nisi as evidence of adultery.

Where adultery is proved against a respondent and the court is satisfied that the petitioner finds it intolerable to live with the respondent¹ with the consequence that a decree nisi of divorce is pronounced against the respondent, the decree is conclusive evidence of that adultery, and the respondent cannot be heard to deny that finding in subsequent proceedings between the same parties². A finding of adultery as a fact on which a decree nisi has proceeded is not res judicata, however, so as to bar the intervention of the Queen's Proctor on the ground that the decree was obtained contrary to the justice of the case³. Where a co-respondent has been found to have committed adultery on a husband's petition for divorce, the co-respondent is not estopped in a subsequent divorce suit between him and his own wife from denying the adultery so found in the previous suit, although the decree in the former suit is admissible against him⁴.

¹ See PARA 349 et seq.

² *Conradi v Conradi, Worrall and Way* (1868) LR 1 P & D 514 at 518. See also *Evans v Evans and Robinson* (1858) 1 Sw & Tr 173; *Palmer v Palmer* (1859) 1 Sw & Tr 551 (effect of foreign decree); *Sopwith v Sopwith* (1861) 2 Sw & Tr 160; *Harriman v Harriman* [1909] P 123 at 142, CA per Fletcher Moulton LJ; cf *Hall v Hall and Richardson* (1879) 48 LJP 57; *Hartley v Hartley and Fleming* (1919) 35 TLR 298.

³ *Chalmers v Chalmers* [1930] P 154 (intervener alleged to be a virgin). See PARA 877.

⁴ See the Civil Evidence Act 1968 s 12; PARA 358; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1211. As to the effect of convictions see s 11; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1208.

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358. Findings in other proceedings.

A transcript of the official shorthand writer's note is evidence for certain purposes, for example to prove an admission¹. Where the adultery of a party to a matrimonial suit has been declared and adjudged to have been proved in a decree pronounced in a previous suit between the same parties, such decree is conclusive evidence of adultery, and the party implicated cannot be heard to deny his guilt². The case is, however, different where the previous proceedings were not between the same parties; thus, if a co-respondent has been found guilty of adultery in a suit instituted against him by a husband, he is not estopped in subsequent proceedings between himself and his wife from denying adultery³.

Subsisting convictions by or before any court in the United Kingdom or by a court-martial there or elsewhere⁴, and subsisting findings of adultery and paternity in civil proceedings⁵, are admissible in any civil proceedings.

1 Cf *Brinkley v Brinkley* [1965] P 75, [1963] 1 All ER 493, DC. See also *Nottingham Guardians v Tomkinson* (1879) 4 CPD 343; *Taylor v Taylor* [1970] 2 All ER 609, [1970] 1 WLR 1148, CA; *Stupple v Royal Insurance Co* [1971] 1 QB 50, [1970] 3 All ER 230, CA; *Practice Direction* [1969] 2 All ER 873, [1969] 1 WLR 1192. The observations of a judge at a criminal trial are not evidence against a respondent to whom they are addressed: *Coffey v Coffey* [1898] P 169; cf *Whybrow v Whybrow* (1953) Times, 16 June (cruelty petition; evidence of husband's conviction for attempted murder of wife not admitted); *Ingram v Ingram* [1956] P 390, [1956] 1 All ER 785. As to cases on the judge's notes see *Conradi v Conradi, Worrall and Way (Queen's Proctor intervening)* (1868) LR 1 P & D 514; and see *Ling v Ling and Croker* (1858) 1 Sw & Tr 180; cf *Stoate v Stoate* (1861) 2 Sw & Tr 223.

2 *Conradi v Conradi, Worrall and Way (Queen's Proctor intervening)* (1868) LR 1 P & D 514 (petitioner's adultery had been established against him in a suit brought by him against his wife, whom he charged with adultery with a co-respondent; afterwards he presented a fresh petition, alleging subsequent adultery with other co-respondents; on the Queen's Proctor's intervention, alleging the petitioner's adultery, the jury found the petitioner not guilty, but the court held that the decree in the former suit was conclusive as to adultery having been committed). In applying this decision to a case where a petitioner claims relief on the ground of the respondent's adultery established in previous proceedings between the same parties, it must be borne in mind that, by what is now the Matrimonial Causes Act 1973 s 1(2)(a) (see PARAS 347, 350), relief is dependent on the court being satisfied on the evidence that the case for the petitioner is proved; hence no estoppels binding the parties were necessarily sufficient to entitle a party to such relief, and the court was not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them: *Harriman v Harriman* [1909] P 123 at 142, CA; and see PARA 734. See also *Hartley v Hartley and Fleming* (1919) 35 TLR 298 (where it was held that the confession by a wife of her adultery, in criminal proceedings against husband, bound her); *Sopwith v Sopwith* (1861) 2 Sw & Tr 160; cf *Evans v Evans and Robinson* (1858) 1 Sw & Tr 173 (petition for judicial separation on ground of adultery failed; it was held that a petition for divorce on ground of same adultery was not estopped by previous proceedings); *Palmer v Palmer* (1859) 1 Sw & Tr 551 (decree of competent foreign court).

3 *Partington v Partington and Atkinson* [1925] P 34, affd on this point, but revsd on another point, by *Hollington v F Hewthorn & Co* [1943] KB 587, [1943] 2 All ER 35, CA.

4 See the Civil Evidence Act 1968 s 11; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1208. As to the information to be included in a petition where a previous conviction is pleaded see PARA 763.

5 See the Civil Evidence Act 1968 s 12; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1211. If such a finding is relied on to prove adultery in later matrimonial proceedings in the High Court or a divorce county court, a transcript of the judgment, or an appropriate extract, recording the finding will be required by the court at the hearing. Any party to the original proceedings may order the transcript from the official shorthand writer; and any other person requiring such a transcript may make application to a district judge for permission for the official shorthand writer to supply a copy: *Practice Direction* [1969] 2 All ER 873, [1969] 1 WLR 1192.

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(iii) Behaviour

359. Behaviour as proof of irretrievable breakdown.

The court¹ may find that a marriage or civil partnership has broken down irretrievably where the petitioner or applicant² satisfies the court that the respondent has behaved³ in a such a way that he cannot reasonably be expected to live with the respondent⁴.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to petitioners and applicants see PARA 321 note 1.

3 See PARA 360 note 1.

4 See the Matrimonial Causes Act 1973 s 1(2)(b); the Civil Partnership Act 2004 s 44(5)(a); and PARA 347. As to the duty of the court to inquire into the facts see PARA 348. As to the effect of parties living with each other after the final incident of behaviour relied on by the petitioner see PARA 361.

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360. Consideration of whether petitioner or applicant can reasonably be expected to live with the respondent.

The court must consider the effect of the respondent's behaviour¹, whether such behaviour is voluntary or involuntary², on the particular petitioner³. This involves a consideration not only of the behaviour of the respondent but of the character, personality, disposition and behaviour of the petitioner⁴. A party's disinclination and boredom with the relationship does not entitle the court to dissolve it⁵. Conduct of sufficient gravity to justify a party leaving may be relied on but not simple desertion by the respondent⁶. Association, not resulting in actual sexual intercourse, with another person might constitute behaviour of a kind to justify a finding of irretrievable breakdown⁷. The fact that one party is living with the other party at the time of the hearing does not of itself establish that the first party should reasonably be expected to live with that other party⁸.

The matter has been approached by considering whether any right-thinking person would come to the conclusion that the party in question had behaved in such a way that the other party could not reasonably be expected to live with him or her, taking into account the whole of the circumstances and the characters and personalities of the parties and their shared history⁹.

1 The behaviour of the respondent must be looked at in the light of all the surrounding circumstances, including the degree of provocation: *Welfare v Welfare* (1977) 8 Fam Law 55. The test of behaviour is a subjective test: *Birch v Birch* [1992] 2 FCR 545, [1992] 1 FLR 564, CA. There is no rule that the respondent is required to plead more than a simple denial: see *Haque v Haque* [1977] 3 All ER 667, [1977] 1 WLR 888 (cited in PARA 782 note 1). As to the effect of parties living with each other after the final incident of behaviour relied on by the petitioner see PARA 361.

2 See *Thurlow v Thurlow* [1976] Fam 32, [1975] 2 All ER 979 (where Rees J considered that negative behaviour by the respondent, ie involuntary behaviour stemming from mental or physical illness, could be such that it would be unreasonable to expect the petitioner to endure it even after taking full account of all the obligations of the married state; the court would consider the capacity of the petitioner to withstand the stresses imposed by the behaviour, the steps taken to cope with it, the length of time during which the petitioner had been called on to bear it and the actual or potential effect on the petitioner's health; Rees J specifically disagreed with the decision in *Smith v Smith* (1973) Times, 15 December (where it was held that the actions of a spouse suffering from mental illness and which were involuntary did not constitute 'behaviour' within the similar provisions of the Divorce Reform Act 1969 s 2(1)(b) (repealed)); *O'Neill v O'Neill* [1975] 3 All ER 289, [1975] 1 WLR 1118, CA (husband made home disagreeable and cast doubts on the paternity of the children; decree granted).

3 *Katz v Katz* [1972] 3 All ER 219, [1972] 1 WLR 955; *Pheasant v Pheasant* [1972] Fam 202, [1972] 1 All ER 587. It is the state of the relationship between the parties which is being examined, not whether conduct is good or bad: *Carew-Hunt v Carew-Hunt* (1972) Times, 28 June. Continued financial irresponsibility may in certain circumstances constitute unreasonable behaviour: *Carter-Fea v Carter-Fea* [1987] Fam Law 131, CA. For a case where a husband's dogmatic and male chauvinistic attitude towards his sensitive wife was held to constitute behaviour with which a wife could not reasonably be expected to live see *Birch v Birch* [1992] 2 FCR 545, [1992] 1 FLR 564, CA. Where refusal of sexual intercourse is the main ground alleged in support of a petition based on unreasonable behaviour, the court must consider very carefully the allegations by, and the reasons of, both parties, since many different factors need to be taken into account: *Mason v Mason* (1980) 11 Fam Law 143, CA. The allegations must be sufficiently pleaded: *Butterworth v Butterworth* [1998] 1 FCR 159, [1997] 2 FLR 336, CA; cf *Cotterell v Cotterell* [1998] 3 FCR 199, CA (petition of wife on ground of unreasonable behaviour; decree nisi granted to wife on ground of unreasonable behaviour but rescinded when parties reconciled; on second petition decree nisi granted on ground of unreasonable behaviour; details of unreasonable behaviour after reconciliation not set out in judgment; decree properly granted). As to petitioners and applicants see PARA 321 note 1.

4 *Ash v Ash* [1972] Fam 135, [1972] 1 All ER 582; *Richards v Richards* [1972] 3 All ER 695, [1972] 1 WLR 1073 (mental illness; no unreasonable behaviour; but see note 1); *Shears v Shears* (1972) 117 Sol Jo 33 (wife's behaviour in obtaining ex parte injunctions ordering husband to leave matrimonial home on grounds which afterwards proved baseless, and in her persistent refusal to allow husband access to his child constituted behaviour in such a way that he could not reasonably be expected to live with her). It is not appropriate to consider whether the conduct was grave and weighty; the test to be applied is whether a right-thinking person, looking at the particular husband and wife, would conclude that one could not reasonably be expected to live with the other, taking into account all the circumstances of the case and the respective characters and personalities of the two parties concerned: *Buffery v Buffery* [1988] FCR 465, [1988] 2 FLR 365, CA.

5 *Kisala v Kisala* (1973) 3 Fam Law 90. It was also said in that case that, when a respondent desires to plead that the relationship has not broken down irretrievably, the common form denial of the petition does not achieve sufficient clarity. See also *Andrews v Andrews* [1974] 3 All ER 643.

6 *Morgan v Morgan* (1973) 117 Sol Jo 223. Simple desertion comes within the provisions of the Matrimonial Causes Act 1973 s 1(2)(c): see *Morgan v Morgan*; and PARA 363. It is not sufficient to prove conduct amounting to no more than desertion or behaviour leading up to desertion: *Stringfellow v Stringfellow* [1976] 2 All ER 539, [1976] 1 WLR 645, CA (facts established by wife showed nothing more than a matrimonial relationship which had broken down and desertion by husband; wife had failed to show that husband had behaved in such a way that she could not reasonably be expected to live with him).

7 *Wachtel v Wachtel* [1973] Fam 72, [1973] 1 All ER 113.

8 *Bradley v Bradley* [1973] 3 All ER 750, [1973] 1 WLR 1291, CA. It may not be reasonable to expect one of the parties to live there but, albeit unreasonable, he or she may have no option but to be there: see *Bradley v Bradley* at 752 and at 1294 per Lord Denning MR.

9 *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47 at 54, [1974] 2 All ER 766 at 771; applied in *Bergin v Bergin* [1983] 1 All ER 905, [1983] 1 WLR 279, DC (cited in PARA 553 note 5). See *Stevens v Stevens* [1979] 1 WLR 885 (a wife may be granted a decree based on her husband's behaviour, even though she was the cause of the breakdown of the marriage); *Welfare v Welfare* (1977) 8 Fam Law 55 (where a wife failed to satisfy the court that she could not reasonably be expected to live with her husband; the reason she could not live with him was not because of his behaviour but because of her passion for another man); *Buffery v Buffery* [1988] FCR 465, [1988] 2 FLR 365, CA (no unreasonable behaviour; husband and wife had simply grown apart).

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361. Living together after final incident of behaviour allegation.

Where in any proceeding for divorce, dissolution or judicial or legal separation the petitioner¹ alleges that the respondent has behaved in such a way that he cannot reasonably be expected to live with the respondent², but the parties have lived with each other³ for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court⁴ to support his allegation, that fact is to be disregarded in determining for the purposes of satisfying the court whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less⁵. This does not mean that, if the parties are together for more than six months after the final occurrence, it is necessarily a bar⁶.

1 As to petitions and applications see PARA 321 note 1.

2 See the Matrimonial Causes Act 1973 s 1(2)(b); the Civil Partnership Act 2004 s 44(5)(a); and PARAS 347, 359, 360.

3 As to references to the parties living with each other see PARA 347 note 7.

4 As to the meaning of 'court' see PARA 346 note 2.

5 Matrimonial Causes Act 1973 ss 2(3), 17(1); Civil Partnership Act 2004 ss 45(1), (2), 56(4). A petitioner who relies on the respondent's behaviour may be required to give information relating to the parties' living arrangements: see the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3), (3A), Appendix 1, Form M7 paras (a)-(e) (r 2.24(3) substituted, r 2.24(3A) added, by SI 2005/2922; Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M7 paras (a)-(e) substituted by SI 2003/2839).

6 *Bradley v Bradley* [1973] 3 All ER 750, [1973] 1 WLR 1291, CA (wife stayed in same house as husband because she had nowhere else to go; not there of her own free will; divorce refused; case remitted for rehearing).

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(iv) Desertion

A. FUNDAMENTAL PRINCIPLES

362. Meaning of 'desertion'.

In its essence desertion¹ means the intentional, permanent forsaking and abandonment² of one party by the other³ without that other's consent⁴, and without reasonable cause⁵. It is a total repudiation of one party's obligations⁶. In view of the large variety of circumstances and of modes of life involved, the court has discouraged attempts at defining desertion, there being no general principle applicable to all cases⁷.

Desertion is not the withdrawal from a place but from a state of things⁸, for what the law seeks to enforce is the recognition and discharge of the common obligations of the parties' joint state⁹; the state of things may usually be termed, for short, 'the home'¹⁰. There can be desertion without previous cohabitation by the parties, or (in the case of a marriage) without there having been consummation¹¹.

The person who actually withdraws from cohabitation is not necessarily the deserting party¹². The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion¹³.

Consensual divorce or dissolution is available in certain circumstances¹⁴ but consent to separation is not the same as consent to divorce or dissolution and, if there is consent to separation, there is no desertion.

1 As to desertion as a fact proving irretrievable breakdown see PARA 347; and see *Perry v Perry* [1952] P 203 at 210, 211, [1952] 1 All ER 1076 at 1079, CA.

2 *Hopes v Hopes* [1949] P 227 at 235, [1948] 2 All ER 920 at 925, CA per Denning LJ; *Jackson v Jackson* [1924] P 19 at 23 (approved in *Weatherley v Weatherley* [1947] AC 628 at 632, [1947] 1 All ER 563 at 565, HL, and in *Herod v Herod* [1939] P 11 at 21, 22, [1938] 3 All ER 722 at 730); *Perry v Perry* [1952] P 203 at 205, [1952] 1 All ER 1076 at 1082, CA per Sir Raymond Evershed MR; *Beeken v Beeken* [1948] P 302 at 311, CA; *Buchler v Buchler* [1947] P 25 at 29, 48, [1947] 1 All ER 319 at 320, 327, CA; *Williams v Williams* [1943] 2 All ER 746 at 752, CA per du Parc LJ (a total repudiation of the obligations of marriage); *Thomas v Thomas* (1923) 39 TLR 520 at 521 (affd [1924] P 194, CA); *Tulk v Tulk* [1907] VLR 64 at 65; *R v Leresche* [1891] 2 QB 418 at 420, CA; *Townsend v Townsend* (1873) LR 3 P & D 129 at 131; *Fitzgerald v Fitzgerald* (1869) LR 1 P & D 694 at 697, as explained in *Pulford v Pulford* [1923] P 18; *Williams v Williams* (1864) 3 Sw & Tr 547; *Haswell v Haswell and Sanderson* (1859) 1 Sw & Tr 502 at 505.

3 As to mutual desertion see PARA 367.

4 *Ward v Ward* (1858) 1 Sw & Tr 185; *Thompson v Thompson* (1858) 1 Sw & Tr 231; *Smith v Smith* (1859) 1 Sw & Tr 359 at 361; *Haviland v Haviland* (1863) 32 LJP & A 65; *Buckmaster v Buckmaster* (1869) LR 1 P & D 713; *Charter v Charter* (1901) 84 LT 272; *Harriman v Harriman* [1909] P 123 at 148, CA; *Fengl v Fengl* [1914] P 274; *Walter v Walter* [1921] P 302; *Pardy v Pardy* [1939] P 288 at 305, [1939] 3 All ER 779 at 784, CA; *Spence v Spence* [1939] 1 All ER 52 at 56, 57; *Edwards v Edwards* [1948] P 268 at 269, [1948] 1 All ER 157 at 158, DC; *Pearson v Pearson* [1948] WN 225, CA; *Kinnane v Kinnane* [1954] P 41, [1953] 2 All ER 1144; *Clark v Clark (by her guardian)* [1956] 1 All ER 823, [1956] 1 WLR 345; *Ingram v Ingram* [1956] P 390 at 411, [1956] 1 All ER 785 at 797; *Pinnick v Pinnick* [1957] 1 All ER 873 at 875, [1957] 1 WLR 644 at 647; *Bosley v Bosley* [1958] 2 All ER 167, [1958] 1 WLR 645, CA; *Parkinson v Parkinson* (1959) Times, 14 April, DC; *Gallagher v Gallagher* [1965] 2 All ER 967, [1965] 1 WLR 1110, CA; *Nutley v Nutley* [1970] 1 All ER 410, [1970] 1 WLR 217, CA.

5 le without the consent or fault of the person asking for relief: see *Lane v Lane* [1951] P 284 at 286; affd [1952] P 34, [1952] 1 All ER 223n, CA; *Day v Day* [1957] P 202 at 210, 211, [1957] 1 All ER 848 at 853. As to 'just cause' see PARA 380 et seq.

6 *Williams v Williams* [1943] 2 All ER 746 at 752, CA per du Parcq LJ; *Perry v Perry* [1952] P 203 at 215, [1952] 1 All ER 1076 at 1082, CA per Sir Raymond Evershed MR; cf *Williams v Williams* (1864) 3 Sw & Tr 547 at 548 (to neglect opportunities of consorting with a wife is not necessarily to desert her). See also *Thomas v Thomas* (1923) 39 TLR 520 at 521 ('wilful breaking off of conjugal relations'); affd [1924] P 194, CA.

7 *Weatherley v Weatherley* [1947] AC 628 at 631, [1947] 1 All ER 563 at 564, HL per Lord Jowitt LC; *Perry v Perry* [1952] P 203 at 215, [1952] 1 All ER 1076 at 1082, CA; *Lane v Lane* [1951] P 284 at 286 (affd [1952] P 34, [1952] 1 All ER 223n, CA); *Cohen v Cohen* [1940] AC 631 at 645, 646, [1940] 2 All ER 331 at 339, HL; *Herod v Herod* [1939] P 11 at 21, [1938] 3 All ER 722 at 730; *Jackson v Jackson* [1924] P 19 at 23; *Pulford v Pulford* [1923] P 18 at 22 (definitions are dangerous); *Frowd v Frowd* [1904] P 177 at 179; *Williams v Williams* (1864) 3 Sw & Tr 547; *Graves v Graves* (1864) 3 Sw & Tr 350 at 353; *Thompson v Thompson* (1858) 1 Sw & Tr 231 at 233.

8 *Pulford v Pulford* [1923] P 18 at 21 per Lord Merrivale P (no cohabitation after marriage; there was nevertheless desertion); *Pardy v Pardy* [1939] P 288 at 302, [1939] 3 All ER 779 at 782, CA per Sir Wilfred Greene MR; *Lane v Lane* [1951] P 284 at 286; affd [1952] P 34, [1952] 1 All ER 223n, CA.

9 *Pulford v Pulford* [1923] P 18 at 22.

10 *Lane v Lane* [1951] P 284 at 286 per Lord Merriman P; affd [1952] P 34, [1952] 1 All ER 223n, CA.

11 *Timoney v Timoney* [1926] NI 75 at 79; *De Laubenque v De Laubenque* [1899] P 42; *Lee Shires v Lee Shires* (1910) 54 Sol Jo 874; *Shaw v Shaw* [1939] P 269, [1939] 2 All ER 381; and see *Bradshaw v Bradshaw* [1897] P 24 at 26, 27; *Buckmaster v Buckmaster* (1869) LR 1 P & D 713; *Fassbender v Fassbender* [1938] 3 All ER 389 (restitution of conjugal rights).

12 *Sickert v Sickert* [1899] P 278 at 284; *Buchler v Buchler* [1947] P 25 at 45, [1947] 1 All ER 319 at 326, CA. As to constructive desertion see PARA 391 et seq.

13 *MacDonald v MacDonald* (1859) 4 Sw & Tr 242.

14 See PARA 407.

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363. Desertion as proof of irretrievable breakdown.

The court¹ may find that a marriage or civil partnership has broken down irretrievably if the petitioner² satisfies³ the court that the respondent has deserted him for a continuous period⁴ of at least two years immediately preceding the presentation of the petition⁵.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to petitioners and applicants see PARA 321 note 1.

3 As to the burden and standard of proof see PARA 369.

4 As to 'desertion' see PARA 362. As to the requirement for a continuous period see PARA 364.

5 See the Matrimonial Causes Act 1973 s 1(2)(c); the Civil Partnership Act 2004 s 44(5)(d); and PARA 347. As to the duty of the court to inquire into the facts see PARA 348. As to constructive desertion see PARA 391 et seq.

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364. Duration of desertion.

Desertion is a course of conduct¹ which exists independently of its duration²; but, as a fact on which a petition for divorce or application for the dissolution of a civil partnership³ may be founded, it must exist for a continuous⁴ period of at least two years immediately preceding the presentation of the petition or the making of the application⁵ or, where the offence appears as a cross-charge, of the answer⁶. Desertion differs from other facts⁷ constituting irretrievable breakdown in that the cause of action of desertion is not complete, but is inchoate, until the suit is constituted⁸. Desertion is a continuing matter⁹.

¹ *Thomas v Thomas* [1924] P 194 at 199, CA; *W v W (No 2)* [1954] P 486 at 502, [1954] 2 All ER 829 at 832, CA.

² *Jordan v Jordan* [1939] P 239 at 251, [1939] 2 All ER 29 at 36; *Beeken v Beeken* [1948] P 302 at 308, CA; cf *Thomas v Thomas* [1924] P 194 at 199, CA.

³ As to petitions and applications see PARA 321 note 1.

⁴ See note 5.

⁵ See the Matrimonial Causes Act 1973 s 1(2)(c); the Civil Partnership Act 2004 s 44(5)(d); and PARAS 347, 362. The period must be 'a continuous period' and cannot be satisfied by aggregating with a period of less than two years an earlier, but detached, period of whatever duration: see *Jordan v Jordan* [1939] P 239 at 248, 249, [1939] 2 All ER 29 at 33, 34, citing a decision of Hodson J in *Cohen v Cohen* [1939] 2 All ER 39n; revsd without affecting this point [1940] AC 631, [1940] 2 All ER 331, HL; *Perry v Perry* [1952] P 203 at 211, 212, [1952] 1 All ER 1076 at 1079, CA per Sir Raymond Evershed MR; *W v W (No 2)* [1954] P 486 at 502, [1954] 2 All ER 829 at 832, 833, CA per Sir Raymond Evershed MR. See, however, *Green v Green* [1946] P 112, [1946] 1 All ER 308 (where, on a consideration of the wording of the Matrimonial Causes Act 1937 s 6(3) (repealed), a period of desertion of less than three years, ie the relevant period of desertion in the Matrimonial Causes Act 1937 (repealed), before the making of a non-cohabitation clause (inadvertently inserted in a maintenance order made by justices) was aggregated with a period of desertion of less than three years after the deletion of the non-cohabitation clause so as to provide a period of three years' desertion immediately preceding the presentation of the petition); and see PARAS 365-366. See also *Bush v Bush* [1939] P 142, [1938] 4 All ER 598; *Lett v Lett* (1907) 23 TLR 569; *Churner v Churner* (1912) 106 LT 769. As to the periods of cohabitation of which no account is to be taken see PARA 365; and as to living apart see PARA 407 et seq.

In computing the two-year period, the day of separation is to be excluded from the computation: cf *Warr v Warr* [1975] Fam 25, [1975] 1 All ER 85.

⁶ *Faulkner v Faulkner* [1941] 2 All ER 748.

⁷ See PARA 347.

⁸ *Perry v Perry* [1952] P 203 at 211, [1952] 1 All ER 1076 at 1079, CA per Sir Raymond Evershed MR; and see at 213, 228, 232 and at 1081, 1089, 1092.

⁹ See *Hartnell v Hartnell* [1951] WN 555 at 556, DC; *Teall v Teall* [1938] P 250 at 256, [1938] 3 All ER 349 at 352.

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365. No account of periods of living together.

In considering whether the period for which the respondent has deserted the petitioner¹ has been continuous², no account is to be taken of any one period, not exceeding six months, or of any two or more periods, not exceeding six months in all, during which the parties resumed living with each other³; but no period during which the parties lived with each other is to count as part of the period of desertion⁴.

1 As to petitioners and applicants see PARA 321 note 1.

2 Ie for the purposes the Matrimonial Causes Act 1973 s 1(2)(c) or the Civil Partnership Act 2004 s 44(5)(d): see PARAS 347, 362, 364.

3 As to references to the parties living with each other see PARA 347 note 7.

4 Matrimonial Causes Act 1973 s 2(5); Civil Partnership Act 2004 s 45(6), (7); and see *Morgan v Morgan* (1973) 117 Sol Jo 223; cf *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA.

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366. Presumed time of desertion following prior decree or order of judicial or legal separation.

Where a petition for divorce or an application for a dissolution order¹ follows a decree of judicial separation or a separation order² containing a provision exempting one party to the marriage or civil partnership from the obligation to cohabit with the other or requiring civil partners to live apart, then, for the purpose of that petition or application, a period of desertion immediately preceding the institution of proceedings for the decree or order is deemed, if the parties have not resumed cohabitation and the decree or order has been continuously in force since it was granted or made, immediately to precede the presentation of the petition or application³.

For the purposes of establishing the fact of desertion⁴, the court⁵ may treat as a period during which the respondent has deserted the petitioner any period during which there is in force:

- 517 (1) an injunction granted by the High Court or a county court excluding the respondent from the family home⁶; or
- 518 (2) an order made⁷ by the High Court or a county court which prohibits the exercise by the respondent of the right to occupy a dwelling house in which the petitioner and the respondent have or at any time have had a family home⁸.

A petitioner may rely on a period of desertion prior to a foreign decree of separation⁹.

1 Ie in such a case as is mentioned in the Matrimonial Causes Act 1973 s 4(1) or the Civil Partnership Act 2004 s 46(1), (2): see PARA 758. As to the meaning of 'dissolution order' see PARA 346 note 1. As to petitions and applications see PARA 321 note 1.

2 As to the meaning of 'separation order' see PARA 346 note 4.

3 Matrimonial Causes Act 1973 s 4(3) (s 4(3) amended, s 4(5) added, by the Domestic Proceedings and Magistrates' Courts Act 1978 s 62); Civil Partnership Act 2004 s 46(4). See *Green v Green* [1946] P 112, [1946] 1 All ER 308 (cited in PARA 364 note 5). In the case of a marriage, this is subject to the Matrimonial Causes Act 1973 s 4(5) (as so added), which contains transitional provisions relating to certain orders made before 1981: s 4(3) (as so amended). As to corroboration see PARA 370.

4 Ie under the Matrimonial Causes Act 1973 s 1(2)(c) or the Civil Partnership Act 2004 s 44(5)(d): see PARAS 347, 363, 364.

5 As to the meaning of 'court' see PARA 346 note 2.

6 Matrimonial Causes Act 1973 s 4(4)(a) (s 4(4) added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 62(b); amended by the Matrimonial Homes Act 1983 Sch 2); Civil Partnership Act 2004 s 46(5)(a).

7 Ie under the Family Law Act 1996 s 33 or s 37 (see PARAS 292-293, 305).

8 Matrimonial Causes Act 1973 s 4(4)(b) (as added and amended: see note 6); Civil Partnership Act 2004 s 46(5)(b).

9 *Tursi v Tursi* [1958] P 54, [1957] 2 All ER 828, following *Ainslie v Ainslie* (1927) 39 CLR 381; cf *Pandiani v Pandiani* (1963) 107 Sol Jo 832.

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367. Mutual desertion.

Whilst it has been said that it is possible in law for a husband and wife to have deserted each other¹, the view that two parties in respect of the same parting may each be guilty of desertion at the same time has been doubted² and disapproved³.

1 *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 at 740, CA per Denning LJ, criticising *Walter v Walter* (1949) 65 TLR 680; *Beigan v Beigan* [1956] P 313 at 320, [1956] 2 All ER 630 at 632, CA per Denning LJ; *Wevill v Wevill* (1962) 106 Sol Jo 155; *Price v Price* [1968] 3 All ER 543, [1968] 1 WLR 1735 (overruled but not on this point which was specifically not discussed: see [1970] 2 All ER 497, [1970] 1 WLR 993, CA).

2 *Simpson v Simpson* [1951] P 320 at 330, [1951] 1 All ER 955 at 960, DC; and see *Spence v Spence* [1939] 1 All ER 52 at 58.

3 *Lang v Lang* (1953) Times, 7 July, CA; and see *Price v Price* [1970] 2 All ER 497 at 498, [1970] 1 WLR 993 at 994, CA per Davies LJ, and at 501 and at 997 per Sachs LJ.

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368. Elements of desertion; factum and animus.

For desertion to exist there must be both the factum, or physical separation, and the animus deserendi¹, or the intention to desert in the sense of bringing cohabitation to an end. The necessary ingredients of desertion must, however, continue throughout the statutory period². For the purpose of establishing irretrievable breakdown founded on the fact of desertion for a continuous period of two years³, the court⁴ may treat desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had the party not been so incapable, the court would have inferred that his desertion continued at that time⁵.

A de facto separation may take place without there being an animus deserendi, as where there is a separation by mutual consent⁶, or a compulsory separation⁷; but, if that animus supervenes, desertion will begin from that moment, whether or not that change of mind is communicated⁸, unless there is consent to the separation by the other party⁹. There may, however, be animus deserendi without separation¹⁰, as where the parties live not as two households under the same roof¹¹ but as one household¹². The animus may be evidenced by the fact of presentation of a petition¹³.

Where the factum and animus both exist, an offer in good faith to resume cohabitation¹⁴ may be made by the deserting party, for desertion is a continuing offence¹⁵, and refusal of such an offer may turn the tables and convert the hitherto deserted party into a deserter¹⁶. Where one party indicates to the other that, if he or she leaves, there will be no question of having him or her back, and that other party subsequently leaves, the leaving amounts to desertion if he or she has the necessary animus¹⁷. It follows that the mere fact that one party is glad to see the other go makes no difference to the quality of the act of leaving¹⁸. Once a party has left, it has been held that a prompt and decisive determination evinced by the other party that he or she should not return may put the former in the same position in law as if he or she had rejected an offer of reconciliation of the other party¹⁹, but this proposition has been doubted²⁰.

1 *Sickert v Sickert* [1899] P 278 at 282; *Pardy v Pardy* [1939] P 288 at 302, [1939] 3 All ER 779 at 782, CA per Sir Wilfred Greene MR; *Earnshaw v Earnshaw* [1939] 2 All ER 698 at 699, CA; *Spence v Spence* [1939] 1 All ER 52 at 58; *Buchler v Buchler* [1947] P 25 at 29, [1947] 1 All ER 319 at 320, CA; *Edwards v Edwards* [1948] P 268 at 269, [1948] 1 All ER 157 at 158; *Hopes v Hopes* [1949] P 227, [1948] 2 All ER 920, CA; *Perry v Perry* [1952] P 203 at 212, [1952] 1 All ER 1076 at 1080, CA; *Lang v Lang* [1955] AC 402 at 417, [1954] 3 All ER 571 at 573, PC; *Price v Price* [1970] 2 All ER 497, [1970] 1 WLR 993, CA (animus but no factum). See also *French-Brewster v French-Brewster* (1889) 62 LT 609 (question of animus left to the jury); *Davis v Davis* (1920) 124 LT 795 (soldier's visits on leave to wife; adultery with another woman resumed immediately after last leave; desertion as from resumption). It has been said that desertion is a question of fact (*R v Davidson etc*, *Durham Justices* (1889) 5 TLR 199 at 200, DC (where it was also stated that formal declaration of an intention to desert is not necessary); *Re Duckworth* (1889) 5 TLR 608 at 609; *R v Leresche* [1891] 2 QB 418 at 420, CA; *Balcombe v Balcombe* [1908] P 176 at 180); and so is the continuance of desertion (*Pratt v Pratt* [1939] AC 417 at 427, [1939] 3 All ER 437 at 442, HL).

2 *Crowther v Crowther* [1951] AC 723 at 735, [1951] 1 All ER 1131 at 1132, HL.

3 *Ie* under the Matrimonial Causes Act 1973 s 1(2)(c) or the Civil Partnership Act 2004 s 44(5)(d): see PARAS 347, 362, 364.

4 As to the meaning of 'court' see PARA 346 note 2.

5 Matrimonial Causes Act 1973 s 2(4); Civil Partnership Act 2004 s 45(5).

6 See the cases in PARA 362 note 4.

7 *Beeken v Beeken* [1948] P 302, CA.

8 *Nutley v Nutley* [1970] 1 All ER 410, [1970] 1 WLR 217, CA.

9 *Pardy v Pardy* [1939] P 288 at 302, [1939] 3 All ER 779 at 782, CA; *Williams v Williams* [1939] P 365 at 368, [1939] 3 All ER 825 at 827, CA (overruled on another point in *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131, HL); *Gatehouse v Gatehouse* (1867) LR 1 P & D 331; *Stickland v Stickland* (1876) 35 LT 767; *Mahoney v M'Carthy* [1892] P 21 at 25, 26 (it is a matter of evidence); *Davis v Davis* (1920) 124 LT 795; *Beeken v Beeken* [1948] P 302, CA; *Gallagher v Gallagher* [1965] 2 All ER 967, [1965] 1 WLR 1110, CA (withdrawal of consent to separation must be genuine); *Nutley v Nutley* [1970] 1 All ER 410, [1970] 1 WLR 217, CA. As to consent fraudulently obtained, and consequently of no effect, see *Harrison v Harrison* (1910) 54 Sol Jo 619; *Crabb v Crabb* (1868) LR 1 P & D 601 at 604; *Lepre v Lepre* [1963] 2 All ER 49 at 58.

10 *Hopes v Hopes* [1949] P 227 at 231, 235, 238, [1948] 2 All ER 920 at 922, 924, 926, CA; *Le Brocq v Le Brocq* [1964] 3 All ER 464, [1964] 1 WLR 1085, CA.

11 *Powell v Powell* [1922] P 278; *Diver v Diver* (unreported), referred to in *Jackson v Jackson* [1924] P 19 at 28, *Smith v Smith* [1940] P 49 at 53, 54, *Wilkes v Wilkes* [1943] P 41 at 42, *Hopes v Hopes* [1949] P 227 at 232; *Smith v Smith* [1940] P 49, [1939] 4 All ER 533; *Wilkes v Wilkes* [1943] P 41, [1943] 1 All ER 433; *Shilston v Shilston* (1945) 174 LT 105; *Wanbon v Wanbon* [1946] 2 All ER 366 (desertion found even where there was 'only one household'); *Angel v Angel* [1946] 2 All ER 635 (principles discussed); *Hopes v Hopes* [1949] P 227, [1948] 2 All ER 920, CA (where *Wanbon v Wanbon* was doubted, and *Evans v Evans* [1948] 1 KB 175, [1947] 2 All ER 656, DC (a decision on the meaning of 'resides with' in the Summary Jurisdiction (Separation and Maintenance) Act 1925 s 1(4) (repealed)) was disapproved by Denning LJ; and see *Naylor v Naylor* [1962] P 253, [1961] 2 All ER 129, DC). *Evans v Evans* was, however, followed in *Wheatley v Wheatley* [1950] 1 KB 39, [1949] 2 All ER 428, DC; in *Curtin v Curtin* [1952] 2 QB 552, [1952] 1 All ER 1348, DC; and in *Hewitt v Hewitt* [1952] 2 QB 627, [1952] 2 All ER 250, DC; but in *Santos v Santos* [1972] Fam 247 at 262, [1972] 2 All ER 246 at 255, CA, it was said that the Divorce Reform Act 1969 s 2(5) (repealed: see now the Matrimonial Causes Act 1973 s 2(6); the Civil Partnership Act 2004 s 45(8); and PARA 347) 'conclusively' resolved the conflict against *Evans v Evans*, and in favour of the view taken in *Smith v Smith* and *Hopes v Hopes*; and see *Mouncer v Mouncer* [1972] 1 All ER 289, [1972] 1 WLR 321. See also *Hanson v Hanson* (1954) Times, 10 March, CA (two households, but no desertion on facts); cf *Fishburn v Fishburn* as reported in [1955] 1 All ER 230 at 233, following *Hopes v Hopes*. See also *Walker v Walker* [1952] 2 All ER 138, CA; *Thomas v Thomas* [1948] 2 KB 294, [1948] 2 All ER 98, DC; *Baker v Baker* [1952] 2 All ER 248, CA; cf *Wily v Wily* [1918] P 1 at 3 (mere unwillingness to live under the same roof not a defence to a petition for restitution of conjugal rights (a remedy abolished by the Matrimonial Proceedings and Property Act 1970 s 20 (repealed)); *Weatherley v Weatherley* [1947] AC 628, [1947] 1 All ER 563, HL (refusal of sexual intercourse by itself not desertion); and *Jones v Jones* [1952] 2 TLR 225 at 226, CA.

12 *Jackson v Jackson* [1924] P 19 at 25, 26; *Stevens v Stevens* (1929) 93 JP 120; *Littlewood v Littlewood* [1943] P 11, [1942] 2 All ER 515; *Wanbon v Wanbon* [1946] 2 All ER 366 (desertion nevertheless found), doubted in *Hopes v Hopes* [1949] P 227, [1948] 1 All ER 920, CA; *Angel v Angel* [1946] 2 All ER 635; *Everitt v Everitt* [1949] P 374, [1949] 1 All ER 908, CA; *Bull v Bull* [1953] P 224, [1953] 2 All ER 601, CA (one roof, despite two short periods of actual desertion); and see *Weatherley v Weatherley* [1947] AC 628, [1947] 1 All ER 563, HL; and *Powell v Powell* [1922] P 278 at 279 (neglect or contempt insufficient).

13 *Gerrard v Gerrard* (1958) Times, 18 November; *Pursey v Pursey* (1959) Times, 9 April; and see PARA 369. As to petitions and applications see PARA 321 note 1.

14 See PARA 397.

15 See PARA 364.

16 See *Thomas v Thomas* [1946] 1 All ER 170.

17 *Beigan v Beigan* [1956] P 313, [1956] 2 All ER 630, CA.

18 *Pizey v Pizey and Stephenson* [1961] P 101 at 108, [1961] 2 All ER 658 at 662, CA per Willmer J.

19 See *Fishburn v Fishburn* [1955] P 29 at 41, [1955] 1 All ER 230 at 236 per Willmer J; *Barnett v Barnett* [1955] P 21, [1954] 3 All ER 689. The result in such a case is that the party who shows the determination to have nothing further to do with the other cannot show desertion, and thus, if the deserted party will not have the deserter back, a stalemate may be reached.

20 *Beigan v Beigan* [1956] P 313, [1956] 2 All ER 630, CA.

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369. Burden and standard of proof.

The burden is on the petitioner to show that desertion without cause subsisted throughout the statutory period¹. The deserting party must be shown to have persisted in the intention to desert throughout the whole of the two-year period², save where he was incapable of continuing the necessary intention³. It has been said that a petitioner should be able honestly to say that he or she was all along willing to fulfil his or her duties, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent⁴; but in practice it is accepted that once desertion has been started by the fault of the deserting party, it is no longer necessary for the deserted party to show that during the two years preceding the presentation of the petition he or she actually wanted the other to come back⁵, for the intention to desert is presumed to continue⁶. That presumption may, however, be rebutted⁷. Where one of the parties has deserted the other, the desertion is not necessarily brought to an end by the commencement or conclusion of proceedings, but it is a question of fact in each case whether the desertion has been terminated⁸. If on the facts it appears that a petitioner has made it plain to the deserting party that he or she will not be received back, or has repelled all the advances made in such regard, the petitioner cannot complain that there has been persistence without cause in the desertion⁹.

The mere act of one party leaving will in general make it easy to infer that the departing party intended to bring the relationship to an end¹⁰.

The court must be satisfied on the evidence that desertion is proved¹¹. This appears to mean that desertion like other facts constituting irretrievable breakdown must be proved by a preponderance of probability, the degree of probability depending on the subject matter¹².

1 *Pratt v Pratt* [1939] AC 417 at 420, [1939] 3 All ER 437 at 438, HL per Lord Macmillan; *Dunn v Dunn* [1949] P 98 at 103, [1948] 2 All ER 822 at 823, CA per Denning LJ; *Arding v Arding* [1954] 2 All ER 671n, [1954] 1 WLR 944; *Perry v Perry* [1963] 3 All ER 766, [1964] 1 WLR 91. See also *Yeatman v Yeatman* (1868) LR 1 P & D 489 at 491, 494; *Oldroyd v Oldroyd* [1896] P 175 at 182; *Beer v Beer* (1906) 22 TLR 338 at 340; *Greene v Greene* [1916] P 188 at 190; *Williams v Williams* [1943] 2 All ER 746 at 751, 752, CA; *Glenister v Glenister* [1945] P 30 at 37, [1945] 1 All ER 513 at 518; *Emanuel v Emanuel* [1946] P 115 at 188, [1945] 2 All ER 494 at 496; *Beer v Beer (Neilson cited)* [1948] P 10 at 14, [1947] 2 All ER 711 at 713; *Kafton v Kafton* [1948] 1 All ER 435 at 438, CA; *Arding v Arding* [1954] 2 All ER 671n, [1954] 1 WLR 944. As to the statutory period see PARA 364.

2 *Pratt v Pratt* [1939] AC 417 at 420, [1939] 3 All ER 437 at 438, HL.

3 See PARA 368.

4 *Pratt v Pratt* [1939] AC 417 at 421, 422, [1939] 3 All ER 437 at 438, 439, HL per Lord Macmillan (citing with approval *Macaskill v Macaskill* 1939 SC 187 at 193); *Herod v Herod* [1939] P 11 at 19, 20, 32, 33, [1938] 3 All ER 722 at 728, 729, 737, 738; and see *Mackenzie v Mackenzie* [1895] AC 384 at 389, HL per Lord Herschell LC; *Cohen v Cohen* [1940] AC 631 at 638, [1940] 2 All ER 331 at 334, 335, HL per Lord Romer; *Crowther v Crowther* [1951] AC 723 at 731, 734, 735, [1951] 1 All ER 1131 at 1133, 1135, 1136, HL; *Perry v Perry* [1952] P 203 at 211, 213, 228, 232, [1952] 1 All ER 1076 at 1079, 1081, 1089, 1092, CA; cf *Harriman v Harriman* [1909] P 123 at 148, CA per Buckley LJ (one party may be thankful that the other party has gone, but that other party may nevertheless be in desertion), and the comment on that case in *Spence v Spence* [1939] 1 All ER 52 at 57, 58, and *Kinnane v Kinnane* [1954] P 41 at 46, [1953] 2 All ER 1144 at 1147; *French-Brewster v French-Brewster* (1889) 62 LT 609. See also *Wallace v Wallace* 1952 SC 197 at 169, but note the warning at 170 (English conceptions of desertion are different from Scottish; and see *Crowther v Crowther* [1951] AC 723 at 734, [1951]

1 All ER 1131 at 1135, HL); *Cairns v Cairns* [1940] NI 183 (petitioner must be prepared to take respondent back, but need have no emotional desire to do so).

5 *Beigan v Beigan* [1956] P 313 at 319, [1956] 2 All ER 630 at 632, CA; *Bevan v Bevan* [1955] 3 All ER 332 at 335, [1955] 1 WLR 1142 at 1147; *Church v Church* [1952] P 313, [1952] 2 All ER 441 (where Willmer J followed *Sifton v Sifton* [1939] P 221 at 226, [1939] 1 All ER 109 at 113). See also *Crowther v Crowther* [1951] AC 723 at 731, 734, 735, [1951] 1 All ER 1131 at 1133, 1135, 1136, HL; *Pratt v Pratt* [1939] AC 417 at 421, [1939] 3 All ER 437 at 438, 439, HL (in some cases it would be a mockery for the innocent party to pretend that there was a desire for resumption); *Lane v Lane* [1951] P 284 at 288, DC; affd [1952] P 34, [1952] 1 All ER 223n, CA (constructive desertion; expelled wife had to prove husband meant, and continued at all material times to mean, what he said; otherwise she failed); cf *Dunn v Dunn* [1949] P 98 at 103, [1948] 2 All ER 822 at 823, CA; *Warburton v Warburton* (1965) 109 Sol Jo 290, CA. As to the position where the deserted party decides from the outset not to have the deserting party back see PARA 368.

6 *Bowron v Bowron* [1925] P 187 at 195, CA; *Sifton v Sifton* [1939] P 221 at 226, [1939] 1 All ER 109 at 111; *Williams v Williams* [1939] P 365 at 369, [1939] 3 All ER 825 at 828, CA (overruled on another point in *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131, HL).

7 See PARA 394.

8 *W v W (No 2)* [1954] P 486, [1954] 2 All ER 829, CA, applying observations of Lord Romer in *Cohen v Cohen* [1940] AC 631 at 635, [1940] 2 All ER 331 at 332, 333, HL (overruling *Stevenson v Stevenson* [1911] P 191, CA), where the question is posed; but see also *Cohen v Cohen* [1940] AC 631 at 645, [1940] 2 All ER 331 at 339, HL (where Lord Romer points out that there may be cases where the petition contains gross charges against the respondent so reckless and so unfounded that the respondent cannot reasonably be expected to make any attempt to bring his desertion to an end). See also PARA 368.

9 See *Pratt v Pratt* [1939] AC 417 at 420, [1939] 3 All ER 437 at 438, HL; *Cohen v Cohen* [1940] AC 631 at 638, 639, [1940] 2 All ER 331 at 335, HL; and the cases cited in note 4; but see also the cases in note 5, and the practice indicated in the text thereto.

10 *Buchler v Buchler* [1947] P 25 at 30, [1947] 1 All ER 319 at 320, CA per Lord Greene MR.

11 See the Matrimonial Causes Act 1973 s 1(4); the Civil Partnership Act 2004 s 44(4); and PARA 348.

12 *Blyth v Blyth* [1966] AC 643 at 669, 673, 674, [1966] 1 All ER 524 at 536, 539, HL.

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370. Corroboration.

Corroboration is not required as an absolute rule of law; there is no rule which prevents a tribunal from finding desertion proved in the absence of corroboration¹. If the court requires corroboration in an undefended suit, it will usually relate to the circumstances and terms of the separation and not to the duration of the desertion².

¹ *Marjoram v Marjoram* [1955] 2 All ER 1 at 7, [1955] 1 WLR 520 at 524, DC; *Stone v Stone* [1949] P 165 at 168, CA; *Tilley v Tilley* [1949] P 240 at 252, 261, [1948] 2 All ER 1113 at 1117, 1124, CA (no one can corroborate himself); *DB v WB* [1935] P 80 at 82, 85; *Joseph v Joseph* [1915] P 122 at 124; *Judd v Judd* [1907] P 241 at 243; cf *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362 at 392; *Williams v Williams* (1932) 147 LT 219 at 220, 221; *Alli v Alli* [1965] 3 All ER 480, DC; *Forster v Forster* (1910) 54 Sol Jo 403 goes too far in saying there must be corroboration: *Lawson v Lawson* [1955] 1 All ER 341, [1955] 1 WLR 200, CA.

² *Barron v Barron* [1963] 1 All ER 215, [1963] 1 WLR 57; *Forte v Forte* (1966) 110 Sol Jo 52.

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B. DESERTION AND CONSENSUAL SEPARATION

371. Time and method of consent.

There is no desertion if there is agreement to separate¹, or to the continuance of a separation². Consent to separation is a question of fact³; the fact that one party leaves the other does not in itself mean that there is agreement to separate, even if neither party wishes to live with the other⁴. The consent may be oral or in writing⁵, or may be implied⁶. The court is slow to infer a term that the separation is to be forever with no opportunity for any unilateral change of mind⁷; but, where there is no such term in the agreement to separate, it is open to either party to terminate the consensual separation by making the appropriate offer to return⁸.

It follows that desertion may be terminated by a subsequent deed consenting to the separation⁹, or by any other agreement or arrangement between the parties to that effect¹⁰.

1 See the cases cited in PARA 362 note 4. It has been held that there may be a consensual separation on the implied undertaking by both parties that one party's liability to support the other is to continue: see *Kinnane v Kinnane* [1954] P 41 at 48, [1953] 2 All ER 1144 at 1148 per Pearce J (desertion found); and see *Macdonald v Macdonald* (1859) 4 Sw & Tr 242 (allowance by husband; no consent); *Nott v Nott* (1866) LR 1 P & D 251 (allowance by wife; no consent). Separation agreements entered into before 1 January 1938 may in some circumstances be disregarded in establishing desertion: see the Matrimonial Causes Act 1973 Sch 1 para 8; *O'Brien v O'Brien* (1959) Times, 16 July; *Pearce v Pearce* [1960] 3 All ER 21 at 24, 25, [1960] 1 WLR 855 at 859, 860, CA.

2 *Pardy v Pardy* [1939] P 288 at 305, [1939] 3 All ER 779 at 785, CA; *Spence v Spence* [1939] 1 All ER 52 at 58 (consent to separation forbidden; otherwise there could be consensual divorce (not permitted at that date: see now PARA 407). This does not mean that one party may not be thankful that the other has gone, but that there must not be consent: *Harriman v Harriman* [1909] P 123 at 148, CA; *Spence v Spence* at 57, 58; *Pizey v Pizey and Stephenson* [1961] P 101 at 108, [1961] 2 All ER 658 at 662, CA; *Phair v Phair* (1963) 107 Sol Jo 554, CA; *Warburton v Warburton* (1965) 109 Sol Jo 290, CA.

3 See *Graeff v Graeff* (1928) 93 JP 48 (tacit consent to separation; no evidence of desertion); *Pardy v Pardy* [1939] P 288 at 305, 307, [1939] 3 All ER 779 at 785, 786, CA.

4 *Phair v Phair* (1963) 107 Sol Jo 554, CA (wife told husband to go; he wanted to leave anyway; as he was given no option in the matter, he was not in desertion, she was); and see *Ingram v Ingram* [1956] P 390, [1956] 1 All ER 785.

5 *Fengl v Fengl* [1914] P 274, DC; cf *Walter v Walter* [1921] P 302 (oral agreement to separate).

6 *Spence v Spence* [1939] 1 All ER 52; *Graeff v Graeff* (1928) 93 JP 48; *Barnett v Barnett* [1955] P 21 at 28, [1954] 3 All ER 689 at 694.

7 *Bosley v Bosley* [1958] 2 All ER 167 at 173, [1958] 1 WLR 645 at 653, CA (maintenance agreement was at most agreement to separate for an indefinite period; husband was in desertion prior to the agreement and on the facts remained so after it).

8 *Fraser v Fraser* [1969] 3 All ER 654, [1969] 1 WLR 1787.

9 *Lord Long of Wraxall v Lady Long of Wraxall* [1940] 4 All ER 230, CA; cf *Crabtree v Crabtree* [1953] 2 All ER 56, [1953] 1 WLR 708, CA.

¹⁰ *Harvey v Harvey* [1956] P 102, [1952] 3 All ER 772, CA; *Pizey v Pizey and Stephenson* [1961] P 101, [1961] 2 All ER 658, CA. See also PARA 372.

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372. Desertion without resumption of cohabitation.

A separation which begins by being consensual¹ may be changed into desertion without a previous resumption of cohabitation. It has been said that the separation must lose its consensual element on both sides², but this proposition is confined to deeds where the parties have covenanted to live apart for joint lives or for some other definite period and does not apply to agreements to live separately for an indefinite period, these latter agreements being terminable on the will of either party either immediately or perhaps on reasonable notice if the other terms of a particular agreement are such as to lead to the inference that such a term should be implied³. The withdrawal of consent to separation must be genuine⁴.

1 See *Adamson v Adamson* (1907) 23 TLR 434 (wife not consenting to a deed); cf *Piper v Piper* [1902] P 198 at 200, 201; *Holroyd v Holroyd* (1920) 36 TLR 479 (wife not consenting party).

2 *Pardy v Pardy* [1939] P 288 at 302, 303, 306, 307, [1939] 3 All ER 779 at 785, 786, CA. See also *Clark v Clark (No 2)* [1939] P 257 at 260, [1939] 2 All ER 392 at 394; *Basing v Basing* (1864) 3 Sw & Tr 516 (temporary separation agreed; wife to follow husband to Australia; he never sent money, and formed adulterous association there); *Mahoney v M'Carthy* [1892] P 21 at 25, 26 (temporary separation agreed; husband went to America for work; agreement as to resumption of cohabitation not clear; away ten years, communicated with wife on one occasion at most; animus not inferred); *Keech v Keech* (1868) LR 1 P & D 641 (wife left Jamaica for England because of ill-health; husband wanted her back; wife did not return or offer to return when she recovered; husband not in desertion); *Thompson v Thompson* (1858) 1 Sw & Tr 231 (husband left Leeds for London to seek work; wife did not answer his letters; husband not in desertion); *Gatehouse v Gatehouse* (1867) LR 1 P & D 331 (husband turned out of house by mother-in-law; wife stayed, husband saw wife as often as he could, corresponded with her; husband then formed adulterous association; wife heard and ceased to write to him, and he at same time broke off all association with wife; desertion as from time husband abandoned wife for other woman); *Farmer v Farmer* (1884) 9 PD 245 (desertion commenced from time wife discovered adultery of husband although he had corresponded with and visited wife while living with another woman); *Sotherden v Sotherden* [1940] P 73 at 79, 80, [1940] 1 All ER 252 at 256, CA (applying *Gatehouse v Gatehouse* and *Pulford v Pulford* [1923] P 18). Cf *Huxtable v Huxtable* (1899) 68 LJP 83; *Chudley v Chudley* (1893) 69 LT 617; *Henty v Henty* (1875) 33 LT 263; *Stickland v Stickland* (1876) 35 LT 767; and *Smith v Smith* (1888) 58 LT 639, in all of which cases temporary separations only were agreed to, and desertion supervened.

3 *Hall v Hall* [1960] 1 All ER 91, [1960] 1 WLR 52; *Gallagher v Gallagher* [1965] 2 All ER 967, [1965] 1 WLR 1110, CA.

4 *Fraser v Fraser* [1969] 3 All ER 654, [1969] 1 WLR 1787.

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373. Agreement to pay maintenance.

An agreement to pay maintenance while the parties live apart is not necessarily an agreement that one party agrees to the other living apart. The question is one of construction of the particular deed; and, if it is found to be simply a deed defining quantum and duration of payment, and not a bargain to live apart, desertion may run¹. Indeed, the desertion may have commenced before the maintenance agreement and continue to run after the agreement has been reached². An agreement to pay maintenance may be oral or in writing³; and the same considerations apply as with a deed⁴.

1 *Crabtree v Crabtree* [1953] 2 All ER 56, [1953] 1 WLR 708, CA, applying *Lord Long of Wraxall v Lady Long of Wraxall* [1940] 4 All ER 230 at 233, CA. See also *Macdonald v Macdonald* (1859) 4 Sw & Tr 242; *Nott v Nott* (1866) LR 1 P & D 251 (where allowances not under a deed did not constitute consent to separation).

2 *Bosley v Bosley* [1958] 2 All ER 167, [1958] 1 WLR 645, CA.

3 See PARAS 371, 427.

4 See *Peters' Executors v IRC* [1941] 2 All ER 620, CA (effect of a binding oral separation agreement in relation to income tax).

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374. Repudiation and affirmation of separation deed.

It has been held that if a husband who has left his wife under the terms of a separation deed subsequently repudiates the deed, but continues to live apart from his wife, it is easy to infer that his intention to live apart, which was originally based on the consent of both parties, has become an intention to desert; if, however, the party alleging desertion has during the relevant period affirmed the continuing validity of a separation deed, as by suing for maintenance under it, there cannot be desertion, since the necessary repudiation of consent on his or her part cannot be shown¹. Further, if one party has repudiated the deed and the other can show that during the relevant period he or she had no intention of relying on the deed and was always ready and willing in spite of it to resume cohabitation, that other party cannot be said to have consented to the separation, for the separation is no longer due to the consensus of the parties², and the agreement is a dead letter which no longer regulates their relations³. Breach of a particular covenant in a separation deed may not amount to repudiation; but the breach may be so fundamental or so persistent or may have such a significance when regarded in the light of all the circumstances of the case as to justify the inference that repudiation is intended⁴.

Whether a person remains party to a separation after a separation deed has been repudiated is a question of fact in each case, the answer to which depends on the true inference to be drawn from the words and conduct of the parties⁵. The burden of proving continued acceptance of a separation after repudiation of a deed lies on the party who repudiates⁶.

1 *Clark v Clark (No 2)* [1939] P 257 at 259, [1939] 2 All ER 392 at 394.

2 *Pardy v Pardy* [1939] P 288 at 303, 305, 306, [1939] 3 All ER 779 at 783, 784, CA. For a former view on this proposition see *Crabb v Crabb* (1868) LR 1 P & D 601 (separation in first instance consensual; that aspect was not affected by husband's virtual repudiation of deed; no relation back).

3 *Pardy v Pardy* [1939] P 288 at 307, [1939] 3 All ER 779 at 786, CA. See also *Looker v Looker* [1918] P 132; *Walsh v Walsh* (1919) 122 LT 463; *Roe v Roe* [1916] P 163; *Smith v Smith* [1915] P 288; *Hussey v Hussey* (1913) 109 LT 192; *Balcombe v Balcombe* [1908] P 176.

4 *Pardy v Pardy* [1939] P 288 at 304, [1939] 3 All ER 779 at 784, CA.

5 *Pardy v Pardy* [1939] P 288 at 305, 307, [1939] 3 All ER 779 at 784, 786, CA.

6 *Clark v Clark (No 2)* [1939] P 257 at 260, [1939] 2 All ER 392 at 394, explaining *Norman v Norman* (1939) unreported.

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375. Effect of an invalid or illegal separation deed.

An agreement by the parties to a marriage (or, presumably, a civil partnership), entered into before that marriage, to live afterwards apart has been held to be void as being against public policy, even if the agreement is afterwards confirmed¹. Where parties entered into an illegal separation agreement after a marriage, it was open to one of them to reassert his or her rights to cohabitation, and refusal of consortium after such reassertion put the refusing party in desertion².

1 *Scott v Scott (otherwise Fone)* [1959] P 103n at 106, [1959] 1 All ER 531 at 533, 534 (nullity case); *Re Allan, Allan v Midland Bank Executor and Trustee Co Ltd* [1954] Ch 295, [1954] 1 All ER 646, CA; *Re Williams' Settlement, Greenwell v Humphries* [1929] 2 Ch 361, CA; *Brodie v Brodie* [1917] P 271; *Lily, Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165 at 171, CA; *Marshall v Marshall* (1879) 5 PD 19 at 23; *Cocksedge v Cocksedge* (1844) 14 Sim 244.

2 *Papadopoulos v Papadopoulos* [1936] P 108; and see *Joseph v Joseph* [1953] 2 All ER 710 at 712, 713, [1953] 1 WLR 1182, CA; cf *Rosenberg v Rosenberg* (1954) Times, 16 July (deed after marriage did not, on facts of it, contemplate future separation; evidence not admissible to contradict clear terms of deed).

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376. Effect of Jewish divorce.

A get or Jewish bill of divorcement obtained in England has no legal validity in English law in that it does not effect a divorce, and it does not in itself constitute an agreement to separate under English law; but, if in a particular case it does not amount to repudiation by one spouse of the other but involves an agreement between the spouses that thereafter they should live apart, it may thereby terminate any existing desertion and prevent any future separation from amounting to desertion¹. The court must have regard to all the surrounding circumstances in which the get comes into existence, including the facts following it, to see whether the desertion is terminated by the get².

1 *Joseph v Joseph* [1953] 2 All ER 710, [1953] 1 WLR 1182, CA, distinguishing *Papadopoulos v Papadopoulos* [1936] P 108; and see *Leeser (otherwise May) v Leeser (otherwise Bohrer)* (1955) Times, 5 February (husband's consent to divorce wife by Jewish religious law, followed by her remarriage in a country where that divorce was an effective dissolution, which it was not in England, did not, on facts, amount to connivance at the subsequent adultery); *Tursi v Tursi* [1958] P 54, [1957] 2 All ER 828; *Gillon v Gillon* (1961) Times, 4 July; *Silver v Silver* (1962) 106 Sol Jo 1012. As to the recognition of extra-judicial divorces obtained by means of proceedings, including gets, see *Berkovits v Grinberg (A-G intervening)* [1995] Fam 142, [1995] 2 All ER 681; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 255, 256.

2 *Corbett v Corbett* [1957] 1 All ER 621, [1957] 1 WLR 486 (the get did not terminate desertion). See also *Garrow v Garrow* (1966) 110 Sol Jo 850. As to Jewish religious provisions see 'Jewish Divorces' (1973) 123 NLJ 829.

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C. DESERTION WITHOUT SEPARATION

377. Where parties live under same roof.

While there is no desertion if there is no separation¹, there may be an animus deserendi without a separation, as where the parties, although at arm's length, live as one household² under the same roof. There would, however, be the factum of separation if in fact the parties lived as two households³ under the same roof, even where, because of compulsion, they live in the same bedroom⁴. The onus of proving separation in these as in other desertion cases is on the person alleging desertion⁵; but it must be borne in mind that no account may be taken of certain periods during which the parties have resumed living with each other in the same household⁶.

1 See PARA 368.

2 See the cases cited in PARA 368 note 11.

3 See the cases cited in PARA 368 note 10.

4 *Beeken v Beeken* [1948] P 302 at 311, CA per Lord Merriman P (parties interned by Japanese); cf *Kaye (formerly Kazlowski) v Kazlowska* (1953) Times, 1 April (impossible for wife to leave Cracow; impossible for husband to go to Cracow; wife not in desertion); and *Szajna v Szajna* (1954) Times, 19 June (wife could have left Poland; husband could not go there; wife in desertion).

5 *Everitt v Everitt* [1949] P 374 at 390, [1949] 1 All ER 908 at 920, CA.

6 See PARA 365.

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378. Matters not amounting to separation.

To neglect opportunities of consorting with a partner is not necessarily desertion; indifference, want of proper solicitude, illiberality, denial of reasonable means, are not desertion, so long as there is maintained such degree of manner of intercourse as might naturally be expected from the calling and means of the parties¹. Regard must, therefore, be had to the opportunities for cohabitation available to the parties in question, for these opportunities may be restricted²; and there may be a cohabitation and a separation therefrom even when the parties have not lived together physically under the same roof³.

A temporary separation for mutual convenience does not put an end to cohabitation⁴.

1 *Williams v Williams* (1864) 3 Sw & Tr 547 at 548 (husband and wife domestic servants in different employments).

2 *Williams v Williams* (1864) 3 Sw & Tr 547 (matrimony is made for all; and matrimonial intercourse must accommodate itself to the weightier considerations of material life); *Huxtable v Huxtable* (1899) 68 LJP 83.

3 *Bradshaw v Bradshaw* [1897] P 24 at 26 (wife a domestic servant); and see the cases cited in PARA 362 note 11. See also *Abercrombie v Abercrombie* [1943] 2 All ER 465 (there may be a resumption of cohabitation after separation without the parties coming together in a matrimonial home); and as to that case see *Perry v Perry* [1952] P 203 at 217, [1952] 1 All ER 1076 at 1083, CA.

4 *Chudley v Chudley* (1893) 69 LT 617, CA; *Thomas v Thomas* [1924] P 194 at 199, CA (a mere temporary parting is equivocal, unless and until its purpose and object are made plain). Cf *Wynne v Wynne* [1898] P 18 (fraudulent misrepresentation as to parting for limited period); and *Harrison v Harrison* (1910) 54 Sol Jo 619 (separation deed for six months; a few days after deed husband left for New Zealand with another woman); followed in *Lepre v Lepre* [1963] 2 All ER 49 at 58; and see the cases cited in PARA 372 note 2 and PARAS 380, 382.

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379. Refusal of sexual intercourse.

When the parties are living together, persistent refusal of sexual intercourse by one of them, without any other disruptive conduct on the part of either, has been held not to constitute desertion¹, for it does not produce either separation or living apart²; but persistent refusal without explanation over a long period of time may justify the other party in leaving³, and this is so in all cases where the circumstances are such that the refusing party must be taken to realise that the refusal will probably bring the relationship to an end⁴. Refusal of sexual intercourse may be evidence from which, with other evidence, an intention to bring about a separation may be inferred⁵. Where there is refusal as a condition of resumption of cohabitation between parties who have already separated, that refusal amounts to desertion where the party stipulating that there should be no sexual intercourse in the future knows that such a proposal is unacceptable to the other party, and there are no circumstances such as physical causes or an absolute psychological barrier equivalent to a structural incapacity justifying the refusal⁶.

1 *Weatherley v Weatherley* [1947] AC 628, [1947] 1 All ER 563, HL, approving *Jackson v Jackson* [1924] P 19. Cf *Beevor v Beevor* [1945] 2 All ER 200 (wife's invincible repugnance); *Perry v Perry* [1952] P 203 at 215, 216, [1952] 1 All ER 1076 at 1082, CA.

2 *Jackson v Jackson* [1924] P 19 at 23, 24, following *Orme v Orme* (1824) 2 Add 382.

3 *Sheldon v Sheldon* [1966] P 62, [1966] 2 All ER 257, CA.

4 *Slon v Slon* [1969] P 122, [1969] 1 All ER 759, CA. See also *Sheldon v Sheldon* [1966] P 62, [1966] 2 All ER 257, CA; *Hughes v Hughes* (1966) 110 Sol Jo 349, CA. Cf *Mason v Mason* (1980) 11 Fam Law 143, CA (cited in PARA 360 note 3).

5 *Scotcher v Scotcher* [1947] P 1; *Fletcher v Fletcher* [1945] 1 All ER 582 (withdrawal to religious community and refusal of sexual intercourse; desertion); *Lawrance v Lawrance* [1950] P 84, DC; *Cann v Cann* (1967) 111 Sol Jo 810 (unreasonable refusal by wife, together with insults, lack of consideration and refusal to perform household duties; she thereby manifested an intention to desert).

6 *Hutchinson v Hutchinson* [1963] 1 All ER 1, [1963] 1 WLR 280, DC.

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D. SEPARATION WITH JUST CAUSE

380. Effect of separation with cause.

Desertion must be without cause if it is to constitute one of the facts on which a claim of irretrievable breakdown may be founded¹. It follows that a separation with cause does not constitute desertion.

¹ See PARA 363; and *Day v Day* [1957] P 202 at 210, [1957] 1 All ER 848 at 853; *G v G* [1964] P 133, [1964] 1 All ER 129, DC; *Quoraishi v Quoraishi* [1985] FLR 780, [1985] Fam Law 308, CA (polygamous marriage).

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381. Conduct amounting to just cause.

It seems that any fact constituting irretrievable breakdown¹ would justify the other party in withdrawing from cohabitation². Further, conduct which falls short of a fact constituting irretrievable breakdown may provide just cause for separation³.

¹ See PARA 347.

² Before the passing of the Divorce Reform Act 1969 (repealed), any matrimonial offence, if proved, was a ground for the other spouse withdrawing from cohabitation: see *Glenister v Glenister* [1945] P 30 at 40, 41, [1945] 1 All ER 513 at 519; *Sickert v Sickert* [1899] P 278 at 283.

³ *Williams v Williams* [1943] 2 All ER 746 at 752, CA per du Parcq LJ; *Young v Young* [1964] P 152, [1962] 3 All ER 120, DC; *Clark v Clark (by her guardian)* [1956] 1 All ER 823, [1956] 1 WLR 345; *Edwards v Edwards* [1950] P 8 at 11, 14, [1949] 2 All ER 145 at 147, 148, CA per Bucknill LJ; *Glenister v Glenister* [1945] P 30 at 37, 41, [1945] 1 All ER 513 at 518, 519 (referring to *Russell v Russell* [1895] P 315, CA; on appeal [1897] AC 395, HL); *Herod v Herod* [1939] P 11 at 25, [1938] 3 All ER 722 at 732 (any other misconduct or neglect); *Thomas v Thomas* [1924] P 194 at 201, CA; *Synge v Synge* [1900] P 180 at 180, 193, 197 (affd [1901] P 317, CA); *Yeatman v Yeatman* (1868) LR 1 P & D 489 at 491, 492, 494; *Haswell v Haswell and Sanderson* (1859) 1 Sw & Tr 502 (explained in *Cox v Cox* [1958] 1 All ER 569 at 573, [1958] 1 WLR 340 at 345, 346, DC). See also PARA 385.

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382. Enforced separations.

The court will not find desertion merely because one party spends a holiday away from the other¹. It has been held that if a woman marries a man whose work compels him to live out of England, she impliedly agrees that he should not be compelled to live with her in England², and that if a woman whose husband is compelled by reason of his work to live out of England makes it impossible through her conduct for her to stay with him abroad, she cannot complain of separation without just cause if the husband offers to maintain her elsewhere, and refuses to give up his employment abroad and join her³.

Where a separation is enforced, it is impossible to infer from the mere fact of withdrawal from cohabitation any intention to bring cohabitation permanently to an end, but such an intention may be shown independently; in that case, the extraneous circumstances which necessitate the separation are no longer a cause of separation but are a mere excuse for it⁴.

1 See *G v G* [1930] P 72 at 75.

2 *G v G* [1930] P 72 at 76 (a husband is bound to maintain his wife and children, and, therefore, to earn a living, and it is for him to choose how and where he earns that living, provided that his choice is genuine and not merely a cloak to avoid living with his wife); as to the duty to maintain see also *Lilley v Lilley* [1960] P 158 at 180, [1959] 3 All ER 283 at 289, CA per Hodson LJ (obligation to maintain not affected by enforced separation).

3 *G v G* [1930] P 72 at 75 (wife's persistent extravagance; also she incensed husband's partners against her); cf *Powell v Powell* (1957) Times, 22 February, CA (wife returned to father's home in Greece; husband would not give up home and job in England; decree granted to husband).

4 *G v G* [1964] P 133 at 136, [1964] 1 All ER 129 at 131, DC.

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383. Limited separation; duty to offer to return.

When a party is living apart from the other by agreement for a limited purpose, it is the duty of that other party to offer to return to the other when that purpose has been accomplished¹.

¹ *Keech v Keech* (1868) LR 1 P & D 641 (wife's illness caused her to leave Jamaica where husband lived and was employed but she made no effort to return); and see *Powell v Powell* (1957) Times, 22 February, CA (wife went to visit father in Greece because she was homesick, but refused to return).

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384. Choice of home.

There is no absolute rule whereby either party is entitled to dictate to the other where their home shall be; the matter is to be settled by agreement between the parties, by a process of give and take, and by reasonable accommodation¹. It is not against public policy for parties to enter into a prior agreement on what is to be their home, and, unless the reasons on which the agreement was based cease to exist, or if some changed circumstances give good reason for change in the home, the agreement stands². Neither party, it has been said, has a casting vote³; it has further been suggested that, if the parties are both unreasonable, each might be entitled on the ground of the other's desertion⁴, but this proposition has been doubted and disapproved⁵. The parties should so arrange their affairs that they spend their time together and not apart⁶, and, where there is a difference of view, reason must prevail⁷.

It has been held that a wife does not succeed in establishing that a husband has not provided her with a reasonable home by showing that, having left him unreasonably, she has, by her independent action, found accommodation somewhere else which he is unwilling to accept⁸.

1 *Jackson v Jackson* (1932) 146 LT 406 at 407 (husband's taking house next door to his mother was not an abuse of the husband's marital duties, despite irritation it was likely to cause, as he did not put wife under mother's domination); *Walter v Walter* (1949) 65 TLR 680; *Dunn v Dunn* [1949] P 98 at 103, [1948] 2 All ER 822 at 823, CA per Denning LJ; *Murray v Murray* (1961) Times, 22 November. See also *Fletcher v Fletcher* [1945] 1 All ER 582 (offer of home in religious community held to be unreasonable); *Kenward v Kenward* [1951] P 124 at 136, [1950] 2 All ER 297 at 304, CA per Sir Raymond Evershed MR (considering the effect on the validity of a marriage by Russian law on place of spouses' matrimonial home). It has been held that it is a husband's duty to provide his wife with a home according to his circumstances: see *Millichamp v Millichamp* (1931) 146 LT 96 at 97 (his first duty).

2 *King v King* [1942] P 1, [1941] 2 All ER 103. See also *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735, CA; *Walter v Walter* (1949) 65 TLR 680; *Dunn v Dunn* [1949] P 98, [1948] 2 All ER 822, CA (location of a husband's work is a most important consideration to be borne in mind in selecting the situation of the matrimonial home, although in some cases the wife's business and livelihood may be a predominant consideration); and *Mansey v Mansey* [1940] P 139 at 140, [1940] 2 All ER 424 at 426 per Henn Collins J (if the husband says he wants to live in such and such a place, then, assuming always that he is not doing it to spite his wife, and that the accommodation is of a kind expected to be occupied by a man in his position, the wife is under the necessity of sharing that home with him, or being in desertion).

3 See *Dunn v Dunn* [1949] P 98 at 103, [1948] 2 All ER 822 at 824, CA per Denning LJ. In *McGowan v McGowan* [1948] 2 All ER 1032 at 1035, it was said that the proposition that neither party has a casting vote is but another way of stating that neither has, as a matter of law, the right to choose the home.

4 *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 at 740, CA per Denning LJ, criticising *Walter v Walter* (1949) 65 TLR 680 (where Willmer J held that, where each was obstinate, neither proved that the other was in desertion, nor that the separation was brought about by the fault of the other).

5 See PARA 367.

6 *Dunn v Dunn* [1949] P 98 at 103, 104, [1948] 2 All ER 822 at 823, CA.

7 *McGowan v McGowan* [1948] 2 All ER 1032 at 1035 per Pilcher J. See also *Butland v Butland* (1913) 29 TLR 729 (wife drank to excess); *Fisk v Fisk* (1920) 122 LT 803 (husband's daughters by a previous marriage; husband had no just cause to refuse to have wife back).

8 *McGowan v McGowan* [1948] 2 All ER 1032 at 1035.

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385. Illness.

It is difficult to establish that a separation caused by the illness, physical or mental, of one party, necessitating that party remaining in hospital or otherwise being separated from the other for the relevant continuous period¹, amounts to desertion without just cause²; but the absent party must retain the intention to return to cohabitation when reasonably able to do so³.

¹ See PARA 364.

² *Keeley v Keeley* [1952] 2 TLR 756 at 761, CA per Singleton LJ (such an allegation should be pleaded); *Pulford v Pulford* [1923] P 18 at 23 (cohabitation only suspended while wife in asylum); *Beevor v Beevor* [1945] 2 All ER 200; *G v G* [1964] P 133, [1964] 1 All ER 129, DC; *Perry v Perry* [1963] 3 All ER 766, [1964] 1 WLR 91; cf *Hanbury v Hanbury* [1892] P 222 (affd 8 TLR 559, CA). An insane wife may have an animus deserendi: *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131, HL; and see PARA 389. The illness of one party does not justify the other party in renouncing his obligations: see PARA 390.

³ *Lilley v Lilley* [1960] P 158 at 169, [1959] 3 All ER 283, CA; *Tickle v Tickle* [1968] 2 All ER 154, [1968] 1 WLR 937, DC; *G v G* [1964] P 133, [1964] 1 All ER 129, DC.

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E. ABSENCE OF INTENTION TO DESERT

386. Position of deserting party.

Once desertion has begun in a manner consistent with a continuing intention to desert, the desertion will continue in law notwithstanding the fact that subsequently physical inability to end the desertion, such as imprisonment, prevents the deserting party from returning¹. It is the character of the leaving that is material², provided that the intention to desert is shown to continue, whether by positive evidence or by the absence of anything to negative the presumption that the desertion, once established, continues to run³.

1 *Lilley v Lilley* [1960] P 158 at 169, [1959] 3 All ER 283, CA (neurotic wife who said that she would never return to her husband was guilty of desertion); *Drew v Drew* (1888) 13 PD 97 at 99 (desertion, later imprisonment; desertion continued); *Astrove v Astrove* (1859) 29 LJP & M 27 (same); *Williams v Williams* [1938] 4 All ER 445 (same); and see *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131, HL; and PARA 389.

2 *Drew v Drew* (1888) 13 PD 97 at 98; *Wynne v Wynne* [1898] P 18 at 20.

3 *Beeken v Beeken* [1948] P 302 at 308, CA (compulsory de facto separation with supervening animus deserendi); *Ingram v Ingram* [1956] P 390 at 410, [1956] 1 All ER 785 at 797; *Czepek v Czepek* [1962] 3 All ER 990; but see *Kaye (formerly Kazlowski) v Kazlowska* (1953) Times, 1 April (parties kept apart because of international difficulties), and cf *Szajna v Szajna* (1954) Times, 19 June (wife could have left Poland but refused to; husband could not return there because of political situation). Cf *Williamson v Williamson* (1882) 7 PD 76; *Townsend v Townsend* (1873) LR 3 P & D 129 at 131; and *Lawrence v Lawrence* (1862) 2 Sw & Tr 575.

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387. Absence of animus deserendi.

To constitute actual desertion there must be not only a separation but also the animus deserendi¹; in constructive desertion the deserting party must have intended to bring the consortium to an end², or to have acted with the knowledge that that was what would probably happen³.

1 See PARA 368; *Buchler v Buchler* [1947] P 25 at 29, [1947] 1 All ER 319 at 320, CA (as to which see *Hall v Hall* [1962] 3 All ER 518, [1962] 1 WLR 1246, CA); *Crowther v Crowther* [1951] AC 723 at 734, 735, [1951] 1 All ER 1131 at 1135, 1136, HL.

2 *Buchler v Buchler* [1947] P 25 at 29, 30, [1947] 1 All ER 319 at 320, CA per Lord Greene MR; but see *Burton v Burton* (1969) 113 Sol Jo 852, DC.

3 *Gollins v Gollins* [1964] AC 644 at 666, [1963] 2 All ER 966 at 973, HL; *Lang v Lang* [1955] AC 402, [1954] 3 All ER 571, PC.

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388. Proof of intention.

In a simple case of constructive desertion, the intention to desert may be inferred if the circumstances are such as to justify the inference. In the case of simple desertion the mere act of one party leaving will in general make the inference an easy one¹, but there may be just cause². In the case of constructive desertion, if one party without just cause or excuse persists in doing what he or she knows the other will not and should not tolerate, and that other party in consequence leaves, the party who is left is the deserter whatever his or her intention may have been; one must look at the facts, and while intention may aggravate the facts, the absence of intention will not defeat the charge of constructive desertion³.

Where desertion is once established, but the separation is enforced through other circumstances, the intention to continue the desertion must be proved by positive evidence or by negative inference⁴.

1 *Buchler v Buchler* [1947] P 25 at 30, [1947] 1 All ER 319 at 320, CA (as to which see *Hall v Hall* [1962] 3 All ER 518, [1962] 1 WLR 1246, CA).

2 As to just cause see PARA 380 et seq.

3 *Gollins v Gollins* [1964] AC 644 at 666, [1963] 2 All ER 966 at 974, HL.

4 See PARA 386.

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389. Effect of insanity on desertion.

There is no reason for imputing an irrebuttable inability on the part of a person who suffers from a mental disorder to form an intention to desert or, once desertion has begun and is followed by mental disorder, to keep such an intention¹. For the purpose of proving irretrievable breakdown by reason of desertion², the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that his desertion continued at that time³. An allegation that a party is mentally ill, so as to be incapable of forming an intention to desert, should be pleaded⁴. Illness, whether mental or physical, may amount to just cause for separation⁵; but, where a sick person is medically advised that there should be a temporary separation, albeit that the situation at the end of that period cannot be envisaged, and takes advantage of that temporary situation to manifest an indication to disrupt cohabitation permanently, that person is in desertion from the time of such indication⁶.

Where one party leaves the other, acting on a genuinely held but delusional belief that he or she has just cause for doing so, the rights of a party in relation to a charge of desertion are to be judged as if that belief were true⁷.

1 *Crowther v Crowther* [1951] AC 723 at 732, [1951] 1 All ER 1131 at 1134, HL (overruling *Williams v Williams* [1939] P 365, [1939] 3 All ER 825, CA; distinguishing *Jones v Newtown and Llanidloes Guardians* [1920] 3 KB 381, DC; and approving *Bennett v Bennett* [1939] P 274 at 278, [1939] 2 All ER 387 at 390, 391). In *Wickens v Wickens* [1952] 2 All ER 98, CA, the principle of *Crowther v Crowther* was applied (the case is reported mainly on the question when a guardian ad litem of a person of unsound mind should be appointed: see now **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008) PARA 225); and see *Keeley v Keeley* [1952] 2 TLR 756, CA, applied in *Lilley v Lilley* [1960] P 158 at 181, [1959] 3 All ER 283 at 289, CA; *Clark v Clark (by her guardian)* [1956] 1 All ER 823, [1956] 1 WLR 345; *Kaczmarz v Kaczmarz (by her guardian)* [1967] 1 All ER 416 at 423, [1967] 1 WLR 317 at 327; *G v G* [1964] P 133, [1964] 1 All ER 129, DC (wife left husband because of danger to health and safety of the children; she was not in desertion).

2 See PARA 363.

3 See the Matrimonial Causes Act 1973 s 2(4); the Civil Partnership Act 2004 s 45(5); and PARA 347. For the previous law see *Crowther v Crowther* [1951] AC 723 at 733, [1951] 1 All ER 1131 at 1134, HL, in so far as continuance of desertion is concerned. See also *Osborne v Osborne (by her guardian)* (1961) 105 Sol Jo 650. See also *Keeley v Keeley* [1952] 2 TLR 756, CA (there is a natural reluctance in any court to find that a patient in a mental hospital has deserted his or her spouse); *Lilley v Lilley* [1960] P 158 at 181, [1959] 3 All ER 283 at 289, CA; *Perry v Perry* [1963] 3 All ER 766, [1964] 1 WLR 91; cf *Smith v Smith* (1973) 118 Sol Jo 184; *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA; *Thurlow v Thurlow* [1976] Fam 32, [1975] 2 All ER 979. As to the circumstances in which the court may find that the effect of the behaviour of a mentally ill respondent makes it impossible for the petitioner to live with him see PARA 360 note 2.

4 *Keeley v Keeley* [1952] 2 TLR 756 at 761, CA.

5 *Perry v Perry* [1963] 3 All ER 766, [1964] 1 WLR 91.

6 *Tickle v Tickle* [1968] 2 All ER 154, [1968] 1 WLR 937, DC.

7 *Perry v Perry* [1963] 3 All ER 766 at 769, [1964] 1 WLR 91 at 96; *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA; *Thurlow v Thurlow* [1976] Fam 32, [1975] 2 All ER 979.

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390. Petitioner mentally or otherwise ill.

The fact that the petitioner¹ is in a mental hospital, or is otherwise ill in hospital, does not excuse the respondent who has renounced his or her obligations to that person; and, if during the period of the illness the respondent disappears and does not return when the applicant's recovery is effected, desertion begins as from the date of the respondent's renunciation of his or her obligations².

1 As to petitioners and applicants see PARA 321 note 1.

2 *Sotherden v Sotherden* [1940] P 73, [1940] 1 All ER 252, CA, applying *Pulford v Pulford* [1923] P 18, and *Gatehouse v Gatehouse* (1867) LR 1 P & D 331; *Perry v Perry* [1963] 3 All ER 766, [1964] 1 WLR 91. See also *Leng v Leng* [1946] 2 All ER 590 (husband's neurotic condition, and no more, not just cause for wife's separation); *Hayward v Hayward* (1858) 1 Sw & Tr 81 at 84 (husband not entitled to turn lunatic wife out of doors); cf *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA; *Thurlow v Thurlow* [1976] Fam 32, [1975] 2 All ER 979 (cited in PARA 360 note 2).

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F. CONSTRUCTIVE DESERTION

391. Doctrine of constructive desertion.

Desertion is not to be tested merely by ascertaining which party left first¹. If one party is forced by the conduct² of the other to leave, it may be that the party responsible for the driving out is guilty of desertion³; so, for example, if a husband without just cause or excuse persists in doing things which he knows his wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, the husband will have deserted her whatever his desire or intention may have been⁴. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife and the case of a man who, with the same intention, compels his wife by his conduct to leave him⁵. This is the doctrine of constructive desertion⁶. It is to be observed that conduct by the respondent amounting to constructive desertion will, in the nature of things, constitute behaviour which is such that the petitioner cannot reasonably be expected to live with the respondent⁷; and, if such an allegation is made, it obviates the need to wait for the period of two years necessary in the case of desertion⁸.

1 *Sickert v Sickert* [1899] P 278 at 284; *Bowron v Bowron* [1925] P 187, CA; *Spence v Spence* [1939] 1 All ER 52 at 57; *Buchler v Buchler* [1947] P 25, [1947] 1 All ER 319, CA; *Simpson v Simpson* [1951] P 320 at 331, [1951] 1 All ER 955 at 960, 961; *Lang v Lang* [1955] AC 402 at 417, [1954] 3 All ER 571 at 573, PC.

2 *Sullivan v Sullivan* [1970] 2 All ER 168, [1970] 1 WLR 1008, CA (pregnancy by another man at time of marriage did not amount to expulsive conduct).

3 *Graves v Graves* (1864) 3 Sw & Tr 350; *Koch v Koch* [1899] P 221 (husband refused to discharge servant with whom he had committed adultery; wife left); *Pulford v Pulford* [1923] P 18 at 21; *Jones v Jones* [1952] 2 TLR 225, CA (wife instigated justices into ordering husband to leave matrimonial home; wife in desertion from that time); *Pratt v Pratt* (1962) 106 Sol Jo 876, CA (married life made impossible).

4 *Gollins v Gollins* [1964] AC 644 at 666, [1963] 2 All ER 966 at 974, HL per Lord Reid; *Rothery v Rothery* (1966) Times, 30 March, DC.

5 *Sickert v Sickert* [1899] P 278 at 282; *Charter v Charter* (1901) 84 LT 272 at 273; *Harriman v Harriman* [1909] P 123 at 135, CA; *Thomas v Thomas* [1924] P 194 at 199, 203, CA; *Pike v Pike* [1954] P 81n at 86, [1953] 1 All ER 232 at 233, CA.

6 *Pike v Pike* [1954] P 81n at 86, 88, [1953] 1 All ER 232 at 233, 235, CA; *Kashich v Kashich* (1951) 116 JP 6, DC; *Simpson v Simpson* [1951] P 320 at 326, [1951] 1 All ER 955 at 957; *Lawrance v Lawrance* [1950] P 84 at 86, DC; *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 at 736-738, CA; *Winnan v Winnan* [1949] P 174 at 179, 181, [1948] 2 All ER 862 at 864, 865, CA; *Buchler v Buchler* [1947] P 25 at 29, 48, [1947] 1 All ER 319 at 320, 327, CA; *Spence v Spence* [1939] 1 All ER 52 at 58; *Herod v Herod* [1939] P 11 at 21, 23, [1938] 3 All ER 722 at 729, 731; *Teall v Teall* [1938] P 250 at 256, [1938] 3 All ER 349 at 352; *Bowron v Bowron* [1925] P 187 at 191, CA. It has been said in the House of Lords that the House may have to consider, should the point come before it, whether there is sufficient warrant for the doctrine: see *Weatherley v Weatherley* [1947] AC 628 at 632, [1947] 1 All ER 563 at 564, 565, HL per Lord Jowitt LC.

7 See PARA 360. As to petitioners and applicants see PARA 321 note 1.

8 See PARA 364.

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392. Animus and factum.

It is as necessary in cases of constructive desertion to prove both the factum and the animus on the part of the party charged with the desertion as it is in cases of actual desertion¹. The practical difference between the two cases lies in the circumstances which will constitute such proof, for, while the intention to bring the consortium to an end exists² in both cases, in actual desertion there is an abandonment, whereas in constructive desertion there is expulsion by words or by other conduct³.

1 See PARA 368.

2 See, however, *Gollins v Gollins* [1964] AC 644 at 666, [1963] 2 All ER 966 at 974, HL per Lord Reid ('He did not act with the intention of driving her out, but he acted with the knowledge that that was what would probably happen').

3 *Buchler v Buchler* [1947] P 25 at 29, 30, 45, [1947] 1 All ER 319 at 325, 326, CA. See also the 'simple case' of constructive desertion referred to in *Pike v Pike* [1954] P 81n at 87, [1953] 1 All ER 232 at 235, CA per Hodson LJ, and see at 86 and at 235, 236 per Denning LJ.

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393. Onus and standard of proof.

In a case of constructive desertion, the onus of proving that the intention to desert continues may be much lighter than in a case of mere withdrawal from cohabitation¹. A mere wish or intention that the other party should leave is insufficient by itself to constitute constructive desertion². The wish or intention must be accompanied by conduct which is of such grave and weighty character as to make cohabitation virtually impossible³, and which the court can properly regard as equivalent to expulsion in fact⁴.

It is also said, however, that, when the fact of separation is proved, the intent to bring the home to an end can be inferred, amongst other things, from words so plain, that the party using them may be taken to mean what he says⁵; if there is no background of ill-treatment, it may well be more difficult to prove that mere words of expulsion were intended to be final, conclusive and effective than if there is such a background⁶.

Conduct short of a fact⁷ in itself constituting irretrievable breakdown might be sufficient to justify the other party in leaving⁸; but it is essential to examine the actual facts in order to see whether the conduct of the party who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other party from conduct equivalent to expulsion⁹. The ordinary wear and tear, or mere inconsiderate conduct which is one of the risks, of conjugal life does not in itself suffice¹⁰; however where a husband induced by his conduct, not by mere hearsay, a belief in his wife that he was conducting an improper affair with another woman, and the wife acting on that belief left the husband or turned him out, she is not in desertion¹¹. Likewise, in a marriage there may be conduct in relation to a third person which is neither adulterous nor giving rise to a reasonable belief in adultery but which nevertheless is so inconsistent with the married relationship as to amount to expulsive conduct¹².

Once constructive desertion has ensued owing to a party's conduct, that desertion continues until appropriate steps are taken to terminate it¹³.

1 *Herod v Herod* [1939] P 11 at 22, [1938] 3 All ER 722 at 730.

2 *Buchler v Buchler* [1947] P 25 at 45, [1947] 1 All ER 319 at 325, CA per Lord Greene MR; *Charter v Charter* (1901) 84 LT 272 ('Go where you like. Do what you like'; wife left and refused to return; husband not in desertion); *Lane v Lane* [1952] P 34 at 39, [1952] 1 All ER 223n, CA per Jenkins LJ dissenting; *Partridge v Partridge* (1957) Times, 13 December (wife knew husband who was unpleasant with drink did not want her to go, although he told her to).

3 *Rothery v Rothery* (1966) Times, 30 March, DC (wife pregnant by another man agreed with husband to give up child on its birth so that marriage might continue; she failed to do so and, therefore, had constructively deserted); *Saunders v Saunders* [1965] P 499 at 507, [1965] 1 All ER 838 at 843, DC; *Edwards v Edwards* (*Moore intervening*) (1965) 109 Sol Jo 175; *Hall v Hall* [1962] 3 All ER 518, [1962] 1 WLR 1246, CA; *Pratt v Pratt* (1962) 106 Sol Jo 876, CA; *Kemp v Kemp* [1961] 2 All ER 764, [1961] 1 WLR 1030, DC; *Pizey v Pizey and Stephenson* [1961] P 101, [1961] 2 All ER 658, CA; *McMillan v McMillan* 1961 SLT 429; *Cox v Cox* [1958] 1 All ER 569 at 572, 573, [1958] 1 WLR 340 at 344-346; *Patching v Patching* (1958) Times, 25 April, DC; *Roe v Roe* [1956] 3 All ER 478 at 483, [1956] 1 WLR 1380 at 1385, 1386, DC; *Pike v Pike* [1954] P 81n at 82, [1953] 1 All ER 232 at 233, CA; *Timmins v Timmins* [1953] 2 All ER 187 at 191, [1953] 1 WLR 757 at 761, 762, CA per Denning LJ; *Lane v Lane* [1952] P 34, [1952] 1 All ER 223n, CA; *Chilton v Chilton* [1952] P 196, [1952] 1 All ER 1322, DC; *Jones v Jones* [1952] 2 TLR 225, CA; *Price v Price* [1951] 1 All ER 877 (affd [1951] P 413, [1951] 2 All ER 580n, CA); *Allen v Allen* [1951] 1 All ER 724, CA; *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735, CA;

Lawrance v Lawrance [1950] P 84, DC (husband's refusal of sexual intercourse); *Edwards v Edwards* [1950] P 8, [1949] 2 All ER 145, CA; *Winnan v Winnan* [1949] P 174, [1948] 2 All ER 862, CA (wife preferred cats to husband; husband left; wife in desertion) (but see comment on this case in *Bartholomew v Bartholomew* [1952] 2 All ER 1035, CA (dirty wife; no evidence that she wished to bring consortium to an end; husband left; wife not in desertion); cf *Kaslefsky v Kaslefsky* [1951] P 38, [1950] 2 All ER 398, CA (cruelty)); *Holborn v Holborn* [1947] 1 All ER 32 at 33 (unreasonable and inconsiderate sexual demands); *Buchler v Buchler* [1947] P 25 at 30, 41, 42, 45, [1947] 1 All ER 319 at 320, 323, 324, 325, CA (occasional angry remarks that wife could clear out and live with her mother if she did not like the very close friendship of husband with his bailiff, not sufficiently grave and weighty, for, even if the animus existed, there was no factum of expulsion); *Leng v Leng* [1946] 2 All ER 590 (neurotic condition of husband, nothing else; wife left; no desertion by husband); *Fletcher v Fletcher* [1945] 1 All ER 582 (husband's membership of religious community, and refusal of sexual intercourse; wife refused to live with him in the community; husband in desertion); *Glenister v Glenister* [1945] P 30, [1945] 1 All ER 513; *Teall v Teall* [1938] P 250 at 256, [1938] 3 All ER 349 at 352 (mere discovery of past adultery insufficient); *Pizzala v Pizzala* (1896) 12 TLR 451 (husband adhered to mistress; wife left; husband in desertion); cf *Haviland v Haviland* (1863) 3 Sw & Tr 114 ('Go to your mistress if you like and when you are tired of her come back to me'; not necessarily consent); *Dickinson v Dickinson* (1889) 62 LT 330 (husband brought mistress into matrimonial home; wife left; husband in desertion); *Yeatman v Yeatman* (1868) LR 1 P & D 489 at 493, 494 (mere frailty of temper insufficient).

4 *Buchler v Buchler* [1947] P 25 at 34, 43, 45, [1947] 1 All ER 319 at 322, 324, 325, CA; *Kaslefsky v Kaslefsky* [1951] P 38 at 41, [1950] 2 All ER 398 at 399, CA per Buckley LJ; *Young v Young* [1964] P 152, [1962] 3 All ER 120, DC.

5 *Lane v Lane* [1951] P 284 at 286, 287, DC; affd [1952] P 34, [1952] 1 All ER 223n, CA.

6 *Lane v Lane* [1951] P 284 at 287, DC; and see on appeal [1952] P 34 at 38, [1952] 1 All ER 223n at 224, CA per Somervell LJ; *Young v Young* [1964] P 152, [1962] 3 All ER 120, DC.

7 As to such facts see PARA 347.

8 *Buchler v Buchler* [1947] P 25 at 30, 45, [1947] 1 All ER 319 at 320, 326, CA.

9 *Buchler v Buchler* [1947] P 25 at 35, [1947] 1 All ER 319 at 322, CA; and see *Pew v Pew* (1951) unreported, CA, referred to in *Simpson v Simpson* [1951] P 320 at 335-339, [1951] 1 All ER 955 at 963-965, DC; *Hall v Hall* [1962] 3 All ER 518, [1962] 1 WLR 1246, CA (drunkenness). See also *Hanson v Hanson* (1954) Times, 10 March, CA (inadequacy of housekeeping allowance). It has been suggested that, where the faults are equal on each side, the act of a party leaving with the intention not to return constitutes desertion: *Spence v Spence* [1939] 1 All ER 52 at 58.

10 *Buchler v Buchler* [1947] P 25 at 35m 45, 47, [1947] 1 All ER 319 at 322, 326, CA; *Squire v Squire* [1949] P 51 at 72, [1948] 2 All ER 51 at 60, CA; *Edwards v Edwards* [1950] P 8 at 13, [1949] 2 All ER 145 at 148, CA; *Simpson v Simpson* [1951] P 320 at 342, [1951] 1 All ER 955 at 967; *Rothery v Rothery* (1966) Times, 30 March, DC. See also *Bartholomew v Bartholomew* [1952] 2 All ER 1035, CA; *Marjoram v Marjoram* [1955] 2 All ER 1 at 8, [1955] 1 WLR 520 at 527 (sluttishness alone did not constitute a ground sufficient to establish constructive desertion).

11 *Hunter v Hunter* (1961) 105 Sol Jo 990, DC; see also *Baker v Baker* [1954] P 33 at 35, [1953] 2 All ER 1199 at 1200, DC (husband deliberately induced wife to believe that he had committed adultery).

12 *Hind v Hind* [1969] 1 All ER 1083 at 1086, [1969] 1 WLR 480 at 484, DC.

13 *Burton v Burton* (1969) 113 Sol Jo 852, DC.

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394. Presumptions.

Where conduct of the required nature is established, the necessary intention is readily inferred¹, for prima facie a person is presumed to intend the natural and probable consequences of his acts², and it is not necessary to show in a case of constructive desertion some definite evidence of a clear intention on the part of one party to drive the other away. The maxim does not express an irrebuttable presumption of law, and it is only to be applied in connection with conduct which can fairly be described as expulsive³.

This presumption is not necessarily rebutted by evidence that the party guilty of expulsive conduct in fact had no desire to cause the other party to leave or even desired him or her not to leave⁴.

1 *Buchler v Buchler* [1947] P 25 at 30, [1947] 1 All ER 319 at 321, CA.

2 *Pizzala v Pizzala* (1896) 12 TLR 451; *Sickert v Sickert* [1899] P 278 at 284; *Edwards v Edwards* [1948] P 268 at 269-273, [1948] 1 All ER 157 at 158-160, DC; *Squire v Squire* [1949] P 51 at 56, 57, [1948] 2 All ER 51 at 53, CA (cruelty), approving *Edwards v Edwards*; *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 at 738, 739, CA; *Simpson v Simpson* [1951] P 320 at 326, 332, [1951] 1 All ER 955 at 957, 960, 961 (cruelty); *Kaslefsky v Kaslefsky* [1951] P 38 at 46, [1950] 2 All ER 398 at 403, CA (cruelty); *Jamieson v Jamieson* [1952] AC 525 at 540, [1952] 1 All ER 875 at 881, HL; *Lane v Lane* [1952] P 34 at 38, [1952] 1 All ER 223n at 224, CA; cf *Spence v Spence* [1939] 1 All ER 52 at 58 (intention to desert must be implied); *Herod v Herod* [1939] P 11 at 22, [1938] 3 All ER 722 at 730; *R v Steane* [1947] KB 997 at 1003, [1947] 1 All ER 813 at 815, CCA; *Lane v Lane* [1952] P 34 at 38, [1952] 1 All ER 223n at 224, CA (if the words of expulsion are used and the other party leaves, the natural conclusion is that the words had their intended effect, unless there is some reason to take a different view); *Rothery v Rothery* (1966) Times, 30 March, DC.

3 *Simpson v Simpson* [1951] P 320 at 334, [1951] 1 All ER 955 at 962; *Jamieson v Jamieson* [1952] AC 525 at 540, [1952] 1 All ER 875 at 881, HL; *Lang v Lang* [1955] AC 402 at 427, [1954] 3 All ER 571 at 579, PC; *Waters v Waters* [1956] P 344 at 360, [1956] 1 All ER 432 at 440, DC.

4 See *Lang v Lang* [1955] AC 402 at 423-425, [1954] 3 All ER 571 at 577, 578, PC, citing the summary by Denning LJ in *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 at 738, CA, of the two schools of thought on constructive desertion. That summary explained that one school of thought held that a person was not guilty of constructive desertion, however bad his conduct, unless he had in fact an intention to bring married life to an end (thus applying a subjective test, admitting that there are cases where the intention can be presumed, but asserting that, if in truth the facts negative any intention to disrupt married life, the courts should not attribute that intention to the spouse), while the other school, which was that followed in *Lang v Lang*, took the view that, even if a spouse had no wish in fact to disrupt married life, he or she was presumed to intend the natural consequences of his or her acts; so that, if one spouse's conduct is so bad that the other spouse is forced to leave, the former is guilty of constructive desertion, however much he or she may have desired the other to remain. The subjective test approved by the first school of thought is supported by the decision in *Boyd v Boyd* [1938] 4 All ER 181, by Denning LJ in *Hosegood v Hosegood* at 738 (but see *W v W (No 2)* [1962] P 49, [1961] 2 All ER 626, DC), and again by Denning LJ in *Bartholomew v Bartholomew* [1952] 2 All ER 1035 at 1037, CA. The second school of thought is supported by the decision in *Edwards v Edwards* [1948] P 268, [1948] 1 All ER 157, DC, and by *Simpson v Simpson* [1951] P 320 at 333, 334, [1951] 1 All ER 955 at 961, 962. It was pointed out in *Lang v Lang* at 427 and at 579, that both schools of thought accept the position that the animus deserendi may be inferred from acts alone. The Judicial Committee, in that case, considered what the legal result was where an intention to bring about a particular result (inferred from conduct) co-existed with a wish that the result would not ensue, concluding that conduct which a reasonable man must know would lead in all probability to the departure of his wife and would disrupt the home led to the inference that he intended that consequence, whether or not he in fact wished it, though the inference was open to be rebutted by evidence: *Lang v Lang* at 429 and at 580. In *Marjoram v Marjoram* [1955] 2 All ER 1 at 8, [1955] 1 WLR 520 at 526, 527, Lord Merriman P, while not himself entering into a full consideration of the authorities, said that, in *Lang v Lang* the subjective test was decisively rejected by the Judicial Committee; so, too, *Waters v Waters* [1956] P 344 at 360, [1956] 1

All ER 432 at 440, DC; *Ingram v Ingram* [1956] P 390, [1956] 1 All ER 785 at 798; *W v W (No 2)*; *Burton v Burton* (1969) 113 Sol Jo 852, DC. See also *Fishburn v Fishburn* [1955] P 29 at 36, [1955] 1 All ER 230 at 233 (intention, not desire, the material consideration).

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395. Conduct with third parties and past history.

The conduct relied on may be conduct of the offending party with or relating to a third person¹. Conduct can always be looked at in the light of past history which throws light on it; and acts of minor significance in themselves may in the light of past history be of serious import², as, for example, where there has been a previous finding of constructive desertion against one of the parties³.

1 *Edwards v Edwards* [1948] P 268 at 270, 271, [1948] 1 All ER 157 at 159, DC; and see *Buchler v Buchler* [1947] P 25, [1947] 1 All ER 319, CA; *Lewis v Lewis* [1956] P 205n, [1955] 3 All ER 598, DC (husband guilty of isolated indecent assault on woman in cinema; no ground for wife alleging constructive desertion thereby, for, in view of the then existing statutory provisions as to divorce for unnatural sexual practices, this would be creating a new ground of divorce; further, since the assault was without consent, adultery could be negatived, and the wife had no ground for refusing to be reconciled with husband); *Harvey v Harvey* [1956] P 102, [1955] 3 All ER 772, CA (wife left home because husband refused to turn out wastrel son); *Chadwick v Chadwick* (1964) Times, 24 October, DC (whether husband must put wife before the child of a previous marriage is a question of what is reasonable in the circumstances); *Rothery v Rothery* (1966) Times, 30 March, DC (wife refused to have her child by adulterous union adopted; husband entitled to leave).

2 *Lane v Lane* [1951] P 284; affd [1952] P 34 at 45, CA.

3 *Lane v Lane* [1952] P 34, [1952] 1 All ER 223n, CA; cf *Dixon v Dixon* [1953] P 103, [1953] 1 All ER 910.

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G. TERMINATION OF DESERTION

396. Ways of terminating desertion.

Desertion continues until it is terminated. Termination may take place by the fact of return; or by a supervening intention to return coupled with an approach to the deserted party, made in good faith, with a view to resumption of life together; or by a supervening consensus, for example under a separation agreement made in good faith¹. A mere intention to return, unaccompanied by some notification to the deserted party, will not terminate desertion². Whilst the court has never discouraged attempts at reconciliation by a deserting party³, there is now statutory provision enabling the parties to resume living with each other for one period of six months or for two or more periods not exceeding six months in all⁴.

It is a question of fact in each case whether the commencement or conclusion of dissolution or nullity proceedings terminates the desertion⁵, although a decree of judicial separation terminates the desertion during the continuance of the decree⁶.

1 *Williams v Williams* [1939] P 365 at 368, 369, [1939] 3 All ER 825 at 827, CA per Sir Wilfred Greene MR (overruled on another point in *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131, HL); *Pratt v Pratt* [1939] AC 417, [1939] 3 All ER 437, HL; *Harvey v Harvey* [1956] P 102, [1955] 3 All ER 772, CA; *Pizey v Pizey and Stephenson* [1961] P 101, [1961] 2 All ER 658, CA.

2 *Williams v Williams* [1939] P 365 at 369, [1939] 3 All ER 825 at 828, CA per Sir Wilfred Greene MR; cf *Bevan v Bevan* [1955] 3 All ER 332 at 335, [1955] 1 WLR 1142 at 1146, DC.

3 *Cohen v Cohen* [1940] AC 631 at 645, [1940] 2 All ER 331 at 339, HL per Lord Romer. See also the Matrimonial Causes Act 1973 s 6; the Civil Partnership Act 2004 s 42; and PARA 414.

4 See the Matrimonial Causes Act 1973 s 2(5); the Civil Partnership Act 2004 s 45(6); and PARA 365. As to the effect of sexual intercourse on continuance of desertion see PARA 404.

5 *W v W (No 2)* [1954] P 486, [1954] 2 All ER 829, CA; *Williams v Williams* [1939] P 365, [1939] 3 All ER 825, CA; *Gerrard v Gerrard* (1958) Times, 18 November; *Pursey v Pursey* (1959) Times, 9 April.

6 See PARA 406. As to the effect of such a decree on the statutory period required in charges of desertion see PARA 366.

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397. Offer to return.

If the deserting party genuinely desires to return, his or her partner cannot in law refuse reinstatement¹, although there may be cases where a mere offer to return without an assurance of a change of habits may not be enough²; further, the consequences of a party's conduct may be permanent³ so that the deserting party has no right to be taken back⁴. The matter must be looked at objectively from the point of view of a reasonable person to whom the offer is made⁵. The offer must be genuine, that is to say it must be made in good faith in the sense that it is an offer to return permanently which, if accepted, will be implemented, and is an offer containing an assurance to terminate the conduct, if any⁶, that caused the separation⁷. An offer must likewise be made in good faith where the parties separated consensually⁸. In rejecting such an offer, it is not sufficient simply to assert that it is not genuine; some real ground for rejection must be proved⁹. It is often prudent to test an offer by acceptance¹⁰, particularly if there is no indication as to the lack of genuineness of the offer¹¹.

1 *Perry v Perry* [1952] P 203 at 211, [1952] 1 All ER 1076 at 1080, CA; *Leng v Leng* [1946] 2 All ER 590 (husband neurotic; no reason on that account for wife to refuse to have him back); *Fleming v Fleming* [1942] 2 All ER 337, DC; *Joseph v Joseph* [1939] P 385 (wife's bona fide offer turned down); cf *Tickler v Tickler* [1943] 1 All ER 57 at 60, CA (deserted party may so act as to make it clear that reconciliation is impossible, and may thus provide good cause for the continuing separation); and see *Lang v Lang* (1953) Times, 7 July, CA (wife's insistence on home at place of her employment as housekeeper unreasonable, and she became deserting party in consequence; not possible to hold both parties in desertion at the same time; and see PARA 367 text and notes 2, 3).

2 *W v W (No 2)* [1954] P 486, [1954] 2 All ER 829, CA; *Price v Price* [1951] P 413 at 416, CA; *Holborn v Holborn* [1947] 1 All ER 32 (husband had made excessive sexual demands; wife entitled to leave him, but position not permanent, and, if husband learnt his lesson, wife would not be entitled to stay away from him).

3 *Thomas v Thomas* [1924] P 194 at 202, CA per Scrutton LJ; and in the court of first instance (1923) 39 TLR 520 at 521 per Sir Henry Duke P (there may be no place for repentance).

4 *Everitt v Everitt* [1949] P 374 at 385, [1949] 1 All ER 908 at 916, CA, applying *Edwards v Edwards* [1948] P 268 at 272, [1948] 1 All ER 157 at 160; *Leng v Leng* [1946] 2 All ER 590 at 591; *Basing v Basing* (1864) 3 Sw & Tr 516 at 517; *R v Davidson etc, Durham Justices* (1889) 5 TLR 199, DC; *Edwards v Edwards* (1893) 62 LJP 33 (husband living with another woman; wife entitled to refuse his offer to return); *Graves v Graves* (1864) 3 Sw & Tr 350; cf *Garcia v Garcia* (1888) 13 PD 216 (husband insisted on keeping marriage secret; wife suspected adultery and withdrew from cohabitation; husband in desertion).

5 *Weddell v Weddell* (1961) 105 Sol Jo 153, CA.

6 *Irvin v Irvin* [1968] 1 All ER 271, [1968] 1 WLR 464, DC.

7 *Gaskell v Gaskell* (1963) 108 Sol Jo 37, DC; *Trevor v Trevor* (1965) 109 Sol Jo 574, CA; and see *Ogden v Ogden* [1969] 3 All ER 1055, [1969] 1 WLR 1425 at 1436, CA (wife not entitled to reject genuine offer not containing assurances as to future conduct since she had not sought such assurances).

8 *Fraser v Fraser* [1969] 3 All ER 654, [1969] 1 WLR 1787.

9 *Parkinson v Parkinson* (1959) Times, 14 April, DC.

10 *Dunn v Dunn* [1967] P 217 at 227-229, [1965] 1 All ER 1043 at 1049, DC.

11 *Storey v Storey* [1965] 1 All ER 1052n at 1053, CA; but see *Dunn v Dunn* [1967] P 217, [1965] 1 All ER 1043, DC.

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398. Effect of refusal of offer made in good faith.

A refusal of an offer to return made in good faith where there is no right to refuse it¹ converts the deserted party into the deserting party². A refusal which has no effect on the mind of the deserting party does not necessarily end the desertion³.

1 *Perry v Perry* [1952] P 203 at 232, [1952] 1 All ER 1076 at 1092, CA; *Harvey v Harvey* [1956] P 102 at 108, [1955] 3 All ER 772 at 774, CA; *Weddell v Weddell* (1961) 105 Sol Jo 153, CA.

2 *Thomas v Thomas* [1946] 1 All ER 170; cf *Joseph v Joseph* [1939] P 385.

3 *Brewer v Brewer* [1962] P 69, [1961] 3 All ER 957, CA.

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399. Declaration against having other party back.

Where the deserted party, suffering from a deep sense of grievance, says to the deserting party, who is showing no contrition for and almost no recognition of what he has done: 'I do not want to see you any more', or words to that effect, those words do not exonerate the deserter from doing something to bring an end to the state of desertion which he started; if and when the deserter makes further efforts at reconciliation, those efforts must be tested against the background in which they are made, to judge whether they amount to genuine efforts for reconciliation¹. Where, however, a deserted party evinces a firm and decisive determination in advance that the deserting party should not return, the deserted party has put it out of the power of the deserting party, if so minded, to express repentance and terminate the desertion, so that the deserted party is in the same position as he or she would have been if an approach had been made in good faith and rejected²; but the proper test is to ascertain whether the deserted party's conduct has had any actual effect in preventing the deserter from seeking a reconciliation³. A declaration by the deserted party that he or she will have nothing more to do with the alleged deserter may, in the circumstances, tend strongly against the existence of desertion, especially if the declaration is communicated to the alleged deserter⁴. A deserted party cannot complain if what he or she has said or done has in fact caused the deserting party to desist from making any attempt at reconciliation which the deserting party would otherwise have made⁵; but, if a deserted party develops an aversion to the other party or forms an attachment for someone else, such aversion or other attachment does not bar relief unless it has the effect of preventing a reconciliation and driving away a party who is, or might otherwise become, willing to return⁶.

1 *Bevan v Bevan* [1955] 3 All ER 332 at 336, [1955] 1 WLR 1142 at 1147, DC.

2 *Fishburn v Fishburn* [1955] P 29 at 41, [1955] 1 All ER 230 at 234-236 (wife locked door against husband; no desertion by him), following *Barnett v Barnett* [1955] P 21, [1954] 3 All ER 689. These cases were doubted obiter in *Beigan v Beigan* [1956] P 313, [1956] 2 All ER 630, CA, the real objection being to the words 'if so minded'; Denning LJ at 319 and at 632 said that, if a wife locks the door against her husband, it does not automatically terminate his desertion any more than her own adultery would do. See also *Gibson v Gibson* (1956) Times, 18 July, CA. As to the effect of an offer made in good faith see PARA 398.

3 *Beigan v Beigan* [1956] P 313, [1956] 2 All ER 630, CA. See also note 2.

4 *Brewer v Brewer* [1962] P 69 at 89, [1961] 3 All ER 957 at 967, CA.

5 *Brewer v Brewer* [1962] P 69 at 82, [1961] 3 All ER 957 at 964, CA.

6 *Brewer v Brewer* [1962] P 69 at 90, [1961] 3 All ER 957 at 968, CA.

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400. Genuineness of offer to return.

The intention to desert is presumed to continue, unless the deserting party proves genuine repentance and sincere and reasonable attempts to reconcile¹; for desertion is not a single act complete in itself and revocable by a single act of repentance². A deserting party cannot obliterate his or her misconduct by subsequent offers, as to the genuineness of which the deserted party may, on reasonable grounds, entertain doubts³. If the deserted party has ample grounds for refusing any offer to resume cohabitation made by the other party, the question of genuineness of the offer does not arise⁴. It would follow that, if there has been unreasonable conduct, that should also be considered⁵.

The quality of an attempt at reconciliation is to be judged by the conduct generally of the deserting party⁶.

1 *Bowron v Bowron* [1925] P 187 at 195, 196, CA (constructive desertion; no 'efforts to recover' wife); *Charter v Charter* (1901) 84 LT 272 (husband told wife to go, but construed as mutual separation; husband's request to wife to return refused; husband not in desertion); *Thomas v Thomas* [1924] P 194 at 201, CA; *Pratt v Pratt* [1939] AC 417 at 422, 427, [1939] 3 All ER 437 at 438, 442, HL; *Ware v Ware* [1942] P 49, [1942] 1 All ER 50 (offer not genuine); *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 468; *Price v Price* [1951] P 413 at 416, CA; *Casey v Casey* [1952] 1 All ER 453; *W v W (No 2)* [1954] P 486, [1954] 2 All ER 829, CA; *Gaskell v Gaskell* (1963) 108 Sol Jo 37, DC, approved in *Trevor v Trevor* (1965) 109 Sol Jo 574, CA. As to the phrase 'lack of sincerity' in these cases see *Wells v Wells* [1954] 3 All ER 491 at 492, 493, [1954] 1 WLR 1390 at 1393, 1394, CA.

2 *Thomas v Thomas* [1924] P 194 at 199, CA.

3 *Thomas v Thomas* [1924] P 194 at 199, 201, CA; *R v Davidson etc, Durham Justices* (1889) 5 TLR 199, DC (offer not bona fide; no effort to terminate desertion, and no offer until brought before magistrates); *Re Duckworth* (1889) 5 TLR 608; *Martin v Martin* (1898) 78 LT 568; *W v W (No 2)* [1954] P 486, [1954] 2 All ER 829, CA.

4 *Volp v Volp* (14 October 1940, unreported), but noted on this point in *Everitt v Everitt* [1949] P 374 at 384, [1949] 1 All ER 908 at 915, CA. Where in a marriage the deserting spouse has committed adultery and has deserted, an offer to return to cohabitation may be refused by the deserted spouse, because he or she is under no obligation to condone the adultery: *Cargill v Cargill* (1858) 1 Sw & Tr 235; *Basing v Basing* (1864) 3 Sw & Tr 516; *Knapp v Knapp* (1880) 6 PD 10 at 11; *Farmer v Farmer* (1884) 9 PD 245; *Everitt v Everitt* [1949] P 374, [1949] 1 All ER 908, CA (wife justified in believing adultery committed; desertion not terminated by offer, nor retrospectively terminated by finding that the belief could not be made out), overruling *Lodge v Lodge* (1890) 15 PD 159. Where the conduct relied on is adultery, the deserted spouse should consider bringing the petition on that fact (see the Matrimonial Causes Act 1973 s 1(2)(a); PARAS 347, 350; and *Barker v Barker* [1950] 1 All ER 812 at 816, CA per Bucknill LJ (adultery is the solid basis of the decree; constructive desertion in such a case is somewhat of a legal fiction)).

5 See PARAS 359, 360.

6 *Thomas v Thomas* [1924] P 194 at 199, 203, CA; *Dunn v Dunn* [1967] P 217, [1965] 1 All ER 1043, DC; *Trevor v Trevor* (1965) 109 Sol Jo 574, CA; *Barnard v Barnard* [1965] 1 All ER 1050n, [1965] 2 WLR 56n, CA; *Turpin v Turpin* [1965] 1 All ER 1051n, [1965] 2 WLR 956n; *Storey v Storey* [1965] 1 All ER 1052n, CA; *Nowell v Nowell* (1953) Times, 25 February, CA (vague offer of house in United States). An offer or proposal to provide a home must be definite or distinct: *Cudlipp v Cudlipp* (1858) 1 Sw & Tr 229 at 230.

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401. When the offer is a stratagem.

The offer to return must not be a stratagem to interrupt the continuous period of desertion¹. Where he or she has made life together intolerable², the deserting party must be really contrite and anxious for a resumption³. The fact that an offer of resumption is spontaneous and not made on the advice or at the instigation of legal advisers, or that the offer is not made for the purpose of being used in legal proceedings, adds to its weight and sincerity⁴.

1 See PARAS 364-365.

2 See *Price v Price* [1951] 1 All ER 877 at 880, 881; affd [1951] P 413, [1951] 2 All ER 580n, CA.

3 See *Ware v Ware* [1942] P 49, [1942] 1 All ER 50 (deserting spouse not ready to behave properly as wife); *Pratt v Pratt* [1939] AC 417 at 422, [1939] 3 All ER 437 at 438, HL. Such repentance is not necessary where the hostility of the deserting party against the deserted party has been confined to hostile statements and litigation: *Price v Price* [1951] P 413, [1951] 2 All ER 580n, CA; cf *Wily v Wily* [1918] P 1.

4 *Pratt v Pratt* [1939] AC 417 at 427, [1939] 3 All ER 437 at 442, HL per Lord Romer; *Re Duckworth* (1889) 5 TLR 608 at 609 (offer sent in lawyer's letter not in good faith); *Martin v Martin* (1898) 78 LT 568 (offer in solicitor's letter not genuine); *Price v Price* [1951] P 413, [1951] 2 All ER 580n, CA (offer through solicitors held to be in good faith); and see PARA 400 note 1.

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402. Offer subject to conditions.

The deserting party is not entitled to put unreasonable conditions in an offer to return¹.

¹ *Hutchinson v Hutchinson* [1963] 1 All ER 1, [1963] 1 WLR 280, DC (husband's condition of no intercourse); *Barrett v Barrett* [1948] P 277, CA (husband asked wife to return to him without their daughters; unreasonable); *McGowan v McGowan* [1948] 2 All ER 1032 (cited in PARA 384 note 7); *Slawson v Slawson* [1942] 2 All ER 527 (wife offered to return only as housekeeper; no question of health, age or danger of childbirth, or the like; offer did not terminate her desertion); *Lacey v Lacey* (1931) 146 LT 48 (wife's offer to return to husband merely for sake of children); *Millichamp v Millichamp* (1931) 146 LT 96 (offer of unreasonable home); cf *Jackson v Jackson* (1932) 146 LT 406; and see *Synge v Synge* [1901] P 317, CA (wife's condition of no intercourse); *French-Brewster v French-Brewster* (1889) 62 LT 609 at 611; *Dallas v Dallas* (1874) 43 LJP & M 87 (husband's offer to return if wife would write letter amounting to confession of insanity, and exonerating certain woman from suspicion; unreasonable). See also *Gibson v Gibson* (1859) 29 LJP & M 25 (apparently a mutual separation; wife offered to have husband back if he gave up gambling and drinking; court doubted whether that conditional offer would have started desertion running if other evidence of husband's intention to desert not available).

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403. Resumption of cohabitation.

Desertion can be ended by resumption of cohabitation¹. There can be no completely exhaustive definition of 'cohabitation'², and each case must be decided on its own facts and merits³, but desertion does not cease to run until a true reconciliation has been effected⁴.

The resumption of cohabitation depends on the intention of both parties⁵, and there can be a resumption of cohabitation without the parties necessarily living with each other in the same house⁶.

If there is a resumption of cohabitation, the nature of the resumption and the consequent termination of the desertion cannot be altered by a condition subsequent⁷; but, if the parties resume cohabitation for a period or periods not exceeding six months in all, no account is to be taken of that period or those periods⁸.

1 *Thomas v Thomas* [1924] P 194 at 199, CA. See also the Domestic Proceedings and Magistrates' Courts Act 1978 s 25; the Civil Partnership Act 2004 Sch 6 para 29; and PARA 658.

2 *Mummery v Mummery* [1942] P 107 at 109, [1942] 1 All ER 553 at 555; *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 469; *Lowry v Lowry* [1952] P 252 at 256, 257, [1952] 2 All ER 61 at 62, 63 (residing together as man and wife).

3 *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 470; *Casey v Casey* [1952] 1 All ER 453 at 454 (wife asked back only to look after children; not genuine offer); *Perry v Perry* [1952] P 203 at 215, [1952] 1 All ER 1076 at 1082, CA per Sir Raymond Evershed MR.

4 In considering whether a period of desertion has been continuous, the court does not take account of certain periods during which the parties resume living together: see the Matrimonial Causes Act 1973 s 2(5); the Civil Partnership Act 2004 s 45(6); and PARA 365. As to the effect of sexual intercourse see PARA 404.

5 *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 469; *Rowell v Rowell* [1900] 1 QB 9 at 13, CA; *Mummery v Mummery* [1942] P 107 at 109, 110, [1942] 1 All ER 553 at 555; *Bartram v Bartram* [1950] P 1 at 5, 6, [1949] 2 All ER 270 at 271, CA (wife returned as lodger because nowhere else to go); *Lowry v Lowry* [1952] P 252 at 257, [1952] 2 All ER 61 at 63; *Perry v Perry* [1952] P 203 at 214, 215, 225, 226, 232, [1952] 1 All ER 1076 at 1082, 1088, 1092, CA, disapproving dicta in *Viney v Viney* [1951] P 457, [1951] 2 All ER 204, DC.

6 *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 469, 470 (husband, doctor, had no settled abode); *Germany v Germany* [1938] P 202 at 207, [1938] 3 All ER 64 at 71 (doctor living for convenience in another doctor's house); cf *Thurston v Thurston* (1910) 26 TLR 388 (intermittent visits to wife during statutory period by husband, without intention of remaining or of resuming marital intercourse, did not constitute a return to cohabitation). See, however, the Matrimonial Causes Act 1973 s 2(6); the Civil Partnership Act 2004 s 45(8) (parties to a marriage or civil partnership to be treated as living apart unless they are living with each other in the same household); and PARA 347. Cf PARA 412.

7 *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 468, 470, 471 (no trial, probationary or tentative period possible); *Perry v Perry* [1952] P 203, [1952] 1 All ER 1076, CA.

8 See the Matrimonial Causes Act 1973 s 2(5); the Civil Partnership Act 2004 s 45(6); and PARA 365.

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404. Effect of sexual intercourse.

The mere fact that sexual intercourse has taken place between the parties is not decisive on the issue of resumption of cohabitation, though it is of great weight¹; in any event, the statutory provision in cases of divorce, dissolution and judicial and legal separation as to living together for not more than six months must be considered². Sexual intercourse is of more consequence when it takes place in a home where the parties have earlier lived together than when it takes place at some other address³, and the age of the parties is also relevant for consideration in determining the significance of the intercourse⁴. The birth of a child from an isolated act of intercourse is irrelevant as respect the question whether cohabitation has been resumed⁵.

In view of the mutual intention required to resume cohabitation⁶, no distinction is made as to which party is in desertion, when considering the effect of sexual intercourse by itself⁷.

The legal effect of sexual intercourse may well be substantially different where the case is one of constructive desertion as opposed to simple desertion⁸.

1 *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 469; *Rowell v Rowell* [1900] 1 QB 9 at 14, CA; *Mumery v Mumery* [1942] P 107, [1942] 1 All ER 553 (single act of sexual intercourse; no resumption); *Perry v Perry* [1952] P 203, [1952] 1 All ER 1076, CA; *Marczuk v Marczuk* [1956] P 217, [1955] 3 All ER 758 (acts incidental to visits to obtain money; no resumption); revsd on another point [1956] P 217 at 238, [1956] 1 All ER 657, CA; *Pizey v Pizey and Stephenson* [1961] P 101 at 108, [1961] 2 All ER 658 at 662, CA; *Ives v Ives* [1968] P 375, [1967] 3 All ER 79; *France v France* [1969] P 46, [1969] 2 All ER 870, CA.

2 See PARA 365.

3 *Lowry v Lowry* [1952] P 252 at 258, [1952] 2 All ER 61 at 64.

4 *Perry v Perry* [1952] P 203 at 215, [1952] 1 All ER 1076 at 1082, CA per Sir Raymond Evershed MR; *Casey v Casey* [1952] 1 All ER 453 at 454.

5 *Perry v Perry* [1952] P 203 at 218, [1952] 1 All ER 1076 at 1084, CA per Sir Raymond Evershed MR and at 226 and at 1087 per Jenkins LJ.

6 See PARA 403.

7 *Perry v Perry* [1952] P 203 at 232, [1952] 1 All ER 1076 at 1092, CA per Hodson LJ. In this case certain dicta in *Viney v Viney* [1951] P 457, [1951] 2 All ER 204 were disapproved, but it was pointed out that, as evidence of resumption, acts of sexual intercourse may weigh somewhat more heavily against a husband than a wife: see *Perry v Perry* at 217 and at 1082 per Sir Raymond Evershed MR.

8 *Howard v Howard* [1965] P 65, [1962] 2 All ER 539, DC, distinguishing *Perry v Perry* [1952] P 203, [1952] 1 All ER 1076, CA.

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405. 'Living separate' and resuming cohabitation.

The issue whether parties are 'living separate' within the meaning of a deed of separation, and the issue whether they have resumed cohabitation so as to end a period of desertion, involve the same considerations¹; but, for the purposes of divorce, dissolution and judicial and legal separation, the expressions 'living apart' and 'living with each other' each have a statutory meaning².

1 *Abercrombie v Abercrombie* [1943] 2 All ER 465 at 469; *Rowell v Rowell* [1900] 1 QB 9, CA; *Perry v Perry* [1952] P 203 at 230, [1952] 1 All ER 1076 at 1091, CA per Hodson LJ.

2 See the Matrimonial Causes Act 1973 s 2(6); the Civil Partnership Act 2004 s 45(8); and PARA 347 note 8.

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406. Effect of decree of judicial separation or separation order.

A decree of judicial separation (or, presumably, a separation order¹) terminates desertion so long as it remains in force². The party against whom the decree or order is made no longer has the right to cohabit with the other party³; and, for this reason, the fact that a deserting party stays away because of his intention to desert and not because of obedience to the decree does not affect the termination of the desertion⁴.

1 As to the meaning of 'separation order' see PARA 346 note 4.

2 *Harriman v Harriman* [1909] P 123 at 135, 137, CA (approving *Dodd v Dodd* [1906] P 189, and overruling *Smith v Smith* [1905] P 249, and *Failes v Failes* [1906] P 326). In *Dodd v Dodd*, *Levy v Levy* (1904) 21 TLR 157 was also disapproved. The decision in *Harriman v Harriman* was approved in *Cohen v Cohen* [1940] AC 631 at 644, [1940] 2 All ER 331 at 338, HL. As to the recognition of foreign decrees of judicial separation see *Tursi v Tursi* [1958] P 54, [1957] 2 All ER 828; and PARA 20.

3 *Harriman v Harriman* [1909] P 123 at 137, 146, 154, CA; *Robinson v Robinson* [1919] P 352 at 354, 355; *Taylor v Taylor* (1907) 23 TLR 566 at 567.

4 *Robinson v Robinson* [1919] P 352, not following the dictum of Buckley LJ in *Harriman v Harriman* [1909] P 123 at 148, CA.

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(v) Separation

A. TWO YEARS' LIVING APART AND CONSENT TO DIVORCE OR DISSOLUTION

407. Evidence of irretrievable breakdown.

The court¹ may find that a marriage or civil partnership has broken down irretrievably where the petitioner² satisfies the court that the parties have lived apart³ for a continuous period of at least two years immediately preceding the presentation of the petition or the making of the application and the respondent consents⁴ to a decree being granted or a dissolution order being made⁵. It is undesirable that there should be cross-decrees or orders where each party alleges that they have lived apart for two years and the other consents to a decree⁶.

¹ As to the meaning of 'court' see PARA 346 note 2. As to the duty of the court to make inquiries see PARA 348.

² As to petitioners and applicants see PARA 321 note 1.

³ As to the meaning of 'living apart' see PARA 347 note 8.

⁴ As to consent see PARA 408; and as to the position where the respondent may have been misled into giving consent see PARA 409.

⁵ See the Matrimonial Causes Act 1973 s 1(2)(d); the Civil Partnership Act 2004 s 44(5)(b); and PARA 347. As to the meaning of 'dissolution order' see PARA 346 note 1. As to continuity see PARA 412; and as to the periods of living together which are not to be taken into account see PARA 413. The day on which the separation took place is to be excluded when computing the two-year period: *Warr v Warr* [1975] Fam 25, [1975] 1 All ER 85 (wife failed to prove the statutory period had expired when she presented her petition; petition dismissed).

⁶ *Darvill v Darvill* (1973) 117 Sol Jo 223.

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408. What constitutes consent.

A positive act of consent is required¹; and an indication that a party does not object to a decree or order being granted will not amount to a consent². Rules of court make provision for the purpose of ensuring that, where the parties have lived apart for a continuous period of two years³ and the petitioner⁴ alleges that the respondent consents to a decree being granted or a dissolution order⁵ being made, the respondent has been given such information as will enable him to understand the consequences to him of his consenting to a decree being granted or an order being made and the steps which he must take to indicate that he consents to the grant of a decree or the making of an order⁶. Where consent in writing has been given, it may be that this requirement as to giving information may in exceptional cases be waived by the court⁷. The consent must be a valid, continuing and subsisting consent when the case is heard, remaining operative as the expression of the respondent's state of mind up to the conclusion of proceedings⁸. Consent means voluntary consent, not so-called consent obtained by submission to force or threats or the like⁹.

1 *McG (formerly R) v R* [1972] 1 All ER 362, sub nom *McGill v Robson* [1972] 1 WLR 237; *Matcham v Matcham* (1976) 6 Fam Law 212.

2 *McG (formerly R) v R* [1972] 1 All ER 362 at 363, 364, sub nom *McGill v Robson* [1972] 1 WLR 237 at 238, 239. As to the giving of consent by persons of unsound mind see *Mason v Mason* [1972] Fam 302 at 306, [1972] 3 All ER 315 at 317, 318; and PARAS 42, 45.

3 See PARAS 407, 412.

4 As to petitioners and applicants see PARA 321 note 1.

5 As to the meaning of 'dissolution order' see PARA 346 note 1.

6 See the Matrimonial Causes Act 1973 s 2(7); the Civil Partnership Act 2004 s 45(3), (4); and the Family Proceedings Rules 1991, SI 1991/1247, r 2.9(5), Appendix 1, Forms M6, M6A (amended by SI 2005/2922). See also PARA 786.

7 *McG (formerly R) v R* [1972] 1 All ER 362 at 364, [1972] 1 WLR 237 at 239.

8 *Beales v Beales* [1972] Fam 210 at 221, 222, sub nom *McGill v Robson* [1972] 2 All ER 667 at 674. Whether a person who has given consent, whereupon the other party has acted to his or her detriment, can ever be estopped from withdrawing the consent has not yet been decided: see *Beales v Beales* at 222 and at 674.

9 See *Lawson v Lawson* [1955] 1 All ER 341, [1955] 1 WLR 200, CA.

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409. Respondent misled into giving consent.

Where the court¹ has granted a decree of divorce or a dissolution order² on the basis of a finding that the petitioner³ was entitled to rely on the fact of two years' separation⁴ coupled with the respondent's consent to a decree being granted or a dissolution order being made and has made no such finding as to any other fact which might be evidence of irretrievable breakdown⁵, the court may, on an application made by the respondent⁶, rescind the decree or the conditional dissolution order if it is satisfied that the petitioner misled the respondent, whether intentionally or unintentionally, about any matter which the respondent took into account⁷ in deciding to give his consent⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to the meaning of 'dissolution order' see PARA 346 note 1.

3 As to petitioners and applicants see PARA 321 note 1.

4 See PARA 407.

5 Is any other fact mentioned in the Matrimonial Causes Act 1973 s 1(2) or the Civil Partnership Act 2004 s 44(5) (see PARA 347).

6 In the case of a divorce decree such application may be made at any time before the decree is made absolute: Matrimonial Causes Act 1973 s 10(1). Corresponding provision is not made by the Civil Partnership Act 2004 s 48(1), but may be inferred from the reference in the text to the rescission of the conditional dissolution order.

7 As to information to be given to the respondent see PARA 408.

8 Matrimonial Causes Act 1973 s 10(1); Civil Partnership Act 2004 s 48(1). Thus, where a divorce case is proceeding on the basis of two years' separation, the Matrimonial Causes Act 1973 s 10 will have effect if a Jewish wife gives her consent to a divorce on the basis that the husband will obtain a get, and he fails to do so, and the refusal to initiate the procedure for a get might result in grave financial or other hardship under s 5 (see PARA 411): *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583, sub nom *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745. As to the making absolute of a decree nisi and the making final of a conditional dissolution order see PARA 864 et seq.

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B. FIVE YEARS' LIVING APART: NO CONSENT TO DIVORCE OR DISSOLUTION REQUIRED

410. Evidence of irretrievable breakdown.

The court¹ may find that a marriage or civil partnership has broken down irretrievably where the petitioner satisfies the court that the parties have lived apart² for a continuous period of at least five years immediately preceding the presentation of the petition³. The petition should contain no allegation of fault against the respondent⁴. There is no need for any consent by the respondent, and indeed the respondent cannot ask for the petition to be rejected but must limit his request to those matters which he denies⁵. There are, however, statutory restrictions⁶.

¹ As to the meaning of 'court' see PARA 346 note 2. As to the duty of the court to make inquiries see PARA 348.

² As to the meaning of 'living apart' see PARA 347 note 8.

³ See the Matrimonial Causes Act 1973 s 1(2)(e); the Civil Partnership Act 2004 s 44(5)(c); and PARA 347. As to petitions and applications see PARA 321 note 1. As to continuity see PARA 412; and as to the periods of living together which are not to be taken into account see PARA 413. The day on which the separation took place is to be excluded when computing the five-year period: *Warr v Warr* [1975] Fam 25, [1975] 1 All ER 85 (wife failed to prove the statutory period had expired when she presented her petition; petition dismissed). Where both parties petition for a divorce or dissolution on different facts, one of which is that contained in the Matrimonial Causes Act 1973 s 1(2)(e) or the Civil Partnership Act 2004 s 44(5)(c), the court must decide whether five years' separation has been established and, if so, grant a divorce or dissolution without hearing evidence of the other petition: *Grenfell v Grenfell* [1978] Fam 128, [1978] 1 All ER 561, CA.

⁴ *Chapman v Chapman* [1972] 3 All ER 1089, [1972] 1 WLR 1544, CA (in the ordinary way there should be no order for costs in these cases).

⁵ See *Parsons v Parsons* [1975] 3 All ER 344, [1975] 1 WLR 1272 (it is mandatory for the court to grant a decree to the petitioner in a suit based on the Matrimonial Causes Act 1973 s 1(2)(e); there is no basis on which to grant a decree nisi to the respondent).

⁶ See PARA 411.

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411. Refusal of divorce or dissolution after five years' living apart.

The respondent to a petition for divorce or an application for a dissolution order¹ alleging five years' separation² may oppose the grant of a decree or the making of an order on the ground that the dissolution of the marriage or civil partnership will result in grave financial or other hardship³ to the respondent and that it would be wrong in all the circumstances to dissolve the marriage or civil partnership⁴.

Where the grant of a decree or the making of an order is so opposed, then:

- 519 (1) if the court⁵ finds that the petitioner is entitled to rely in support of his petition on the fact of five years' separation and makes no such finding as to any other fact⁶ constituting irretrievable breakdown⁷; and
- 520 (2) if the court would otherwise⁸ grant a decree or make an order⁹,

the court must consider all the circumstances, including the conduct¹⁰ of the parties and the interests of those parties and of any children or other persons concerned¹¹; and, if the court is of opinion that the dissolution will result in grave financial or other hardship¹² to the respondent and that it would in all the circumstances be wrong to dissolve the marriage or civil partnership, it must dismiss the petition¹³.

1 As to the meaning of 'dissolution order' see PARA 346 note 1. As to petitions and applications see PARA 321 note 1.

2 As to 'five years' separation' see PARA 410.

3 For these purposes 'grave financial hardship' means exactly what the words say and has to be considered subjectively in relation to the particular relationship and the circumstances in which the parties lived while it subsisted: *Talbot v Talbot* (1971) 115 Sol Jo 870; and see *Parkes v Parkes* [1971] 3 All ER 870, [1971] 1 WLR 1481, CA; *Julian v Julian* (1972) 116 Sol Jo 763 (potential loss of pension rights; petition dismissed); *Mathias v Mathias* [1972] Fam 287, [1972] 3 All ER 1, CA (army and state pensions; no grave financial or other hardship); *Parker v Parker* [1972] Fam 116, [1972] 1 All ER 410 (loss of police widow's pension could be made up by deferred annuity or by policy producing specified sum on maturity); *Brickell v Brickell* [1974] Fam 31, [1973] 3 All ER 508, CA; *Burvill v Burvill* (1974) 118 Sol Jo 205; *Reiterbund v Reiterbund* [1975] Fam 99, [1975] 1 All ER 280, CA (social security benefits would not be less than those receivable as widow's pension; no hardship); *Le Marchant v Le Marchant* [1977] 3 All ER 610, [1977] 1 WLR 559, CA (loss of index-linked pension; grave financial hardship); *Jackson v Jackson* [1994] 2 FCR 393, [1993] 2 FLR 848, CA (loss of widow's pension; no hardship since loss offset by entitlement to income support); *K v K (financial provision)* [1996] 3 FCR 158, sub nom *K v K (financial relief: widow's pension)* [1997] 1 FLR 35 (loss of widow's pension; grave financial hardship); *Archer v Archer* [1999] 2 FCR 158, [1999] 1 FLR 327, CA (loss of widow's pension where wife had substantial capital assets did not constitute financial hardship). 'Other hardship' must mean something other than 'financial': *Banik v Banik* [1973] 3 All ER 45 at 48, [1973] 1 WLR 860 at 864, CA (putting forward a case that a divorce would result in the respondent becoming a social outcast in her own community might amount to a defence of grave hardship; see also *Banik v Banik (No 2)* (1973) 117 Sol Jo 874; *Parghi v Parghi* (1973) 117 Sol Jo 582 (Hindus, well educated; the approach to divorce of educated persons in India is similar to that of the western world; grant of decree would not add to hardship already suffered by separation; but divorce might cause hardship to Hindu wife in different circumstances); *Rukat v Rukat* [1975] Fam 63, [1975] 1 All ER 343, CA). 'Grave' applies not only to financial but also to other hardship: *Rukat v Rukat* [1975] Fam 63, [1975] 1 All ER 343, CA. See also note 12. Whilst in one sense the test to be applied is subjective, in so far as the court is concerned, looking at the matter through the respondent's eyes, with whether the particular respondent is going to suffer hardship, nevertheless the court must then apply an objective test to all the relevant facts: see

Rukat v Rukat at 75 and at 352, 353 per Ormrod LJ; *Balraj v Balraj* (1980) 11 Fam Law 110 at 111, 112, CA per Cumming-Bruce LJ.

4 Matrimonial Causes Act 1973 s 5(1); Civil Partnership Act 2004 s 47(1); and see *Grenfell v Grenfell* [1978] Fam 128, [1978] 1 All ER 561, CA. Where a prima facie case of grave financial hardship is set up, the proper approach is that the petition should be dismissed unless the petitioner meets the answer by putting forward reasonable proposals, acceptable to the court, which are sufficient to remove the financial hardship: *Le Marchant v Le Marchant* [1977] 3 All ER 610, [1977] 1 WLR 559, CA; and see *Lee v Lee* (1973) 117 Sol Jo 616 (married son seriously ill; husband, petitioner, made reasonable financial proposals which involved sale of house in which wife lived; if the house were sold, wife would find it almost impossible to get other accommodation enabling her to assist son; hardship; petition dismissed). See also *Patel v Patel* (1977) 8 Fam Law 215 (where husband seeks divorce from wife who is overseas, she should be properly represented and made aware of her rights, especially under the Matrimonial Causes Act 1973 s 5).

5 As to the meaning of 'court' see PARA 346 note 2.

6 Is any other fact mentioned in the Matrimonial Causes Act 1973 s 1(2) or the Civil Partnership Act 2004 s 44(5) (see PARA 347).

7 Matrimonial Causes Act 1973 s 5(2)(a); Civil Partnership Act 2004 s 47(2)(a), (b).

8 Is apart from the Matrimonial Causes Act 1973 s 5 or the Civil Partnership Act 2004 s 47.

9 Matrimonial Causes Act 1973 s 5(2)(b); Civil Partnership Act 2004 s 47(2)(c).

10 For these purposes 'conduct' is not confined to misconduct in the old sense of a matrimonial offence but must clearly include it: *Brickell v Brickell* [1974] Fam 31 at 38, [1973] 3 All ER 508 at 512, CA per Davies LJ (wife might suffer grave financial hardship by the loss of a widow's pension, but not right in circumstances to rescind decree nisi that had been pronounced), overruling *Dorrell v Dorrell* [1972] 3 All ER 343 at 347, [1972] 1 WLR 1087 at 1092.

11 Matrimonial Causes Act 1973 s 5(2); Civil Partnership Act 2004 s 47(3)(a).

12 For these purposes 'hardship' includes the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage or civil partnership were not dissolved: Matrimonial Causes Act 1973 s 5(3); Civil Partnership Act 2004 s 47(4); and see *Johnson v Johnson* (1981) 12 Fam Law 116 (index-linked pension).

13 Matrimonial Causes Act 1973 s 5(2); Civil Partnership Act 2004 s 47(3)(b).

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C. GENERAL PRINCIPLES

412. Establishing continuity.

The period of living apart¹ whether for two² or five³ years must be continuous⁴. In most cases, the parties will not be considered to have been living apart whilst both recognise the relationship as continuing, even though they are separated⁵. Thus, the relationship does not end by reason of a separation brought about by the pressure of external circumstances such as absence on professional or business pursuits, or in search of health, or, it may be, even of pleasure; sexual intercourse, dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation, may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the relationship does or does not exist, the weight of each of these elements varying with the health, position in life, and all the circumstances of the parties⁶. The court must look for a definite termination of the consortium before the physical fact of being apart can be said to constitute separation⁷. Cohabitation does not necessarily imply living together physically under the same roof⁸. Where the parties are separated but not living apart, it is open to one of the parties to decide henceforth to live apart and such decision need not be communicated by word or conduct to the other party; an uncommunicated ending of recognition that a relationship is subsisting can mark the moment at which the parties begin to live apart⁹.

1 As to 'living apart' see PARA 347 note 8.

2 See PARA 407.

3 See PARA 410.

4 See PARAS 407, 413.

5 See *Santos v Santos* [1972] Fam 247 at 263, [1972] 2 All ER 246 at 255, CA per Sachs LJ.

6 *Tulk v Tulk* [1907] VLR 64 at 65, applied in *Main v Main* (1949) 78 CLR 636 at 642; and *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA; and see *Collins v Collins* (1961) 3 FLR 17; *R v Creamer* [1919] 1 KB 564, CCA; *Eadie v IRC* [1924] 2 KB 198.

7 *Collins v Collins* (1961) 3 FLR 17 at 22, applied in *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA; and see *Mouncer v Mouncer* [1972] 1 All ER 289, [1972] 1 WLR 321 (living together); *Hollens v Hollens* (1971) 115 Sol Jo 327 (living apart).

8 *Bradshaw v Bradshaw* [1897] P 24 at 26, applied in *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA; and see *Nugent-Head v Jacob* [1948] AC 321, [1948] 1 All ER 414, HL. See also PARA 403 note 6.

9 *Santos v Santos* [1972] Fam 247 at 259-262, [1972] 2 All ER 246 at 253-255, CA per Sachs LJ.

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413. No account of periods of living together.

In considering whether the period for which the parties to a marriage or civil partnership have lived apart¹ has been a continuous² period of at least two years³ or, as the case may be, five years⁴, no account is to be taken of any one period, not exceeding six months, or of any two or more periods, not exceeding six months, in all during which the parties resumed living with each other; but no period during which the parties lived with each other is to count as part of the period for which they lived apart⁵.

1 As to 'living apart' see PARA 347 note 8.

2 As to continuity see PARA 412.

3 See PARA 407.

4 See PARA 410.

5 Matrimonial Causes Act 1973 s 2(5); Civil Partnership Act 2004 s 44(6), (7). Thus where two years' living apart is claimed, the parties can spend up to 20% of the relevant time together, ie six months in two years six months, without interrupting the continuity of the separation, and where five years' living apart is claimed, the parties can spend about 9% of the time together, ie six months in five years and six months: see *Santos v Santos* [1972] Fam 247 at 261, [1972] 2 All ER 246 at 254, 255, CA per Sachs LJ.

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(vi) Reconciliation

414. Duty to consider reconciliation.

In divorce, dissolution or judicial or legal separation proceedings the petitioner's solicitor¹ is required to certify whether he has discussed with the petitioner the possibility of a reconciliation and given the petitioner the names and address of persons qualified to help effect a reconciliation between parties to a marriage or civil partnership who have become estranged². If at any stage of the proceedings it appears to the court³ that there is a reasonable possibility of a reconciliation between the parties the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation⁴.

1 As from a day to be appointed this duty is expressed to fall on a person's 'legal representative' rather than their solicitor: Matrimonial Causes Act 1973 s 6(1) (prospectively amended by the Legal Services Act 2007 Sch 21 para 29); Civil Partnership Act 2004 s 42(2) (prospectively amended by the Legal Services Act 2007 Sch 21 para 150). At the date at which this volume states the law no such day had been appointed. As to petitioners and applicants see PARA 321 note 1.

2 Matrimonial Causes Act 1973 ss 6(1), 17(3) (s 6(1) prospectively amended: see note 1); Civil Partnership Act 2004 s 42(1), (2) (prospectively amended: see note 1); Family Proceedings Rules 1991, SI 1991/1247, r 2.6(3), Appendix 1, Form M3 (amended by SI 2005/2922).

The Secretary of State may, with the approval of the Treasury, make grants, subject to such conditions as he considers appropriate, in connection with the provision of marriage support services, research into the causes of marital breakdown, and research into ways of preventing marital breakdown: Family Law Act 1996 s 22(1), (3) (s 22 amended by SI 2003/3191). In exercising this power the Secretary of State is to have regard, in particular, to the desirability of services of that kind being available when they are first needed: Family Law Act 1996 s 22(2) (as so amended).

3 As to the meaning of 'court' see PARA 346 note 2.

4 Matrimonial Causes Act 1973 s 6(2); Civil Partnership Act 2004 s 42(3). This power is additional to any other power of the court to adjourn proceedings: Matrimonial Causes Act 1973 s 6(2); Civil Partnership Act 2004 s 42(3).

UPDATE

414 Duty to consider reconciliation

NOTE 1--Day appointed is 1 January 2010: SI 2009/3250.

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(4) PRESUMPTION OF DEATH

415. Application and grounds for presumption.

Any married person or civil partner¹ who alleges that reasonable grounds exist for supposing that the other party to the marriage or civil partnership is dead may present a petition to the court² to have it presumed that the other party is dead and to have the marriage or civil partnership dissolved³. If satisfied that such reasonable grounds exist, the court may⁴ grant a decree of presumption of death and dissolution of the marriage⁵ or a presumption of death order which dissolves a civil partnership⁶.

1 As to the meaning of 'civil partner' see PARA 2 note 1.

2 As to petitions and applications see PARA 321 note 1. As to the meaning of 'court' see PARA 346 note 2.

3 Matrimonial Causes Act 1973 s 19(1) (amended by the Domicile and Matrimonial Proceedings Act 1973 Sch 6); Civil Partnership Act 2004 s 55(1). As to procedure see PARA 750 et seq. Neither collusion nor any other conduct on the part of the petitioner which has at any time been a bar to relief in matrimonial proceedings constitutes a bar to the grant of presumption of death and dissolution of marriage: Matrimonial Causes Act 1973 s 19(6). Collusion as a bar to relief in divorce and nullity was abolished by the Divorce Reform Act 1969 Sch 2 (repealed) and the Nullity of Marriage Act 1971 s 6 (repealed).

4 The relief is discretionary: *Thompson v Thompson* [1956] P 414 at 425, [1956] 1 All ER 603 at 608.

5 Matrimonial Causes Act 1973 s 19(1) (as amended: see note 3). The decree is a decree dissolving the marriage: *Deacock v Deacock* [1958] P 230, [1958] 2 All ER 633, CA. It follows that there is a right to remarry thereafter, although the Matrimonial Causes Act 1965 s 8(1), which specifically stated this right, has been repealed and not replaced.

6 Civil Partnership Act 2004 s 55(1). A 'presumption of death order' is an order made by the court which dissolves a civil partnership on the ground that one of the civil partners is presumed to be dead: s 37(1)(c).

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416. Presumption from absence of seven years or more.

In any proceedings for a decree of presumption of death and dissolution of marriage or a presumption of death order and dissolution of a civil partnership¹ the fact that for a period of seven years or more the other party to the marriage or civil partnership has been continually absent from the petitioner², and the petitioner has no reason to believe that the other party has been living within that time, is evidence that the other party is dead until the contrary is proved³.

The petitioner must give evidence that he has no reason to believe that the other party has been living within the period, and then, where the facts leave the matter as one of speculation, the court may grant the decree or order⁴. Failure to make appropriate inquiries may prove fatal to the petition⁵. Each case must be determined on its own facts; there is no other presumption of law as to continuance of life or death⁶. Absence under a separation agreement does not bar the petition, though continual absence from the petitioner where the parties have bound themselves to live apart proves very little⁷.

1 See PARA 415.

2 As to petitioners and applicants see PARA 321 note 1.

3 Matrimonial Causes Act 1973 s 19(3); Civil Partnership Act 2004 s 55(2).

4 *Thompson v Thompson* [1956] P 414 at 425, [1956] 1 All ER 603 at 608; *Parkinson v Parkinson* [1939] P 346, [1939] 3 All ER 108 (decree made); *Tweney v Tweney* [1946] P 180, [1946] 1 All ER 564 (husband disappeared; exhaustive inquiries fruitless; after ten years wife remarried informing registrar and second husband of all circumstances; second marriage presumed valid until evidence to contrary adduced; no such evidence adduced; wife granted decree nisi against second husband); *Spurgeon v Spurgeon* (1930) 46 TLR 396; *Re Watkins, Watkins v Watkins* [1953] 2 All ER 1113, [1953] 1 WLR 1323; *Re Peete, Peete v Crompton* [1952] 2 All ER 599 at 602 (evidence of husband's death not accepted); *Chipchase v Chipchase* [1939] P 391, [1939] 3 All ER 895; *Anon (validity of marriage)* (1953) Times, 17 October; cf *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721 (nullity case on ground of bigamy).

5 *Bradshaw v Bradshaw* [1956] P 274n at 282n; *Ward v Ward* (1956) Times, 10 February, CA; *Bullock v Bullock* [1960] 2 All ER 307, [1960] 1 WLR 975, DC (inquiries made by police; death presumed); *Bennett v Bennett* (1961) 105 Sol Jo 885, CA.

6 *MacDarmid v A-G* [1950] P 218 at 221, [1950] 1 All ER 497 at 499; cf *Chard v Chard (otherwise Northcott)* [1956] P 259 at 270, [1955] 3 All ER 721 at 727 (any presumption of continuance of life being one of fact, due weight can be given in each case to the different circumstances of any given individual, eg whether a friendless orphan or a gregarious man in public life, whether in good or bad health, and whether following a quiet or a dangerous occupation).

7 *Parkinson v Parkinson* [1939] P 346 at 351, [1939] 3 All ER 108 at 110.

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417. Respondent found alive.

If a petition for a decree of presumption of death has been made in relation to a party to a marriage, and after decree nisi, but before decree absolute, that party is found to be alive, the court will rescind the decree and dismiss the petition¹; and where a party obtains a decree absolute and the other party is later found to be alive, that other party is entitled to seek financial provision from the petitioner². These provisions are presumably also applicable, *mutatis mutandis*, in respect of an application for a presumption of death order in relation to a civil partner.

1 *Manser v Manser* [1940] P 224, [1940] 4 All ER 238, applying *Fender v St John-Mildmay* [1938] AC 1 at 28, [1937] 3 All ER 402 at 419, HL; and see *Stanhope v Stanhope* (1886) 11 PD 103 at 109, CA; *Maxted v Maxted* (1961) Times, 26 January (decree nisi rescinded); *Gallacher v Gallacher (Queen's Proctor showing cause)* (1964) 108 Sol Jo 523.

2 *Deacock v Deacock* [1958] P 230, [1958] 2 All ER 633, CA.

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(5) RELATED AND SUBSIDIARY CAUSES

(i) Division of Property

418. Property rights in the family home.

By virtue of their status as spouses or civil partners, the parties to a marriage or a civil partnership have a number of statutory rights relating to the occupation or ownership of the family home which are enforceable by registering a charge on the property¹ or by order of the court²; provision is also made for the transfer of tenancies³. Rights in a family home also arise under the common law⁴.

1 See the Family Law Act 1996 Pt IV (ss 30-63); and PARA 285 et seq.

2 See the Married Women's Property Act 1882; the Civil Partnership Act 2004 ss 65-69; and PARA 224 et seq. As to Mesher and Martin orders see PARA 316.

3 See the Family Law Act 1996 Sch 7; and PARA 310 et seq.

4 See PARA 278 et seq.

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(ii) Financial Relief and Provision of Reasonable Maintenance

419. Applications for financial provision and relief.

On a petition for divorce, dissolution, annulment, judicial or legal separation or presumption of death application may be made to the court for various kinds of relief¹. Although the statutory provisions do not state explicitly what is to be the aim of the court in exercising its powers to grant relief it is implicit that the purpose of those powers is to enable the court to make fair financial arrangements in the absence of agreement between the former spouses or civil partners, and the court's powers must always be exercised with that objective in view².

Financial relief is also available in England and Wales where a marriage or civil partnership has been dissolved or annulled, or the parties have been legally separated, by means of judicial or other proceedings in an overseas country and the divorce, dissolution, annulment or legal separation is entitled to be recognised as valid in England and Wales³.

1 See PARA 450 et seq. As to petitions and applications see PARA 321 note 1.

2 See *White v White* [2001] 1 AC 596 at 604, 605, [2001] 1 All ER 1 at 8, HL per Lord Nicholls of Birkenhead; applied in *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FCR 331.

3 See PARA 530 et seq.

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420. Financial provision in case of failure to provide reasonable maintenance.

The court may make provision by means of financial provision orders in the case of failure by one party to a marriage or civil partnership to provide reasonable maintenance for the other party or a child of the family, whether or not a petition for divorce, dissolution, annulment or judicial or legal separation has been made¹; and it may also at any stage of the proceedings make an order for maintenance pending the outcome of proceedings².

1 See PARA 542 et seq. As to petitions and applications see PARA 321 note 1.

2 See PARA 456.

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(iii) Declarations of Marital or Civil Partnership Status

421. Right to apply for declaration.

Any person may apply to the High Court or a county court for one or more of the following declarations in relation to a marriage or civil partnership specified in the application¹:

- 521 (1) a declaration that the marriage or civil partnership was at its inception a valid marriage or civil partnership²;
- 522 (2) a declaration that the marriage or civil partnership subsisted on a date specified in the application³;
- 523 (3) a declaration that the marriage or civil partnership did not subsist on a date so specified⁴;
- 524 (4) a declaration that the validity of a divorce, dissolution, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage or civil partnership is entitled to recognition in England and Wales⁵; and
- 525 (5) a declaration that the validity of a divorce, dissolution, annulment or legal separation so obtained in respect of the marriage or civil partnership is not entitled to recognition in England and Wales⁶.

1 Family Law Act 1986 s 55(1) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 4(a)); Civil Partnership Act 2004 s 58(1). As to procedure on such an application see PARA 1001 et seq.

2 Family Law Act 1986 s 55(1)(a); Civil Partnership Act 2004 s 58(1)(a). As to valid marriages and civil partnerships see PARAS 3, 4; as to void marriages and civil partnerships see PARA 326 et seq. The court has no power to declare that a marriage or civil partnership was at its inception void: see the Family Law Act 1986 s 58(5)(a); the Civil Partnership Act 2004 s 59(5); and PARA 1004.

3 Family Law Act 1986 s 55(1)(b); Civil Partnership Act 2004 s 58(1)(b).

4 Family Law Act 1986 s 55(1)(c); Civil Partnership Act 2004 s 58(1)(c).

5 Family Law Act 1986 s 55(1)(d); Civil Partnership Act 2004 s 58(1)(d).

6 Family Law Act 1986 s 55(1)(e); Civil Partnership Act 2004 s 58(1)(e).

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422. Applications by third parties.

Where an application for a declaration of marital or civil partnership status¹ is made to a court by any person other than a party to the marriage or civil partnership to which the application relates, the court must refuse to hear the application if it considers that the applicant does not have a sufficient interest in the determination of that application².

¹ See PARAS 421, 1001 et seq.

² Family Law Act 1986 s 55(3) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 4(b)); Civil Partnership Act 2004 s 58(2).

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(iv) Separation Agreements

A. FORM AND VALIDITY

423. Valid agreements.

An agreement between a husband and wife (or, presumably, between civil partners) to live apart, whether with or without cause, is not contrary to public policy¹ and is in general² valid and enforceable, provided that it is made in contemplation of, and is followed by, an immediate separation³.

A separation agreement is not abrogated where, on the outbreak of war, one party is living in enemy territory and the other is in the United Kingdom⁴. Parties who are already living apart, whether by agreement or otherwise, may enter into an agreement for the maintenance of one by the other⁵.

¹ This was not so formerly, voluntary separations being regarded as encroaching on the jurisdiction of the ecclesiastical courts in matrimonial causes, and it was only gradually that the courts of equity, in particular, ceased to regard such agreements as invalid: see *Besant v Wood* (1879) 12 ChD 605 at 620 per Jessel MR; *Wilson v Wilson* (1848) 1 HL Cas 538; *Wilson v Wilson* (1854) 5 HL Cas 40; *Hunt v Hunt* (1862) 4 De GF & J 221.

² There are qualifications to the comprehensive effectiveness of separation agreements: eg they do not prevent subsequent recovery of contribution to the cost of certain social security benefits (see PARA 217), provisions as to parental responsibility for children are not enforceable unless they are for the children's benefit (see PARA 441), and the parties cannot by contract oust the court's jurisdiction to order maintenance (see PARA 697).

³ *Re Meyrick's Settlement* [1921] 1 Ch 311 at 319; *Hunt v Hunt* (1862) 4 De GF & J 221; *Vansittart v Vansittart* (1858) 2 De G & J 249; and see *Courtney v Courtney* [1923] 2 IR 31. As to agreements for future separation see PARA 424. The execution by the husband of a separation deed at the request of a third person was a legal consideration for a promise by the third person to pay a sum of money towards the husband's debts: *Jones v Waite* (1842) 9 Cl & Fin 101, HL. As to mutual promises that are not contracts see PARA 206.

⁴ *Bevan v Bevan* [1955] 2 QB 227, [1955] 2 All ER 206. If statute so requires, the payments should throughout the war be made to the custodian of enemy property: *Bevan v Bevan*.

⁵ As to the consideration for an agreement to maintain see PARA 431; as to the court's statutory power to vary written maintenance agreements see PARA 700 et seq; and as to the validity of a provision in a written maintenance agreement restricting any right to apply to the court for maintenance see PARA 697.

UPDATE

423 Valid agreements

NOTE 3--An agreement made after marriage providing for a future separation can be enforced and varied by a court in the same way as a separation agreement: *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, [2009] 1 All ER 851.

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424. Void agreements; public policy.

Any agreement or settlement during cohabitation providing for the event of a future, as distinguished from an immediate, separation is void as being contrary to public policy¹; so also is an agreement, entered into before marriage (or, presumably, the registration of a civil partnership), that the parties will afterwards live separate and apart, even if the agreement is afterwards confirmed². A provision contemplating future separation contained in a deed executed by parties living apart with the object and result of bringing them together again is, however, not contrary to public policy³.

1 See **CONTRACT** vol 9(1) (Reissue) PARA 864.

2 *Brodie v Brodie* [1917] P 271.

3 *Re Meyrick's Settlement* [1921] 1 Ch 311; *Lurie v Lurie* [1938] 3 All ER 156; *Ewart v Ewart* [1959] P 23 at 31, [1958] 3 All ER 561 at 564. As to gifts made with the intention of inducing married couples to live apart see PARA 222.

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425. Agreement not to sue in respect of past matters.

A clause in a separation deed by which the parties agree not to take proceedings against each other in respect of any behaviour which had taken place before the execution of the deed, or providing that in case of any proceedings in respect of any subsequent behaviour no previous misconduct is to be pleaded or alleged or to be admissible in evidence, is not, if the agreement is honestly entered into, void as being against public policy or as tending to pervert the course of justice¹.

¹ *L v L* [1931] P 63. This clause is conveniently known as a '*Rose v Rose* clause': see *Rose v Rose* (1883) 8 PD 98, CA. See also *Rowley v Rowley* (1864) 3 Sw & Tr 338 (affd (1866) LR 1 Sc & Div 63); *Norman v Norman* [1908] P 6; *Harris v Harris and Woodden* (1872) 21 WR 80; *Gooch v Gooch* [1893] P 99; *Ehlers v Ehlers* (1915) 113 LT 1215; *Crocker v Crocker* [1921] P 25, CA; *Rosenberg v Rosenberg* (1954) Times, 16 July (deed of reconciliation held valid though parties afterwards separated). As to the effect of such a clause in the event of a subsequent petition for divorce or dissolution see PARA 438.

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426. Compromise of certain criminal proceedings.

A contract for separation is not invalid merely because it is entered into by way of compromise of criminal proceedings between the parties for an assault by one of them on the other or for any other crime which would formerly have been a misdemeanour¹.

¹ *McGregor v McGregor* (1888) 21 QBD 424, CA (cross-summonses for assault withdrawn on oral agreement to live apart, the husband paying the wife a weekly sum for herself and the children, she agreeing to indemnify him against any debts contracted by her; wife entitled to sue for arrears). See also *Elworthy v Bird* (1825) 2 Sim & St 372. As to the enforceability of agreements to conceal more serious offences see **CONTRACT** vol 9(1) (Reissue) PARA 848.

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427. Formalities and presumption of legality.

No particular formality is necessary for the validity of a contract for separation¹. It may be made by deed, but a mere oral agreement is binding¹. A deed of separation may be varied by a subsequent written agreement not by deed². An agreement for separation is presumed to be legal until the contrary is proved, the burden of proving illegality lying on the person alleging it³.

1 *McGregor v McGregor* (1888) 21 QBD 424, CA; *Aldridge v Aldridge (otherwise Morton)* (1888) 13 PD 210; *Sweet v Sweet* [1895] 1 QB 12; *Lacey v Lacey* (1931) 146 LT 48 (memorandum of agreement to live separate and apart); and see *Courtney v Courtney* [1923] 2 IR 31. The intervention of a trustee for the wife was formerly necessary owing to her inability to contract with her husband (see *Walrond v Walrond* (1858) John 18), and also in some cases because spouses could not convey property directly to one another. As to the removal of these disabilities see PARA 204. A written agreement for separation is not admissible in evidence unless stamped: *Fengl v Fengl* [1914] P 274. An oral agreement was inferred, although the husband had refused to sign a written agreement, in *Peters' Executors v IRC* [1941] 2 All ER 620, CA.

2 *Berry v Berry* [1929] 2 KB 316.

3 *Jones v Waite* (1842) 9 Cl & Fin 101, HL; *Clough v Lambert* (1839) 10 Sim 174.

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428. Separation articles.

An executory contract for separation, formerly called separation articles, may be specifically enforced¹. There is, however, an important difference, as regards illegal provisions, between separation articles and a separation deed. If any portion of an executory contract is contrary to public policy or otherwise illegal, specific performance will not be granted of any part of it², whereas, if some of the clauses in a separation deed are legal and others illegal, those which are legal may be enforceable by the courts³.

1 *Wilson v Wilson* (1848) 1 HL Cas 538 at 572; *Vansittart v Vansittart* (1858) 2 De G & J 249, considered in *Cahill v Cahill* (1883) 8 App Cas 420 at 430 et seq, HL.

2 *Vansittart v Vansittart* (1858) 2 De G & J 249; *Walrond v Walrond* (1858) John 18.

3 *Hamilton v Hector* (1872) LR 13 Eq 511; and see *Bennett v Bennett* [1952] 1 KB 249, [1952] 1 All ER 413, CA.

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429. Fraud and misrepresentation.

If one of the parties to a contract for separation is induced to enter into it by a fraudulent misrepresentation with reference to material facts, such as the previous misconduct of the other party, or in ignorance of material facts fraudulently concealed, the contract is voidable at the instance of the party deceived¹ and the deed may be ordered to be rescinded². This rule applies even where it is agreed that all past causes of complaint are to be condoned, if the contract is made in reliance on a positive assertion of innocence³. Where the misrepresentation was not fraudulent, the party deceived may nevertheless be entitled to rescind if the misrepresentation has become a term of the contract⁴. A fraudulent misrepresentation which is not believed is no ground for setting the contract aside⁵.

1 *Evans v Carrington* (1860) 2 De GF & J 481 (deed executed by husband in ignorance of wife's previous adultery, fraudulently concealed); *Evans v Edmonds* (1853) 13 CB 777 (wife's trustee represented that she was virtuous and moral, whereas he had committed adultery with her; contract voidable, although it was not shown that the wife was privy to the misrepresentation); *Crabb v Crabb* (1868) LR 1 P & D 601 (wife not bound by separation agreement as husband never had any intention of fulfilling it). Cf *Wales v Wadham* [1977] 2 All ER 125, [1977] 1 WLR 199 (where after his wife's remarriage a husband claimed that he had been induced to enter into a separation agreement by her false representation that she would not remarry, and it was held that in the circumstances there were no grounds for setting the agreement aside as the wife was under no contractual duty to disclose to her husband her intention to remarry, the agreement not being a contract uberrimae fidei).

2 *Hulton v Hulton* [1917] 1 KB 813, CA (false representations and concealment by husband as to means). See also *J-PC v J-AF* [1955] P 215, sub nom *J v J* [1955] 2 All ER 617, CA; *Payne v Payne* [1968] 1 All ER 1113, [1968] 1 WLR 390, CA; *Wilkins v Wilkins* [1969] 2 All ER 463, [1969] 1 WLR 922; *Wales v Wadham* [1977] 2 All ER 125, [1977] 1 WLR 199 (cited in note 1).

3 *Brown v Brown* (1868) LR 7 Eq 185 (covenant by husband to condone all past causes of complaint and take no proceedings in reference to them, wife positively asserting her innocence).

4 See the Misrepresentation Act 1967 s 1; and **CONTRACT** vol 9(1) (Reissue) PARA 987.

5 *Wasteney v Wasteney* [1900] AC 446, PC.

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430. Duress and mistake.

A person will not be bound by a separation agreement to which she is induced to consent by threats of violence¹ or other undue pressure² on the part of the other party. Threats of proceedings for dissolution, nullity or judicial or legal separation are not, however, such duress as will entitle either party to resist performance of an agreement for separation, even in the case of a threat by the wife of a nullity suit on the ground of the husband's impotence³. A contract for separation entered into under a mutual mistake of fact which is material to the existence of the agreement, such as a mistake as to the validity of the marriage or civil partnership, is void⁴.

1 *Lambert v Lambert* (1767) 2 Bro Parl Cas 18, HL.

2 *Adamson v Adamson* (1907) 23 TLR 434 (husband and his solicitor told wife that the only way to get any money was to sign the agreement, otherwise the husband would leave her, and she would get nothing; she had no independent advice; she was not bound by the agreement); *Holroyd v Holroyd* (1920) 36 TLR 479 (similar case); and see *Crabb v Crabb* (1868) LR 1 P & D 601; and cf *Biffin v Bignell* (1862) 7 H & N 877; *de Pret-Roose v de Pret-Roose* (1934) 78 Sol Jo 914 (threat by husband to remove children not amounting to duress). As to duress generally see **CONTRACT** vol 9(1) (Reissue) PARAS 710, 711; and as to undue influence see **CONTRACT** vol 9(1) (Reissue) PARA 712 et seq; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 839 et seq. The burden of proving undue influence is on the party who alleges it: *Gillman v Gillman* (1946) 174 LT 272. The court will not look with favour on assignments of proprietary interests in the matrimonial home made without legal advice: see *Backhouse v Backhouse* [1978] 1 All ER 1158 at 1166, [1978] 1 WLR 243 at 252.

3 *Wilson v Wilson* (1848) 1 HL Cas 538 at 572.

4 *Galloway v Galloway* (1914) 30 TLR 531; *Law v Harragin* (1917) 33 TLR 381; and see *Butcher v Vale* (1891) 8 TLR 93; *Wilkins v Wilkins* [1969] 2 All ER 463, [1969] 1 WLR 922; *B (GC) v B (BA)* [1970] 1 All ER 913, sub nom *Brister v Brister* [1970] 1 WLR 664. As to mistake of fact generally see **CONTRACT** vol 9(1) (Reissue) PARA 703 et seq.

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431. Valuable consideration.

In a separation deed or agreement, the mere agreement to live apart is sufficient valuable consideration¹, whether for the purpose of enforcing specific performance of separation articles² no part of which is contrary to public policy³, or for supporting a separation deed or agreement against creditors or subsequent purchasers⁴.

Where a husband and wife who were already living apart entered into an agreement for the maintenance of the wife by the husband, consideration on the wife's part for the husband's covenant to maintain was afforded by a covenant by the wife to support herself out of the maintenance payments⁵.

1 A separation agreement was formerly regarded as voluntary, unless there was some valuable consideration on both sides beyond the mere covenants to live apart. This principle was partly founded on the former incapacity of a husband and wife to contract with one another (see *Walrond v Walrond* (1858) John 18) and partly on the view formerly held that separations by agreement were contrary to public policy (see PARA 423 note 1). For examples of valuable consideration see *Stephens v Olive* (1786) 2 Bro CC 90; *Hobbs v Hull* (1788) 1 Cox Eq Cas 445; *Worrall v Jacob* (1817) 3 Mer 256; *Jee v Thurlow* (1824) 2 B & C 547; *Logan v Birkett* (1833) 1 My & K 220; *Wellesley v Wellesley* (1839) 10 Sim 256; *Jodrell v Jodrell* (1845) 9 Beav 45; *Wilson v Wilson* (1848) 1 HL Cas 538; *Walrond v Walrond*; *Vansittart v Vansittart* (1858) 2 De G & J 249; *Gibbs v Harding* (1870) 5 Ch App 336; *Marshall v Marshall* (1879) 5 PD 19; *Hart v Hart* (1881) 18 ChD 670; *Aldridge v Aldridge (otherwise Morton)* (1888) 13 PD 210; *McGregor v McGregor* (1888) 21 QBD 424, CA; *Re Pope, ex p Dicksee* [1908] 2 KB 169, CA; *Hulse v Hulse* (1910) 103 LT 804. *Horton v Horton (No 2)* [1961] 1 QB 215, [1960] 3 All ER 649, CA (consideration for supplemental agreement was the compromise of a possible claim for rectification of the original agreement).

2 As to separation articles see PARA 428.

3 As to agreements and covenants contrary to public policy see PARAS 424, 698; and **CONTRACT** vol 9(1) (Reissue) PARA 841.

4 See *Re Weston, Davies v Tagart* [1900] 2 Ch 164 (wife living apart in pursuance of her covenant: held valuable consideration and sufficient to support an assignment of property to trustees for her benefit against the husband's trustee in bankruptcy); *Aldridge v Aldridge (otherwise Morton)* (1888) 13 PD 210 (mutual agreements to live apart and not to sue one another for nullity of the marriage; the agreement of each was sufficient valuable consideration to support the agreement by the other not to sue); and see *McGregor v McGregor* (1888) 21 QBD 424, CA; *Courtney v Courtney* [1923] 2 IR 31.

5 See *Williams v Williams* [1957] 1 All ER 305, [1957] 1 WLR 148, CA. As to the court's statutory power to vary written maintenance agreements see PARA 700 et seq.

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B. CONSTRUCTION AND OPERATION

432. Usual clauses.

In an agreement entered into for the execution of a separation deed 'with the usual covenants and clauses', 'usual' is to be construed with reference to the surrounding circumstances and to the conveyancing practice and custom in such cases¹. The 'usual clauses' have included a covenant by the husband to permit the wife to live separate and apart without molestation or interference by him and a covenant by the wife to indemnify the husband against debts contracted by her during the separation².

A condition that the wife would remain chaste (a 'dum casta' clause) was not a 'usual clause' and would not be implied, whether in a separation agreed to as part of a compromise of a divorce suit³ or otherwise⁴.

1 *Hart v Hart* (1881) 18 ChD 670 at 687.

2 See *Wilson v Wilson* (1854) 5 HL Cas 40; *Hart v Hart* (1881) 18 ChD 670 at 684; *Gibbs v Harding* (1870) 5 Ch App 336; and PARAS 434 (non-molestation), 435 (indemnity). The wife may also indemnify the husband against debts incurred before the deed, but this is not usual: *Brailey v Brailey* [1922] P 15, CA.

3 *Hart v Hart* (1881) 18 ChD 670.

4 *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA. See also PARA 438.

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433. Estoppel where deed acted on.

Where a wife acted on a deed of separation and accepted benefits under it, she was estopped from denying that she had contracted; and a recital in a deed to which she was a party of an agreement to live apart was sufficient evidence of a contract by her to that effect¹.

¹ *Clark v Clark* (1885) 10 PD 188, CA; *Re Weston, Davies v Tagart* [1900] 2 Ch 164.

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434. Covenant not to molest.

To amount to molestation something must be done by one party, or on his or her authority, with the intention of annoying the other, and it must be an annoyance in fact¹. Where a spouse's intention in petitioning for divorce was primarily to annoy the other spouse, that act has been held to amount to molestation, but there would be no breach of the covenant if the intention is primarily to bring the marriage to an end².

1 *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA (adultery by wife, even though followed by birth of an illegitimate child, held not to be a breach of a covenant not to molest the husband; but to put the child forward as legitimate would be such a breach); and see *Besant v Wood* (1879) 12 ChD 605; *Sweet v Sweet* [1895] 1 QB 12.

2 *Hunt v Hunt* [1897] 2 QB 547, CA (divorce proceedings by husband abroad; held not a molestation in absence of intention to annoy). The same applies to petitions for judicial or legal separation: *Thomas v Everard* (1861) 6 H & N 448. It would now be difficult to establish such molestation.

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435. Covenant to indemnify against debts.

A covenant in general terms to indemnify the husband against the wife's debts was held to extend to costs incurred by the husband in defending actions on her contracts for necessities¹; and a covenant of indemnity against debts which the wife had then contracted, or should thereafter contract during the separation, was held to include debts for necessities contracted by the wife as agent for the husband while they were living together². The indemnity is, however, confined to debts contracted during the separation unless the contrary is expressed³.

1 *Duffield v Scott* (1789) 3 Term Rep 374.

2 *Summers v Ball* (1841) 8 M & W 596; *Brailey v Brailey* [1922] P 15, CA.

3 See note 2.

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436. How far provisions construed as permanent.

The extent to which the provisions of a separation deed are to be regarded as permanent, and how far they are to be construed as limited to the period during which the separation continues, depends on the intention of the parties, to be ascertained from the terms of the deed as a whole and the circumstances of the particular case¹. An agreement to pay maintenance while the parties live apart is not necessarily an agreement that one party agrees to the other living apart; the question is one of construction of the particular agreement².

Provisions relating to the settlement of property will be construed as permanent unless a contrary intention plainly appears³. A covenant by one party for payment of an annuity to the other will be construed as permanent, or as limited to the time during which they remain separated, according to the expressed or presumed intention of the parties⁴. The fact that the first party covenants to pay the annuity during the other's life is some indication of an intention that it should be permanent, but is not conclusive⁵. Where a covenant for the payment of an annuity is regarded as a permanent provision, it is enforceable against the payer's executors or administrators after his death⁶.

An annuity for maintenance and support payable under a separation deed, unless made payable in advance⁷, accrues from day to day, and is apportionable in the event of the recipient's death between the dates fixed for the payment of instalments⁸, but such an annuity is not assignable by the recipient⁹.

1 *Randle v Gould* (1857) 8 E & B 457; *Rowell v Rowell* [1900] 1 QB 9, CA; *Wilson v Mushett* (1832) 3 B & Ad 743; and see PARA 447.

2 See *Crabtree v Crabtree* [1953] 2 All ER 56, [1953] 1 WLR 708, CA; *Lord Long of Wraxall v Lady Long of Wraxall* [1940] 4 All ER 230, 233, CA; *Bosley v Bosley* [1958] 2 All ER 167, [1958] 1 WLR 645, CA; *Parkinson v Parkinson* (1959) Times, 14 April, DC; and PARA 373.

3 *Ruffles v Alston* (1875) LR 19 Eq 539 (wife entitled to money secured by her brother's promissory note; on a separation the brother covenanted to hold the money in trust for the wife and husband successively for their lives, and then for the children; it was held that there was a permanent settlement); *Negus v Forster* (1882) 46 LT 675, CA; *Re Spark's Trusts, Spark v Massey* [1904] 1 Ch 451; compromised [1904] 2 Ch 121, CA (funds vested in trustee in trust for wife and children; it was held that there was a permanent settlement). Cf *O'Malley v Blease* (1869) 20 LT 899.

4 See *Kirk v Eustace* [1937] AC 491, [1937] 2 All ER 715, HL (covenant by husband to pay weekly sum to wife 'during her life'; death of husband; husband's estate remained liable to pay weekly sum to widow); cf *Langstone v Hayes* [1946] KB 109, [1946] 1 All ER 114, CA (covenant by husband to pay annuity to wife, until annuity determined as thereafter provided; annuity to be determined on resumption of cohabitation; terms of deed assumed husband to be still alive; husband's estate not liable). See also *Goslin v Clark* (1862) 12 CBNS 681 (covenant to pay annuity during life of wife held permanent); *Clough v Lambert* (1839) 10 Sim 174; *Randle v Gould* (1857) 8 E & B 457; *Rowell v Rowell* [1900] 1 QB 9, CA; *Nicol v Nicol* (1886) 31 ChD 524, CA; *Negus v Forster* (1882) 46 LT 675, CA; *Chapman v Guest* (1887) 3 TLR 438; *Crouch v Waller* (1859) 4 De G & J 302; *Re Gilling, Procter v Watkins* (1905) 74 LJ Ch 335.

5 See note 4.

6 *Kirk v Eustace* [1937] AC 491, [1937] 2 All ER 715, HL; *Clough v Lambert* (1839) 10 Sim 174; *Atkinson v Littlewood* (1874) LR 18 Eq 595; cf *Re Gilling, Procter v Watkins* (1905) 74 LJ Ch 335; *Macnaghten v Paterson* [1907] AC 483, PC (provision for payment of annuity with power to reduce the amount). Where provision is

made for payments to be reduced on a diminution of income, executors are not bound to sell non-income bearing assets of the estate to prevent a reduction in payments: see *Re Korda* (1957) Times, 23 November; affd (1958) Times, 19 July, CA. As to the alteration by the court of an agreement after the death of one of the parties see PARA 700 et seq.

7 *Trevalion v Anderton* (1897) 66 LJQB 489, CA.

8 See the Apportionment Act 1870 ss 2, 3; *Howell v Hanforth* (1775) 2 Wm Bl 1016; and **RENTCHARGES AND ANNUITIES** vol 39(2) (Reissue) PARA 839 et seq.

9 *Hyde v Price* (1797) 3 Ves 437.

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437. Trust for benefit of children.

A trust in a separation deed for the benefit of children is construed, prima facie, as including only children born or conceived prior to the separation, and not those who may be born after a reconciliation and resumption of cohabitation¹.

¹ *Hulme v Chitty* (1846) 9 Beav 437; and see *Re Spark's Trusts*, *Spark v Massey* [1904] 1 Ch 451; *compromised* [1904] 2 Ch 121, CA.

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438. Subsequent misconduct.

A covenant or agreement by either party not to take proceedings for divorce or dissolution or judicial or legal separation on the basis of any existing fact from which irretrievable breakdown may be inferred is not a bar to proceedings in the event, and on the basis, of subsequent conduct from which such a breakdown may be inferred¹. Where there has been express condonation by deed of all behaviour before the date of the deed one party cannot rely, as between himself and the other party, on that other party's conduct before the date of the deed for the purpose of a petition for divorce or dissolution².

It has been held that there is no implied condition in a contract for separation that the wife will remain chaste³; and, in the absence of a *dum casta* clause, the wife's subsequent adultery is no defence, either at law or in equity, to an action against the husband on his covenant to pay her an annuity⁴.

1 *Kunski v Kunski* (1907) 23 TLR 615; and see *Dowling v Dowling* [1898] P 228; *Bourne v Bourne* [1913] P 164; *Ehlers v Ehlers* (1915) 113 LT 1215; *Thompson v Thompson* [1916] P 165; *Lister v Lister* [1922] P 227. As to the facts from which irretrievable breakdown may be inferred see PARA 347; and as to the validity of such an agreement see PARA 425.

2 *Rowley v Rowley* (1864) 3 Sw & Tr 338; *Rose v Rose* (1883) 8 PD 98, CA; and see PARA 347. As to petitions and applications see PARA 321 note 1.

3 *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA; and see PARA 432.

4 *Wasteney v Wasteney* [1900] AC 446, PC; *Sweet v Sweet* [1895] 1 QB 12; *Hart v Hart* (1881) 18 ChD 670; *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA; *Jee v Thurlow* (1824) 2 B & C 547; *Baynon v Batley* (1832) 8 Bing 256. An unconditional covenant to pay an annuity in a separation deed will be restricted by a recital of an agreement to pay *dum casta*: *Crouch v Crouch* [1912] 1 KB 378. As to the effect of divorce see PARA 442.

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439. Effect of breach.

A breach of the provisions of a contract for separation does not preclude the party committing the breach from setting up and enforcing the contract, unless the breach is of such a deliberate and substantial nature as to amount to a repudiation of the contract¹. Covenants for the payment of an annuity, covenants for the maintenance of children and non-molestation covenants will be construed as independent covenants in the absence of an express provision making one dependent on the other².

1 *Durand v Durand* (1789) 2 Cox Eq Cas 207; *Besant v Wood* (1879) 12 ChD 605 at 627; *Kunski v Kunski* (1898) 68 LJP 18 (default by husband in payment of weekly allowance not sufficient to prevent his setting up the contract); *Kennedy v Kennedy* [1907] P 49 (husband ceased to pay allowance, and expressed his intention to make no further payments; held to be a repudiation by husband); *Balcombe v Balcombe* [1908] P 176; and see *Smith v Smith* [1915] P 288; *Roe v Roe* [1916] P 163.

2 *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA (where molestation by the wife was held no defence to an action for recovery of the annuity); *Crouch v Waller* (1859) 4 De G & J 302 (where the wife was held unfit to have the custody of the children).

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440. Satisfaction of annuity by legacy.

Whether a bequest by will of one party operates as a satisfaction of an annuity which he has contracted to pay to the other party by a separation deed depends on the ordinary rules as to the satisfaction of debts by legacies¹.

¹ *Atkinson v Littlewood* (1874) LR 18 Eq 595 (bequest of annuity of same amount as under separation deed; the widow was put to her election); *Horlock v Wiggins, Wiggins v Horlock* (1888) 39 ChD 142, CA (separation deed and will contemporaneous; legacy held not a satisfaction); *Coates v Coates* [1898] 1 IR 258 (covenant to pay 15 shillings a week for life; bequest of 12 shillings a week for life and the use of a house and furniture was not a satisfaction); *Re Manners, Public Trustee v Manners* [1949] Ch 613, [1949] 2 All ER 201, CA (separation deed providing for annuity of £250 for life; bequest of sum for purchase of annuity of £250 was, on construction, no satisfaction).

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441. Provisions as to parental responsibility and contact.

Provisions in a separation agreement as to parental responsibility for and contact with children will not be enforced by the court as, in proceedings where the parental responsibility for or upbringing of a minor is in question, its duty is to regard the minor's welfare as the first and paramount consideration¹, although as part of the exercise of this duty it may have regard to the agreement reached by the parties. Although the court will not enforce the parental responsibility and contact provisions, the other provisions of the agreement are not thereby rendered unenforceable².

Where one party undertakes to support children for whom he or she has parental responsibility and the other party covenants to pay an annuity, that other party's liability on the covenant is not necessarily affected by the fact that the children are removed from his or her parental responsibility on the ground of his or her unfitness³.

In relation to a covenant for their maintenance in a separation deed, the children are not in the position of beneficiaries and have no right of action on that covenant⁴.

1 See the Children Act 1989 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 300 et seq.

2 See *Jump v Jump* (1883) 8 PD 159.

3 *Crouch v Waller* (1859) 4 De G & J 302; and see *Rowell v Rowell* (1903) 89 LT 288, CA (where the husband covenanted to pay an additional weekly sum to the wife for the maintenance and education of a son as long as he was under 21, and it was held that the husband was not relieved of his liability to pay the additional sum merely because the son was maintained and educated at little expense to the wife).

4 *Gandy v Gandy* (1885) 30 ChD 57, CA; and see *Crouch v Waller* (1859) 4 De G & J 302.

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442. Effect of divorce, dissolution, annulment and judicial or legal separation.

A dissolution or annulment of the marriage (or, presumably, the civil partnership) does not of itself affect those provisions of a separation agreement which constitute a permanent settlement of property, nor a party's liability on a covenant to pay an annuity to the other by way of a permanent provision¹; but such provisions may be varied by the court in pursuance of its jurisdiction with regard to the variation of settlements², or its general power to alter financial arrangements contained in separation deeds³.

The provisions of a separation agreement are not affected by a decree of judicial or legal separation as such, but the court has jurisdiction to make orders as to financial provision and property adjustment⁴ and may alter financial arrangements in the agreement in certain circumstances⁵.

1 *Charlesworth v Holt* (1873) LR 9 Exch 38 (covenant to pay an annuity during the spouses' joint lives so long as they should live separate and apart; it was held that the obligation was not limited to the duration of the marriage and that a dissolution of the marriage on the ground of the wife's adultery did not affect the husband's liability on the covenant); *May v May* [1929] 2 KB 386, CA. For a different result on the construction of a particular agreement see *Covell v Sweetland* [1968] 2 All ER 1016, [1968] 1 WLR 1466 (agreement ceased on decree absolute). See also *Rowley v Rowley* (1866) LR 1 Sc & Div 63, HL; *Grant v Budd* (1874) 30 LT 319; *Goslin v Clark* (1862) 12 CBNS 681; cf *Re Gilling*, *Procter v Watkins* (1905) 74 LJ Ch 335. See also *Adams v Adams* [1941] 1 KB 536, [1941] 1 All ER 334, CA (deed not affected by decree of nullity on ground of physical incapacity); *Fowke v Fowke* [1938] Ch 774, [1938] 2 All ER 638; and PARA 436 note 4.

2 *Worsley v Worsley and Wignall* (1869) LR 1 P & D 648 (covenant by husband to pay annuity for joint lives); *Benyon v Benyon and O'Callaghan* (1876) 1 PD 447 (husband, having received an allowance from the wife under a separation deed, held entitled, in a suit for dissolution of the marriage on the ground of her subsequent adultery, to apply to the court for an increased provision out of her income); and see *Cooper v Cooper and Ford* [1932] P 75; *Tomkins v Tomkins* [1948] P 170, [1948] 1 All ER 237, CA (husband's covenant to pay weekly sum during joint lives discharged). As to the variation of settlements generally see PARA 510 et seq.

3 As to this power see PARA 700 et seq.

4 See PARA 419 et seq.

5 See PARA 700 et seq.

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C. REMEDIES FOR BREACH

443. Specific performance.

The remedy for a refusal by either party to carry out the terms of an executory agreement for separation is an action for specific performance¹. In order to maintain such an action it is not necessary that there should be any valuable consideration other than the mutual promises to separate and live apart².

In an action for specific performance of separation articles, the court will not inquire into the cause of the separation³.

1 *Besant v Wood* (1879) 12 ChD 605; *Wilson v Wilson* (1848) 1 HL Cas 538 (agreement for separation in consideration of abandonment by wife of proceedings for nullity of marriage); *Hart v Hart* (1881) 18 ChD 670 (agreement for separation by way of compromise of proceedings for divorce); *Seeling v Crawley* (1700) 2 Vern 386; *Guth v Guth* (1792) 3 Bro CC 614 (offer by husband to resume cohabitation no answer to action for specific performance); *Fletcher v Fletcher* (1788) 2 Cox Eq Cas 99; and see *R v Mead* (1758) 1 Burr 542; *Lord Vane's Case* (1744) 13 East 171n at 173n; and *R v Winton* (1792) 5 Term Rep 89 (where a writ of habeas corpus was applied for to discharge a wife who was detained by the husband notwithstanding an agreement of separation). A wife may sue her husband for breach of a separation deed entered into when both parties were domiciled in England, notwithstanding that at the date of the issue of the writ the husband is domiciled abroad: *Drexel v Drexel* [1916] 1 Ch 251. As to the principle that a breach of a contract for separation does not necessarily preclude the party committing the breach from enforcing the contract see PARA 439.

2 See PARA 431.

3 *Wilson v Wilson* (1848) 1 HL Cas 538 at 574. As to separation articles see PARA 428.

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444. Injunction.

An injunction may be granted restraining either party to a contract for separation from molesting the other party¹ or from otherwise committing a breach of an enforceable provision of the contract². Proceedings which have actually been begun in breach of the contract cannot be restrained by injunction³, the remedy in such case being to plead the contract by way of defence in the proceedings⁴.

1 *Sanders v Rodway* (1852) 16 Beav 207 at 211. As to non-molestation orders generally see PARA 716 et seq.

2 *Besant v Wood* (1879) 12 ChD 605. As to void agreements and provisions see PARAS 424, 697.

3 *Marshall v Marshall* (1879) 5 PD 19; *Clark v Clark* (1885) 10 PD 188, CA. See also the Supreme Court Act 1981 s 49(3); and **CIVIL PROCEDURE** vol 11 (2009) PARA 494.

4 *Marshall v Marshall* (1879) 5 PD 19; *Clark v Clark* (1885) 10 PD 188, CA; *Gandy v Gandy* (1882) 7 PD 168, CA; *Aldridge v Aldridge (otherwise Morton)* (1888) 13 PD 210 (nullity suit); cf *Bishop v Bishop, Judkins v Judkins* [1897] P 138, CA. A separation agreement may be a bar to proceedings for divorce, dissolution or judicial or legal separation founded on desertion: see PARA 371.

UPDATE

444 Injunction

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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445. Breach of covenant.

A wife may sue her husband on his covenants with her in a separation agreement¹; presumably the same is true of civil partners. To entitle a third person, not a party to the agreement, to sue either of the contracting parties, the third person must possess an actual beneficial right which places him in the position of a beneficiary². A volunteer who is a party to a separation deed and a direct covenantee under it is entitled to damages for breach of a covenant contained in the deed³.

1 As to the right of a husband and wife to sue one another in contract see PARA 206. Formerly, where a trustee was joined for the wife, she could sue her husband on his covenants with her trustee if the trustee refused to do so: *Gandy v Gandy* (1885) 30 ChD 57, CA; and see *Archard v Coulsting* (1843) 6 Man & G 75 (where the wife sued in the names of her trustee's executors on giving them security for costs).

2 *Gandy v Gandy* (1885) 30 ChD 57, CA. See generally **CONTRACT** vol 9(1) (Reissue) PARA 762; **EQUITY** vol 16(2) (Reissue) PARA 609. As to trusts for the benefit of children see PARA 437.

3 *Cannon v Hartley* [1949] Ch 213, [1949] 1 All ER 50 (action by a daughter who was a party to a deed of separation between her parents for breach by her father of a covenant to settle after-acquired property).

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446. Proof for annuity in bankruptcy.

An annuity covenanted to be paid in a separation deed is a debt provable in the payer's bankruptcy, and no claim in respect of the annuity can afterwards be maintained by the recipient¹. The estimated value of such an annuity may be proved for, even if it is determinable on the happening of specified events².

1 *Victor v Victor* [1912] 1 KB 247, CA; *McQuiban v McQuiban* [1913] P 208; *Dewe v Dewe*, *Snowdon v Snowdon* [1928] P 113.

2 *Re Batey, ex p Neal* (1880) 14 ChD 579, CA; and see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 503. Where the recipient or their trustee proves for the ascertained value of such an annuity and receives a dividend, there is no obligation to refund any portion of the dividend merely because, by reason of the recipient's death, the amount of the dividend may happen to exceed the sum which would have been payable by the payer if he had remained solvent: *Re Pannell, ex p Bates* (1879) 11 ChD 914, CA.

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D. EFFECT OF RECONCILIATION

447. Whether agreement determined.

A separation agreement sometimes contains an express provision that, in the event of a reconciliation and the resumption of cohabitation, the provisions of the agreement are to cease; but it may be expressly provided that certain trusts are to continue notwithstanding an agreement by the parties to live together again¹. In the absence of express provision, the question to what extent a contract for separation is affected by a reconciliation depends on the intention of the parties to be ascertained from the terms of the contract as a whole and the circumstances of the particular case².

Where a covenant for payment of an annuity is to be construed as limited to the period of separation³, a subsequent agreement that if the recipient will return to cohabitation the payer will continue the payment is valid, and will have the effect of making the annuity permanent⁴.

1 *Wilson v Mushett* (1832) 3 B & Ad 743.

2 See PARA 436; and see *Marquis of Westmeath v Marchioness of Westmeath* (1831) 1 Dow & Cl 519; *Bateman v Countess of Ross* (1813) 1 Dow 235, HL; *Angier v Angier* (1718) Gilb Ch 152; *O'Malley v Blease* (1869) 20 LT 899. In the case of a separation deed between unmarried parties who had cohabited, it was held that an annuity granted by the deed did not cease on a resumption of cohabitation: *Re Abdy, Rabbeth v Donaldson* [1895] 1 Ch 455, CA.

3 See PARA 436.

4 *Webster v Webster* (1853) 4 De GM & G 437.

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448. Arrears of annuity.

The fact that the parties are reconciled and resume cohabitation does not of itself operate as an accord and satisfaction of arrears, accrued during the separation, of an agreed allowance, even if the allowance was payable only during the continuance of the separation¹.

¹ *Macan v Macan* (1900) 70 LJQB 90.

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449. Resumption of cohabitation necessary.

The mere circumstance that the parties cease to be separated, in the sense that they reside together in a state of hostility, is not sufficient to terminate the provisions of a separation agreement¹, nor is a reconciliation, as evidenced by friendly correspondence, without a resumption of cohabitation². Casual acts of sexual intercourse are not alone conclusive evidence that the parties have ceased to live apart within the meaning of a separation deed³.

1 *Bateman v Countess of Ross* (1813) 1 Dow 235, HL.

2 *Frampton v Frampton* (1841) 4 Beav 287.

3 *Rowell v Rowell* [1900] 1 QB 9, CA. As to resumption of cohabitation generally see PARAS 403-405.

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7. FINANCIAL RELIEF

(1) FINANCIAL RELIEF ON DIVORCE, DISSOLUTION, NULLITY, SEPARATION AND PRESUMPTION OF DEATH

(i) Financial Provision Orders

A. SCOPE AND EFFECT OF ORDERS

450. Meaning of 'financial provision order'.

A financial provision order is an order for periodical payments or lump sum provision available¹ for the purpose of adjusting the financial position of the parties to a marriage or a civil partnership, and children, in connection with proceedings for divorce, dissolution, nullity or judicial or legal separation, that is to say:

- 526 (1) any order for periodical payments in favour of a party to a marriage or civil partnership or in favour of a child of the family²;
- 527 (2) any order for secured periodical payments in favour of a party to a marriage or civil partnership or in favour of a child of the family³; and
- 528 (3) any order for lump sum provision in favour of a party to a marriage or civil partnership or in favour of a child of the family⁴.

Any order for the attachment of pension income⁵ is a financial provision order rather than any new or distinct species of order⁶.

Either party to a marriage or civil partnership may apply for a financial provision order⁷; and one party may institute proceedings seeking financial relief in favour of the other party against himself or herself⁸.

1 Ie under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 see PARA 458 et seq. 'Financial provision order' is defined, in the terms set out in the text, by the Family Proceedings Rules 1991, SI 1991/1247, r 1.2 (definition substituted by SI 2005/2922), citing the orders mentioned in the Matrimonial Causes Act 1973 s 21(1) and the Civil Partnership 2004 Sch 5 paras 2(1), 80(1).

2 See PARAS 458 et seq, 492 et seq.

3 See PARAS 467 et seq, 492 et seq.

4 See PARAS 476 et seq, 492 et seq.

5 Ie under the Matrimonial Causes Act 1973 s 25B or the Civil Partnership Act 2004 Sch 5 para 24: see PARA 485 et seq.

6 *T v T (financial relief: pensions)* [1998] 2 FCR 364, [1998] 1 FLR 1072.

7 See the Matrimonial Causes Act 1973 s 23; the Civil Partnership Act 2004 Sch 5 paras 1, 2; and PARA 458 et seq. For applications by husbands against their wives see *Griffiths v Griffiths* [1974] 1 All ER 932, [1974] 1 WLR

1350, CA; *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333, CA; *P v P (financial provision: lump sum)* [1978] 3 All ER 70, [1978] 1 WLR 483, CA; *B v B (financial provision)* (1982) 3 FLR 298, sub nom *B v B* 12 Fam Law 92, CA. In seeking to achieve a fair outcome, there is no place for discrimination between the parties: *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL; applied in *Dharamshi v Dharamshi* [2001] 1 FCR 492, [2001] 1 FLR 736, CA; *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FCR 331.

8 *Simister v Simister* [1987] 1 All ER 233, [1986] 1 WLR 1463; *Peacock v Peacock* [1984] 1 All ER 1069, [1984] 1 WLR 532; *Sherdley v Sherdley* [1988] AC 213, [1987] 2 All ER 54, HL; *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA.

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451. Relationship of financial provision and property adjustment orders.

Financial provision orders¹ and property adjustment orders² are inter-related, particularly in relation to the family home and lump sum payments, and the court ought not ordinarily to look at the various reliefs in isolation from one another³. Nor is it usually necessary to decide the exact property rights of the parties as against one another. Where, however, assets are owned jointly with third parties, precise ascertainment of the beneficial interests of the parties may be necessary⁴. The court is particularly concerned with preserving homes for the parties and their children⁵.

The court should state what new trusts or dispositions are to be effected in consequence of its orders⁶.

1 See PARA 450.

2 See PARA 498 et seq.

3 *Button v Button* [1968] 1 All ER 1064 at 1067, [1968] 1 WLR 457 at 462, CA per Lord Denning MR; *Baynham v Baynham* [1969] 1 All ER 305 at 307, [1968] 1 WLR 1890 at 1894, CA per Lord Denning MR. The court should be free to make either a property adjustment order or a lump sum order whichever turns out to be the more convenient in the circumstances: *Doherty v Doherty* [1976] Fam 71 at 79, [1975] 2 All ER 635 at 640, CA per Ormrod LJ.

4 See eg *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA; and PARAS 280, 601. A spouse or civil partner must identify by reference to an established principle some proper basis for seeking to extend a financial claim to assets which appear to be held by a third party: see *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467.

5 *Browne (formerly Pritchard) v Pritchard* [1975] 3 All ER 721, [1975] 1 WLR 1366, CA.

6 *Jones v Jones* [1972] 3 All ER 289, [1972] 1 WLR 1269.

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452. Effect of subsequent marriage or civil partnership.

If after the grant of a decree dissolving or annulling a marriage or the making of a dissolution or nullity order in relation to a civil partnership either party to that marriage or civil partnership forms a subsequent marriage or civil partnership¹, that party is not entitled to apply, by reference to the grant of that decree or to that dissolution or nullity order, for a financial provision order² or a property adjustment order³ in his or her favour against the other party to that marriage or civil partnership⁴.

Any application for financial relief must, therefore, be made in the correct form prior to any subsequent marriage or remarriage or the formation of a subsequent civil partnership by the intended applicant. It has been held that a party who has remarried cannot rely on the fact that the other party has made an application in order to confer jurisdiction on the court to make an order in his or her favour; if he or she seeks an order, he or she must apply for it and, if he or she has remarried before making an application, he or she is deprived of the right to apply⁵.

1 References in the Matrimonial Causes Act 1973 to remarriage and to the formation of a civil partnership by a person, and references in the Civil Partnership Act 2004 Sch 5 to a subsequent marriage or a subsequent civil partnership, include references to a marriage or civil partnership which is by law void or voidable: Matrimonial Causes Act 1973 s 52(3), (3A) (s 52(3A) added by the Civil Partnership Act 2004 Sch 27 para 46); Civil Partnership Act 2004 Sch 5 para 80(4), (5). As to void and voidable marriages and civil partnerships see PARA 326 et seq.

2 As to the meaning of 'financial provision order' see PARA 450.

3 As to the property adjustment orders see PARA 498 et seq.

4 Matrimonial Causes Act 1973 s 28(3) (amended by the Matrimonial and Family Proceedings Act 1984 s 5(3); and by the Civil Partnership Act 2004 Sch 27 para 43(1), (4)); Civil Partnership Act 2004 Sch 5 para 48.

5 See *Robin v Robin* (1983) 4 FLR 632, 13 Fam Law 147, CA. In *Jackson v Jackson* [1973] Fam 99, [1973] 2 All ER 395 it was held that an application in the petition was sufficient; in *Wilson v Wilson* [1976] Fam 142, [1976] 3 All ER 464, CA it was held that an application for periodical payments in the petition did not permit a claim for a lump sum to be brought after remarriage; in *Doherty v Doherty* [1976] Fam 71, [1975] 2 All ER 635, CA it was held that an application before the remarriage for a transfer of property order carried with it the right to apply for a lump sum; in *Hargood (formerly Jenkins) v Jenkins* [1978] Fam 148, sub nom *Jenkins v Hargood (formerly Jenkins)* [1978] 3 All ER 1001 it was held that an indication in the acknowledgment of service of the petition of an intention to claim ancillary relief was insufficient; and in *Nixon v Fox (formerly Nixon)* [1978] Fam 173, [1978] 3 All ER 995 it was held that the wife's application before her remarriage for a periodical payments order in favour of her child did not permit an application for a lump sum after her remarriage.

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453. Financial relief in nullity proceedings.

The court has power to make financial and property orders on the application of either party to a marriage or civil partnership, including both parties in nullity proceedings¹. This is so even though the marriage is void ipso jure, for example on the ground that the respondent 'wife' has a husband living at the time of her second 'marriage'² or in a case where the parties to the marriage ceremony are not respectively male and female³. Further, an order for periodical payments has been made in favour of a wife respondent against whom a decree of nullity on the ground of her wilful refusal to consummate the marriage had been made⁴.

The situation now is that the court has a statutory duty to have regard to all the circumstances of the case, and the old cases, while no doubt of some assistance in some instances, must be viewed in the light of the statutory duty as interpreted by the courts⁵.

1 See PARA 458 et seq. Marriages and civil partnerships which are void ipso jure (see PARA 326 et seq) are included: *Ramsay v Ramsay (otherwise Beer)* (1913) 108 LT 382. As to the principles on which such periodical provision was allotted in cases of nullity see *Gardiner (otherwise Phillips) v Gardiner* (1920) 36 TLR 294. It has been said that there is no fixed proportion, the amount depending on the particular facts of the case, and to be decided on the sense of propriety and moral justice of the court: see *Dunbar (otherwise White) v Dunbar* [1909] P 90; *Gullan v Gullan (otherwise Goodwin)* [1913] P 160; *Sharpe (otherwise Morgan) v Sharpe* [1909] P 20 (cases of impotence where there had been a marriage settlement); *Clifton (otherwise Packe) v Clifton* [1936] P 182, [1936] 2 All ER 886 (short cohabitation, the petitioner having means); and *Dailey v Dailey (otherwise Smith)* [1947] 1 All ER 847; on appeal [1947] 2 All ER 269n, CA. See also *K v K (otherwise R)* [1910] P 140 (nullity on the ground of respondent's insanity; order by consent made at the time of the decree nisi); *Gullan v Gullan (otherwise Goodwin)* [1913] P 160 (respondent's impotence); *Edwards v Edwards (otherwise Cowtan)* [1934] P 84.

2 As to the exercise of this jurisdiction see *Whiston v Whiston* [1995] Fam 198, [1998] 1 All ER 423, CA (bigamous marriage constituting criminal act); *Rampal v Rampal (No 2)* [2001] EWCA Civ 989, [2002] Fam 85, [2001] 2 FCR 552 (the authorities do not establish a rule that no bigamist is entitled to apply for financial relief; the operation of public policy on statutory claims in fields other than financial provision after divorce leads to the conclusion that the general rule is that the principle of *ex turpi causa non oritur actio* is not to be applied absolutely, but in the exercise of a proportionate judgment after careful scrutiny of the nature of the crime and the relevant surrounding circumstances; wife knew at the time that the marriage was bigamous and alleged bigamy after 22 years only when the husband filed proceedings for ancillary relief; husband thus not precluded from making application for ancillary relief on the grounds of public policy). See also *Ramsay v Ramsay (otherwise Beer)* (1913) 108 LT 382; but see *Bateman v Bateman (otherwise Harrison)* (1898) 78 LT 472; explaining *Wilkins v Wilkins* [1896] P 108, CA.

3 *Corbett v Corbett (otherwise Ashley)* [1971] P 83, [1970] 2 All ER 33 (operated male transsexual); and see *S-T (formerly J) v J* [1998] Fam 103, [1998] 1 All ER 431, CA (transsexual male, born female, committed perjury when making false declaration that there was no legal hindrance to marriage with a woman; subsequent application for ancillary relief by transsexual not barred in limine but refused on the facts).

4 *Dailey v Dailey (otherwise Smith)* [1947] 1 All ER 847; on appeal [1947] 2 All ER 269n, CA (where a decree of nullity on the ground of wilful refusal to consummate the marriage was made against the wife, and it was held that the fact that the husband had continued to live with his wife for 21 years was a matter to be considered under the heading 'conduct of parties'; it was also held that the court had power to order part of the maintenance to be secured for her life in the special circumstances of the case).

5 See PARA 589 et seq.

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454. Financial relief in proceedings for presumption of death and dissolution of marriage or civil partnership.

An order for periodical payments has been held to be available after a decree of presumption of death and dissolution¹, if the presumed deceased is in fact still alive². All the financial reliefs are available in such circumstances.

1 As to presumption of death and dissolution of marriages and civil partnerships see PARA 415 et seq.

2 *Deacock v Deacock* [1958] P 230, [1958] 2 All ER 633, CA (wife respondent alive; obtained order 13 years after decree), overruling *Wall v Wall* [1950] P 112, [1949] 2 All ER 927 on this point; cf *Purse v Purse* [1981] Fam 143, [1981] 2 All ER 465, CA.

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455. Order against or in favour of person suffering from mental disorder.

The fact that one party is incapable through mental disorder of managing his affairs and that a receiver of his estate has been appointed does not debar the other party from claiming and obtaining orders for financial provision, including maintenance pending suit or the outcome of proceedings¹, and property adjustment².

Where the court³ makes an order⁴ requiring payments, including a lump sum payment, to be made, or property to be transferred, to a spouse or a civil partner, and the court is satisfied that the person in whose favour the order is made lacks capacity⁵, then, subject to any order, direction or authority made or given in relation to that person⁶, the court may order the payments to be made, or as the case may be, the property to be transferred, to such persons having charge of that person as the court may direct⁷.

1 As to maintenance pending suit or the outcome of proceedings see PARA 456.

2 *CL v CFW* [1928] P 223 (the primary duty of those concerned with the case of a person suffering from mental disorder is to apply his estate for his maintenance). The Family Division will not usurp the jurisdiction of the Court of Protection: *Swettenham v Swettenham* [1939] 3 All ER 989, CA.

3 As to the meaning of 'court' see PARA 346 note 2.

4 Ie under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) or the Civil Partnership Act 2004 Sch 5 (see PARA 458 et seq).

5 Ie within the meaning of the Mental Capacity Act 2005: see s 2; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641 et seq.

6 Ie under the Mental Capacity Act 2005: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641 et seq.

7 Matrimonial Causes Act 1973 s 40 (amended by the Mental Capacity Act 2005 Sch 6 para 19); Civil Partnership Act 2004 Sch 5 para 78. Note that Sch 5 para 78 has not been amended by the Mental Capacity Act 2005 so as to correspond to the amended provisions of the Matrimonial Causes Act 1973 s 40; thus the Civil Partnership Act 2004 Sch 5 para 78 continues to refer to a person being 'incapable, by reason of mental disorder within the meaning of the Mental Health Act 1983, of managing and administering his or her property and affairs' rather than to that person 'lacking capacity', and refers to being subject to any order, direction or authority made or given in relation to the relevant person under the Mental Health Act 1983 Pt VII (ss 93-113) rather than to an order, direction or authority made or given under the Mental Capacity Act 2005. However, it is submitted that the correct reading of these provisions for both marriages and civil partnerships is that set out in the text.

As to the application of the Matrimonial Causes Act 1973 s 40 and the Civil Partnership Act 2004 Sch 5 para 78 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 1 and the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 and the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as those provisions apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537. As to the procedure where one party is a child or a protected party see PARA 1019 et seq.

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456. Maintenance pending suit or the outcome of proceedings.

On a petition¹ for divorce, dissolution, nullity or judicial or legal separation the court² may make an order requiring either spouse or civil partner to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the date on which the petition was presented and ending with the date on which proceedings are determined, as the court thinks reasonable³. Such maintenance is not assignable⁴. Either party may apply at any stage of the proceedings for an order under these provisions⁵; and the ability of the court to make an order commences with the presentation of the petition⁶ and survives until decree absolute or dissolution order or the death of either party⁷.

Although the court is not directed to consider the factors to which it is otherwise to have regard in deciding whether to exercise its powers in granting financial relief⁸, those factors may nevertheless provide guidance in applications for maintenance pending suit or the outcome of proceedings. In seeking to make such orders as it thinks reasonable, the court will make a broad assessment of the parties' financial circumstances and will seek to ensure that the parties' interim needs are met pending the more extensive inquiry that will take place at the substantive hearing⁹. The order should take into account the standard of living of the parties during the marriage or civil partnership¹⁰ and in an appropriate case the duration thereof¹¹, and may include an element towards the payee's costs¹².

The court will rarely embark on an inquiry about conduct at the stage at which it is adjudicating on maintenance pending suit or the outcome of proceedings¹³, although in an appropriate case it may do so¹⁴.

An order for maintenance pending suit or the outcome of proceedings may be varied, discharged, suspended in whole or in part and revived in the same manner as substantive orders for periodical payments¹⁵; and repayment may be ordered in certain circumstances¹⁶.

1 As to petitions and applications see PARA 321 note 1.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Matrimonial Causes Act 1973 ss 22, 52(2)(b); Civil Partnership Act 2004 Sch 5 para 38. As to the procedure on an application for such maintenance see PARA 902 et seq.

4 *Taylor (formerly Kraupl) v National Assistance Board* [1956] P 470, [1956] 2 All ER 455; on appeal on other grounds [1957] P 101, [1957] 1 All ER 183, CA; [1958] AC 532, [1957] 3 All ER 703, HL; and see *Re Robinson* (1884) 27 ChD 160, CA; *Watkins v Watkins* [1896] P 222 at 226, 227, CA per Lindley LJ; *Paquine v Snary* [1909] 1 KB 688, CA; *Campbell v Campbell* [1922] P 187 at 192; *Smith v Smith* [1923] P 191 at 204, CA per Scrutton LJ.

5 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F; PARA 923; and *Dart v Dart* [1997] 1 FCR 21 at 28, [1996] 2 FLR 286 at 293, CA.

6 *M v M* [1928] P 123.

7 *Stanhope v Stanhope* (1886) 11 PD 103, CA.

8 Ie principally under the Matrimonial Causes Act 1973 s 25 and the Civil Partnership Act 2004 Sch 5 paras 20, 21: see PARA 589 et seq.

9 See eg *Peacock v Peacock* [1984] 1 All ER 1069, [1984] 1 WLR 532; *F v F (maintenance pending suit)* (1983) 4 FLR 382, 13 Fam Law 16.

10 *T v T (financial provision)* [1990] FCR 169, sub nom *Re T (divorce: interim maintenance: discovery)* [1990] 1 FLR 1.

11 *F v F (maintenance pending suit)* (1983) 4 FLR 382, 13 Fam Law 16.

12 *A v A (maintenance pending suit: payment of legal fees)* [2001] 1 WLR 605, sub nom *A v A (maintenance pending suit: provision for legal costs)* [2001] 1 FCR 226 (wife had acute need for good representation; husband could afford to pay the sum ordered and it was reasonable to require him to do so); *G v G (maintenance pending suit: legal costs)* [2002] EWHC 306 (Fam), [2002] 3 FCR 339, [2003] 2 FLR 71.

13 *Offord v Offord* (1981) 3 FLR 309, 11 Fam Law 208.

14 *F v F (maintenance pending suit)* (1983) 4 FLR 382, 13 Fam Law 16.

15 See the Matrimonial Causes Act 1973 s 31(1), (2)(a); the Civil Partnership Act 2004 Sch 5 para 50(1)(c); and PARA 567.

16 See the Matrimonial Causes Act 1973 s 33(1), (2)(a); the Civil Partnership Act 2004 Sch 5 para 64(1), (2)(a); and PARA 573.

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457. Orders under former legislation.

The provisions of the Matrimonial Causes Act 1965 dealing with financial provisions¹ were repealed by the Matrimonial Proceedings and Property Act 1970; and in turn the financial provisions² of the 1970 Act were repealed by the Matrimonial Causes Act 1973³. The Matrimonial Proceedings and Property Act 1970 enacted transitional provisions and savings in respect of existing orders and applications⁴, and like transitional provisions and savings appear in the Matrimonial Causes Act 1973⁵.

The Matrimonial Causes Act 1965 provided for the court, on granting a decree of divorce or nullity or at any time thereafter, to make one or more of the following orders:

- 529 (1) an order requiring the husband to secure to the wife, to the satisfaction of the court, a lump or annual sum for any term not exceeding her life;
- 530 (2) an order requiring the husband to pay to the wife a monthly or weekly sum for her maintenance during their joint lives; and
- 531 (3) an order requiring the husband to pay to the wife a lump sum, provided that, where the wife petitioned for divorce on the ground of her husband's insanity, the position of the spouses was reversed and the court's power was confined to making equivalent orders against the wife and in favour of the husband⁶.

The Act further provided for the court, on the grant of a decree of judicial separation or at any time thereafter, to order the payment of alimony or a lump sum or both to the wife except in a case where the wife's petition was presented on the ground of the husband's insanity, in which circumstances the court was empowered to order equivalent relief in favour of the husband⁷.

All such orders, other than orders for the payment of a lump sum, may now be varied, discharged, suspended or revived as if they were orders for the making of periodical payments or secured periodical payments under the Matrimonial Causes Act 1973⁸, except that an order for secured provision made before 16 December 1949 may only be varied in certain circumstances⁹.

1 Ie the Matrimonial Causes Act 1965 ss 15-22 (repealed).

2 Ie the Matrimonial Proceedings and Property Act 1970 ss 1-8 (repealed).

3 Matrimonial Causes Act 1973 s 54(1), Sch 3.

4 Matrimonial Proceedings and Property Act 1970 s 28, Sch 1 (repealed). Orders made under the Matrimonial Causes Acts 1950 to 1963 were deemed to have been made under the corresponding provisions of the Matrimonial Causes Act 1965: Sch 1 para 1 (repealed).

5 Matrimonial Causes Act 1973 s 53, Sch 1 Pt III.

6 Matrimonial Causes Act 1965 ss 16(1), (3), 19 (repealed).

7 Matrimonial Causes Act 1965 s 20(1) (repealed).

8 Matrimonial Causes Act 1973 Sch 1 para 17(1), (2), applying s 31 as modified by Sch 1 para 17(3). As to the variation of orders under s 31 generally see PARAS 567, 568. Provision is also made for the variation, discharge or suspension of surviving orders for maintenance under suits for restitution of conjugal rights, abolished as a remedy by the Matrimonial Proceedings and Property Act 1970 s 20: see the Matrimonial Causes Act 1973 Sch 1 para 18.

9 Matrimonial Causes Act 1973 Sch 1 para 17(4) (which provides that such an order for secured provision may only be varied where the court is satisfied that the case is one of exceptional hardship which cannot be met by discharge, variation or suspension of any other maintenance order made or deemed to have been made under the Matrimonial Causes Act 1965 s 16(1)(b) (repealed)).

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B. PERIODICAL PAYMENTS

458. Power to make order.

Where the court¹:

- 532 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or
- 533 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order that either party to the marriage or civil partnership is to make to the other such periodical payments, for such term, as may be specified in the order (a 'periodical payments order')⁵. The court may order periodical payments to be made in a currency other than sterling but it should allow the parties to make representations about the currency in which the order will be made⁶.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 23(1).

3 Civil Partnership Act 2004 Sch 5 para 1(1)(a).

4 le on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 23(1); Civil Partnership Act 2004 Sch 5 para 1(1).

5 Matrimonial Causes Act 1973 ss 21(1)(a), 23(1)(a); Civil Partnership Act 2004 Sch 5 paras 2(1)(a), (2), 80(1)(a). Where on or after the grant of a decree of divorce or nullity of marriage or an order for dissolution or nullity of a civil partnership an application is made by a party to the marriage or civil partnership for a periodical payments order in his or her favour, then, if the court considers that no continuing obligation should be imposed on either party to make periodical payments in favour of the other (see PARA 592), the court may dismiss the application with a direction that the applicant is not entitled to make any future application under the Matrimonial Causes Act 1973 s 23(1)(a) or the Civil Partnership Act 2004 Sch 5 para 2(1)(a) in relation to that marriage or civil partnership for a financial provision order: Matrimonial Causes Act 1973 s 25A(3) (added by the Matrimonial and Family Proceedings Act 1984 s 3); Civil Partnership Act 2004 Sch 5 para 23(4).

As to the date when the order takes effect see PARA 459; and as to pension attachments see PARA 485 et seq. The court's power exists by virtue of the statutory provisions; and it cannot order periodical payments to be made otherwise than within these terms (see *Milne v Milne* (1981) 2 FLR 286, CA; *Sabbagh v Sabbagh* [1985] FLR 29, [1985] Fam Law 187); in particular, it is implicit in the concept of periodical payments that where there has been a capital adjustment between the parties, the function of periodical payments should not be seen as furthering the payee's ability to mine the payer's income for further capital (see *J v J* (*ancillary relief: periodical payments*) [2004] EWHC 53 (Fam), [2004] 1 FCR 709, [2004] All ER (D) 141 (Mar)).

Orders whereby the court might express periodical payments in favour of a spouse or civil partner to continue *dum sola* are obsolete: remarriage, or the formation of a civil partnership, by a person in whose favour the order has been made automatically determines the order: see the Matrimonial Causes Act 1973 s 28; the Civil Partnership Act 2004 Sch 5 paras 47, 48; and PARAS 452, 460. As to the issues of conduct to which the court is to have regard when considering matters of financial provision see the Matrimonial Causes Act 1973 s 25; the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq.

The court may also make a periodical payments order in case of failure by one party to the marriage to provide reasonable maintenance for the other: see the Matrimonial Causes Act 1973 s 27(6)(a); the Civil Partnership Act 2004 Sch 5 para 41(1)(a); and PARA 543. Periodical payments may also be made pending suit or the outcome of proceedings: see PARA 456.

6 *R v Cambridge County Court, ex p Ireland* [1985] FLR 102, [1985] Fam Law 23.

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459. Date order takes effect.

Where a periodical payments order¹ is made on or after granting a decree of divorce or nullity of marriage or making a dissolution or nullity order in respect of a civil partnership², neither the order nor any settlement made in pursuance of it is to take effect³ unless the decree has been made absolute or, as the case may be, the dissolution or nullity order has been made final⁴.

1 As to the meaning of 'periodical payments order' see PARA 458.

2 I.e. under the Matrimonial Causes Act 1973 s 23(1)(a) or the Civil Partnership Act 2004 Sch 5 paras 1(1), 2(1)(a): see PARA 458.

3 I.e. without prejudice to the power to give a direction under the Matrimonial Causes Act 1973 s 30 or the Civil Partnership Act 2004 Sch 5 para 76 for the settlement of an instrument by conveyancing counsel: see PARA 473.

4 Matrimonial Causes Act 1973 s 23(5); Civil Partnership Act 2004 Sch 5 para 4. In respect of a marriage, it has been held that the court has no jurisdiction, even with consent, to make a substantive order before a decree nisi is pronounced, and that an order made before a decree nisi is pronounced cannot be rectified under the court's inherent jurisdiction or under the slip rule: see *Board (Board intervening) v Checkland* [1987] 2 FLR 257, CA, following *Munks v Munks* [1985] FLR 576, [1985] Fam Law 131, CA. However, a court may approve a draft consent order in advance of a decree nisi and direct that it should take effect at a future date: *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA. Presumably the same situation would obtain in respect of a dissolution or nullity order relating to a civil partnership.

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460. Duration of continuing periodical payments orders.

The term to be specified in a periodical payments order¹ in favour of a party to a marriage or civil partnership is to be² such term as the court³ thinks fit, except that the term must not begin before the date of the making of an application for the order and must be so defined as not to extend beyond the death of either of the parties or, where the order is made on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order relating to a civil partnership, the remarriage, or the formation of a subsequent civil partnership or marriage, by the party in whose favour the order is made⁴.

Where a periodical payments order in favour of a party to a marriage or civil partnership is made on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order relating to a civil partnership, the court may direct that that party is not to be entitled to apply⁵ for the extension of the term specified in the order⁶.

¹ As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

² I.e. subject, in the case of an order made on or after the grant of a decree of divorce or nullity of marriage, to the provisions of the Matrimonial Causes Act 1973 s 25A(2) (see PARA 592) and s 31(7) (see PARA 568), or, in the case of an order made on or after the making of a dissolution or nullity order relating to a civil partnership, to the provisions of the Civil Partnership Act 2004 Sch 5 para 23(3) (see PARA 592) and Sch 5 para 59(4) (see PARA 568).

³ As to the meaning of 'court' see PARA 346 note 2.

⁴ Matrimonial Causes Act 1973 s 28(1)(a) (s 28(1) amended by the Matrimonial and Family Proceedings Act 1984 s 5(1); and by the Civil Partnership Act 2004 Sch 27 para 43(1), (2)); Civil Partnership Act 2004 Sch 5 para 47(1), (2), (4). As to references to remarriage, to a subsequent marriage and to the formation of a subsequent civil partnership see PARA 452 note 1. As to the application of these provisions to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

Where a periodical payments order in favour of a party to a marriage or civil partnership is made otherwise than on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order relating to a civil partnership (see PARA 542 et seq), and the marriage or civil partnership in question is subsequently dissolved or annulled but the order continues in force, the order ceases to have effect, notwithstanding anything in it, on the remarriage, or the formation of a subsequent civil partnership or marriage, by that party, except in relation to any arrears due under it on the date of the remarriage, marriage or formation of the civil partnership: Matrimonial Causes Act 1973 s 28(2) (amended by the Civil Partnership Act 2004 Sch 27 para 43(3)); Civil Partnership Act 2004 Sch 5 para 47(6).

⁵ I.e. under the Matrimonial Causes Act 1973 s 31 or the Civil Partnership Act 2004 Sch 5 para 51: see PARA 567.

⁶ Matrimonial Causes Act 1973 s 28(1A) (added by the Matrimonial and Family Proceedings Act 1984 s 5(2)); Civil Partnership Act 2004 Sch 5 para 47(5).

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461. Request for periodical payments order at same rate as order for maintenance pending suit or the outcome of proceedings.

Where at or after the date of a decree nisi of divorce or nullity of marriage or a conditional order of dissolution or nullity of civil partnership an order for maintenance pending suit or outcome of proceedings, as the case may be¹, is in force, the party in whose favour the order was made may, if he has made an application for a periodical payments order² for himself in his petition or answer, as the case may be, request the district judge³ in writing to make such an order (a 'corresponding order') providing for payments at the same rate as those provided for by the order for maintenance pending suit or outcome of proceedings⁴.

Where such a request is made, the proper officer⁵ must serve on the other spouse or civil partner a notice of request in the prescribed form⁶ requiring him, if he objects to the making of a corresponding order, to give notice to that effect to the court and to the applicant within 14 days after service of the notice in the prescribed form⁷. If the other spouse or civil partner does not give notice of objection within the time so specified, the district judge may make a corresponding order without further notice to that spouse or civil partner and without requiring the attendance of the applicant or his solicitor, and must in that case serve a copy of the order on the applicant as well as on the other spouse or civil partner⁸.

1 As to orders for maintenance pending suit or the outcome of proceedings see PARA 456.

2 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

3 As to the meaning of 'district judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.67(1) (amended by SI 2005/2922).

5 'Proper officer' means the family proceedings department manager (in relation to the principal registry), the court manager (in relation to any other court or registry), or other officer of the court or registry acting on his behalf in accordance with directions given by the Lord Chancellor: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 1997/1056).

6 For the prescribed form of notice of request see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form I (added by SI 1999/3491; substituted by SI 2000/2267).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.67(2) (amended by SI 1999/3491; SI 2005/2922).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.67(3) (amended by SI 2005/2922).

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462. Interim orders.

A party may apply at any stage of the proceedings for an order for interim periodical payments¹; and, pending the final determination of the application, the district judge² may³ make an interim order on such terms as he thinks just⁴. Such orders are usually made where further investigations or inquiry are required, or where an application is adjourned part heard and interim provision is considered necessary. Interim orders may be varied, discharged, suspended in whole or in part and revived in the same manner as substantive orders for periodical payments⁵.

1 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F; and PARA 923.

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 See subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F.

4 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.64(2); and PARA 933.

5 See the Matrimonial Causes Act 1973 s 31(1), (2)(a); the Civil Partnership Act 2004 Sch 5 para 50(1)(c); and PARA 567.

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463. Matters to which the court is to have regard.

In deciding whether to exercise its power to make a periodical payments order¹ and, if so, in what manner, the court² is to have regard to certain matters³. The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable⁴.

In applying its discretion, the court will take into account the cohabitation of a party claiming periodical payments as one of the circumstances of the case⁵; but the court will not force a person to become dependent on their new partner⁶.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁷.

¹ As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

² As to the meaning of 'court' see PARA 346 note 2.

³ See the Matrimonial Causes Act 1973 s 25(1), (2); the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq. As to this requirement see generally *Rye v Rye* [2002] EWHC 956 (Fam), [2002] 2 FLR 981, [2002] All ER (D) 249 (May).

⁴ See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.

⁵ See eg *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 All ER 336, CA; *Atkinson v Atkinson* [1988] Fam 93, [1987] 3 All ER 849, CA.

⁶ *Hepburn v Hepburn* [1989] FCR 618, [1989] 1 FLR 373, CA. Subsequent marriages and civil partnerships bring about a termination of the right to periodical payments: see PARA 452.

⁷ See PARA 595.

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463 Matters to which the court is to have regard

NOTE 3--See also *Bokor-Ingram v Bokor-Ingram; I v I* [2009] EWCA Civ 412, [2009] All ER (D) 209 (Jun).

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464. Unfair pressure on payer.

The making of an order for an amount or amounts larger than the circumstances of the parties warrant, so as to bring pressure on the payer to do something he not unreasonably refuses to do, is wrong in principle¹; it has been held that where the trustees of a settlement had a discretion to make payments to a husband from trust funds and, in the exercise of that discretion, did not make such payments, the court could not order the husband to pay maintenance to the wife amounting to most of his income in order to bring pressure to bear on the trustees to exercise their discretion in a way they did not wish to exercise it². The court may, however, make orders that encourage trustees to enhance the means of the maintaining party, so long as no improper pressure is brought to bear on the trustees³.

1 *Wakeford v Wakeford* [1953] 2 All ER 827, [1953] 1 WLR 1222, DC.

2 *Howard v Howard* [1945] P 1, [1945] 1 All ER 91, CA; *B v B (financial provision)* (1982) 3 FLR 298, 12 Fam Law 92, CA. See also *Browne v Browne* [1989] 1 FLR 291, [1989] Fam Law 147, CA (court wrong to exert pressure on a discretionary trustee; court must look at reality of situation).

3 *Thomas v Thomas* [1996] 2 FCR 544, [1995] 2 FLR 668, CA.

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465. Orders of other courts.

Before taking proceedings for divorce, dissolution, judicial or legal separation or nullity, a spouse or civil partner may have obtained an order in a magistrates' court¹, including an order that the other spouse or civil partner should make such periodical payments as the magistrates' court considers reasonable². The existence of this order must be taken into account on an application for periodical payments; and, since it is undesirable that there should be more than one financial order current at the same time from two courts, the proper course may well be to discharge the magistrates' court's order. The High Court and county courts have power to discharge the magistrates' court's order without it being necessary to make a separate application for this purpose in the magistrates' court³.

Orders of foreign courts will be taken into account, although the court's attitude to such orders may depend on their enforceability in England and Wales⁴. Previous orders for financial provision in proceedings for judicial separation between the parties will also be taken into account where a periodical payments application is made within the framework of a divorce suit.

1 le under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 para 2(1)(a): see PARA 553.

2 See PARA 553.

3 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 28; the Civil Partnership Act 2004 Sch 6 para 46(a); and PARA 566.

4 *Harrop v Harrop* [1920] 3 KB 386; *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522; *Beatty v Beatty* [1924] 1 KB 807, CA; *Simons v Simons* [1939] 1 KB 490, [1938] 4 All ER 436. See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 158, 292.

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466. Alienation and bankruptcy.

Periodical payments, unlike secured periodical payments¹, under an order of the court in matrimonial or civil partnership proceedings cannot be assigned nor can they be released or taken in execution². Even though the right to arrears of periodical payments may be assignable³, the court is unlikely to enforce arrears in favour of an assignee⁴. Neither arrears of such periodical payments nor future payments constitute a debt or liability for purposes of insolvency⁵, and a debt provable in the bankruptcy is, therefore, not created⁶. A spouse or civil partner remains liable under a periodical payments order⁷ notwithstanding his or her bankruptcy and subsequent discharge⁸.

1 See PARA 467 et seq.

2 *Re Robinson* (1884) 27 ChD 160, CA; *Watkins v Watkins* [1896] P 222, CA; *Campbell v Campbell* [1922] P 187. Cf the Matrimonial Causes Act 1973 s 39; the Civil Partnership Act 2004 Sch 5 para 77; and PARAS 505, 509.

For an agreement between a wife and her solicitors assigning to the latter her rights in any financial provision and property adjustment orders which she might obtain in the proceedings, excluding periodical payments, in order to meet the solicitor's bill see *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116 (cited in PARA 484 note 1).

3 *Watkins v Watkins* [1896] P 222 at 228, CA per Lindley LJ.

4 *Re Robinson* (1884) 27 ChD 160, CA.

5 Ie within the meaning of the Insolvency Rules 1986, SI 1986/1925, r 12.3(2): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491.

6 *Re Rice, ex p Rice* (1864) 10 LT 103; cf *Victor v Victor* [1912] 1 KB 247, CA; *McQuiban v McQuiban* [1913] P 208 (payments under separation deeds provable).

7 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

8 *Linton v Linton* (1885) 15 QBD 239, CA; *Re Hawkins, ex p Hawkins* [1894] 1 QB 25; *Kerr v Kerr* [1897] 2 QB 439; *James v James* [1964] P 303, [1963] 2 All ER 465, DC. As to arrears under a separation deed see, however, *Victor v Victor* [1912] 1 KB 247, CA; *McQuiban v McQuiban* [1913] P 208.

As to the respective rights of a bankrupt and her trustee in bankruptcy, where maintenance is payable under a deed, see *Re Tennant's Application* [1956] 2 All ER 753, [1956] 1 WLR 874, CA; as to the respective rights of sequestrators and a trustee in bankruptcy, where it is sought to enforce arrears of maintenance under an order see *Coles v Coles* [1957] P 68, [1956] 3 All ER 542; and as to the effect of a husband's undertakings in an order regarding the matrimonial home when a bankruptcy order was made against him see *Re Solomon (a bankrupt), ex p Trustee of Property of Bankrupt v Solomon* [1967] Ch 573; *Re A Debtor, ex p Trustee v Solomon* [1966] 3 All ER 255.

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C. SECURED PERIODICAL PAYMENTS

467. Power to make order.

Where the court¹:

- 534 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or
- 535 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order that either party to the marriage or civil partnership is to secure to the other, to the satisfaction of the court, such periodical payments, for such term, as may be specified in the order (a 'secured periodical payments order')⁵. The court may order periodical payments to be made in a currency other than sterling but it should allow the parties to make representations about the currency in which the order will be made⁶.

An order to secure periodical payments is intended to impose an obligation on the payer to establish a capital asset from which the recipient will be maintained. The payer is not under an obligation to pay a specific amount of maintenance; rather the obligation is to create the security from which the maintenance will be paid⁷. Consequently such orders are rare; in most instances available capital will be distributed between the parties and any maintenance obligation will be imposed by means of a regular order for periodical payments.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 23(1).

3 Civil Partnership Act 2004 Sch 5 para 1(1)(a).

4 le on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 23(1); Civil Partnership Act 2004 Sch 5 para 1(1).

5 Matrimonial Causes Act 1973 ss 21(1)(b), 23(1)(b); Civil Partnership Act 2004 Sch 5 paras 2(1)(b), (2), 80(1)(b). Where on or after the grant of a decree of divorce or nullity of marriage or an order for dissolution or nullity of a civil partnership an application is made by a party to the marriage or civil partnership for a secured periodical payments order in his or her favour, then, if the court considers that no continuing obligation should be imposed on either party to secure periodical payments in favour of the other (see PARA 592), the court may dismiss the application with a direction that the applicant is not entitled to make any future application under the Matrimonial Causes Act 1973 s 23(1)(b) or the Civil Partnership Act 2004 Sch 5 para 2(1)(b) in relation to that marriage or civil partnership for a financial provision order: Matrimonial Causes Act 1973 s 25A(3) (added by the Matrimonial and Family Proceedings Act 1984 s 3); Civil Partnership Act 2004 Sch 5 para 23(4).

As to the date when the order takes effect see PARA 468; and as to pension attachments see PARA 485 et seq. As to the court's power to make periodical payments generally cf the cases cited in PARA 458 note 5. Orders whereby the court might express secured periodical payments in favour of a spouse or civil partner to continue *dum sola* are obsolete: remarriage, or the formation of a civil partnership, by a person in whose favour the order has been made automatically determines the order: see the Matrimonial Causes Act 1973 s 28; the Civil Partnership Act 2004 Sch 5 paras 47, 48; and PARAS 460, 452. As to the issues of conduct to which the court is to

have regard when considering matters of financial provision see the Matrimonial Causes Act 1973 s 25; the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq.

The court may also make a secured periodical payments order in case of failure by one party to the marriage to provide reasonable maintenance for the other: see the Matrimonial Causes Act 1973 s 27(6)(b); the Civil Partnership Act 2004 Sch 5 para 41(1)(b); and PARA 543.

6 *R v Cambridge County Court, ex p Ireland* [1985] FLR 102, [1985] Fam Law 23.

7 See *Shearn v Shearn* [1931] P 1.

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468. Date order takes effect.

Where a secured periodical payments order is made¹ on or after granting a decree of divorce or nullity of marriage or making a dissolution or nullity order in respect of a civil partnership², neither the order nor any settlement made in pursuance of it is to take effect³ unless the decree has been made absolute or, as the case may be, the dissolution or nullity order has been made final⁴.

¹ As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

² I.e. under the Matrimonial Causes Act 1973 s 23(1)(b) or the Civil Partnership Act 2004 Sch 5 paras 1(1), 2(1)(b): see PARA 467.

³ I.e. without prejudice to the power to give a direction under the Matrimonial Causes Act 1973 s 30 or the Civil Partnership Act 2004 Sch 5 para 76 for the settlement of an instrument by conveyancing counsel: see PARA 473.

⁴ Matrimonial Causes Act 1973 s 23(5); Civil Partnership Act 2004 Sch 5 para 4. In respect of a marriage, it has been held that the court has no jurisdiction, even with consent, to make a substantive order before a decree nisi is pronounced, and that an order made before a decree nisi is pronounced cannot be rectified under the court's inherent jurisdiction or under the slip rule: see *Board (Board intervening) v Checkland* [1987] 2 FLR 257, CA, following *Munks v Munks* [1985] FLR 576, [1985] Fam Law 131, CA. However, a court may approve a draft consent order in advance of a decree nisi and direct that it should take effect at a future date: *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA. Presumably the same situation would obtain in respect of a dissolution or nullity order relating to a civil partnership.

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469. Duration of continuing secured periodical payments orders.

The term to be specified in a secured periodical payments order¹ in favour of a party to a marriage or civil partnership is to be² such term as the court³ thinks fit, except that the term must not begin before the date of the making of an application for the order and must be so defined as not to extend beyond the death of the party in whose favour the order is made or, where the order is made on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order relating to a civil partnership, the remarriage, or the formation of a subsequent civil partnership or marriage, by the party in whose favour the order is made⁴.

Where a secured periodical payments order in favour of a party to a marriage or civil partnership is made on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order relating to a civil partnership, the court may direct that that party is not to be entitled to apply⁵ for the extension of the term specified in the order⁶.

1 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

2 I.e. subject, in the case of an order made on or after the grant of a decree of divorce or nullity of marriage, to the provisions of the Matrimonial Causes Act 1973 s 25A(2) (see PARA 592) and s 31(7) (see PARA 568), or, in the case of an order made on or after the making of a dissolution or nullity order relating to a civil partnership, to the provisions of the Civil Partnership Act 2004 Sch 5 para 23(3) (see PARA 592) and Sch 5 para 59(4) (see PARA 568).

3 As to the meaning of 'court' see PARA 346 note 2.

4 Matrimonial Causes Act 1973 s 28(1)(b) (s 28(1) amended by the Matrimonial and Family Proceedings Act 1984 s 5(1); and by the Civil Partnership Act 2004 Sch 27 para 43(1), (2)); Civil Partnership Act 2004 Sch 5 para 47(1), (3), (4). As to references to remarriage, to a subsequent marriage and to the formation of a subsequent civil partnership see PARA 452 note 1. As to the application of these provisions to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

Where a secured periodical payments order in favour of a party to a marriage or civil partnership is made otherwise than on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order relating to a civil partnership (see PARA 542 et seq), and the marriage or civil partnership in question is subsequently dissolved or annulled but the order continues in force, the order ceases to have effect, notwithstanding anything in it, on the remarriage, or the formation of a subsequent civil partnership or marriage, by that party, except in relation to any arrears due under it on the date of the remarriage, marriage or formation of the civil partnership: Matrimonial Causes Act 1973 s 28(2) (amended by the Civil Partnership Act 2004 Sch 27 para 43(3)); Civil Partnership Act 2004 Sch 5 para 47(6).

5 I.e. under the Matrimonial Causes Act 1973 s 31 or the Civil Partnership Act 2004 Sch 5 para 51: see PARA 567.

6 Matrimonial Causes Act 1973 s 28(1A) (added by the Matrimonial and Family Proceedings Act 1984 s 5(2)); Civil Partnership Act 2004 Sch 5 para 47(5).

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470. Interim orders.

A party may apply at any stage of the proceedings for an order for interim secured periodical payments¹; and, pending the final determination of the application, the district judge² may³ make an interim order on such terms as he thinks just⁴. Such orders are usually made where further investigations or inquiry are required, or where an application is adjourned part heard and interim provision is considered necessary. Interim orders may be varied, discharged, suspended in whole or in part and revived in the same manner as substantive orders for secured periodical payments⁵.

1 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F; and PARA 923. As to the making of a secured periodical payments order see PARA 467.

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F.

4 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.64(2): and PARA 933.

5 See the Matrimonial Causes Act 1973 s 31(1), (2)(a); the Civil Partnership Act 2004 Sch 5 para 50(1)(c); and PARA 567.

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471. Matters to which the court is to have regard.

In deciding whether to exercise its power to make a secured periodical payments order¹ and, if so, in what manner, the court² is to have regard to certain matters³. The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable⁴.

The court will take into account the effect on the payer of tying up the asset that provides the security⁵ and also the need to have security for the payment of maintenance⁶; and the court has an unfettered discretion in deciding whether to make such an order and, if so, on what terms⁷.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁸.

1 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

2 As to the meaning of 'court' see PARA 346 note 2.

3 See the Matrimonial Causes Act 1973 s 25(1), (2); the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq. As to this requirement see generally *Rye v Rye* [2002] EWHC 956 (Fam), [2002] 2 FLR 981, [2002] All ER (D) 249 (May).

4 See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.

5 *Shearn v Shearn* [1931] P 1.

6 Eg because the payer may leave the jurisdiction or prove to be unreliable in the payment of normal maintenance: see *Barker v Barker* [1952] P 184, [1952] 1 All ER 1128, CA; *Chichester v Chichester* [1936] P 129, [1936] 1 All ER 271.

7 *Shearn v Shearn* [1931] P 1.

8 See PARA 595.

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472. Property that may be the subject of a secured periodical payments order.

When the court intends to make a secured periodical payments order¹ it will usually indicate that intention to the parties and invite them to agree on the asset which is to provide the security. The appropriate security will usually be stocks, shares or real property. It will usually be unduly onerous to order that the whole of one party's capital assets should provide the security². If the parties cannot agree which property is to provide the security, the court will do so. It is, however, wrong to delegate that task to conveyancing counsel³, although, once the intentions of the court are determined, it may direct that conveyancing counsel draft any necessary documents in order to put that intention into effect⁴. The court will rarely require reversionary interests to provide the necessary security⁵.

1 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

2 *Barker v Barker* [1952] P 184, [1952] 1 All ER 1128, CA.

3 *Barker v Barker* [1952] P 184, [1952] 1 All ER 1128, CA.

4 See PARA 473.

5 *Allison v Allison* [1927] P 308.

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473. Deed to secure payments.

Where the court¹ decides to make a financial provision order requiring any payments to be secured², it may direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties³. Where the order is to be made in proceedings for divorce, dissolution, nullity of marriage or civil partnership or judicial or legal separation, the court may, if it thinks fit, defer the grant of the decree or the making of the order in question until the instrument has been duly executed⁴.

The court may order the lodgment of documents for the purpose of settling the deed⁵. Where a person refuses or neglects to execute a deed securing payments as ordered by the court, the court may order that execution be effected by such person as it nominates for that purpose, and a deed so executed operates as if executed by the party originally directed to execute it⁶. The court has power to order the rectification of a deed⁷ and to vary it⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 See PARA 467 et seq.

3 Matrimonial Causes Act 1973 s 30(a); Civil Partnership Act 2004 Sch 5 para 76(1)(a), (2).

4 Matrimonial Causes Act 1973 s 30(b); Civil Partnership Act 2004 Sch 5 para 76(3).

5 *Bartlett v Bartlett* (1918) 34 TLR 518.

6 See the Supreme Court Act 1981 s 39; the County Courts Act 1984 s 38; and PARA 641. See also *Howarth v Howarth* (1886) 11 PD 68 at 95, CA; cf *De Ricci v De Ricci* [1891] P 378 (application arising out of a compromise, which had become a rule of court).

7 *Burroughes v Abbott* [1922] 1 Ch 86; cf *Philipson v Philipson* (1933) 148 LT 455. Except for fraud, such a deed is irrevocable: *Bradley v Bradley* (1882) 7 PD 237.

8 See the Matrimonial Causes Act 1973 s 31(3); the Civil Partnership Act 2004 Sch 5 para 45(3); and PARA 567.

UPDATE

473 Deed to secure payments

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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474. Effect of death of spouse or civil partner.

Where a secured periodical payments order is made¹, the party in favour of whom the order is made has an enforceable claim which is maintainable after the death of the other party against that party's estate, whether or not the effect of the order is to create a charge on property of that other party, and the order may be enforced against his or her personal representatives; the court may order the personal representatives to execute the necessary deed².

The right to apply for an order for secured periodical payments is, however, not a cause of action which survives³ against a person's estate⁴. It has been held that an application by a personal representative of the party against whom an order was made to extinguish or diminish periodical payments payable under the order could not be maintained⁵.

Where the person liable to make payments under a secured periodical payments order has died, an application relating to that order and to any order⁶ for the sale of property which requires the proceeds of sale of property to be used for securing those payments, to vary or discharge the order or to suspend any provision temporarily or to revive a suspended provision⁷ may be made by the person entitled to payments under the order or by the personal representatives of the deceased person, but, except with the permission of the court, no such application may be made after the end of the period of six months from the date on which representation in regard to the estate of that person is first taken out⁸.

The personal representatives of a deceased person against whom a secured periodical payments order was made are not liable for having distributed any part of the estate of the deceased after the expiration of the period of six months on the ground that they ought to have taken into account the possibility that the court might permit such an application to be made after that period by the person entitled to payments under the order; but any power to recover any part of the estate so distributed arising by virtue of the making of an order to vary, discharge, suspend or revive is not thereby prejudiced⁹.

1 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

2 *Hyde v Hyde* [1948] P 198, [1948] 1 All ER 362; *Mosey v Mosey and Barker* [1956] P 26, [1955] 2 All ER 391.

3 As to the survival of causes of action after death generally see the Law Reform (Miscellaneous Provisions) Act 1934 s 1; PARAS 684-686; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814.

4 *Dipple v Dipple* [1942] P 65, [1942] 1 All ER 234.

5 *Mosey v Mosey and Barker* [1956] P 26, [1955] 2 All ER 391.

6 Ie an order made under the Matrimonial Causes Act 1973 s 24A(1) or the Civil Partnership Act 2004 Sch 5 paras 10, 11: see PARA 520.

7 Ie under the Matrimonial Causes Act 1973 s 31(1), (2)(c) or the Civil Partnership Act 2004 Sch 5 para 50(1) (b): see PARA 567.

8 Matrimonial Causes Act 1973 s 31(6) (amended by the Matrimonial Homes and Property Act 1981 s 8(2) (b)); Civil Partnership Act 2004 Sch 5 para 60(1)-(3). As to the matters to which the court is to have regard in

exercising its powers see the Matrimonial Causes Act 1973 s 31(7); the Civil Partnership Act 2004 Sch 5 para 59; and PARA 568. In considering for these purposes the question when representation was first taken out, a grant limited to settled land or to trust property must be left out of account, and a grant limited to real estate or to personal estate must be left out of account, unless a grant limited to the remainder of the estate has previously been made or is made at the same time: Matrimonial Causes Act 1973 s 31(9); Civil Partnership Act 2004 Sch 5 para 60(6).

Where a person against whom a secured periodical payments order was so made has died and an application is made under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 for the variation or discharge of that order or for the revival of the operation of any provision thereof which has been suspended, the court has power to direct that the application made under either of those provisions is to be deemed to have been accompanied by an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692): ss 18(1)(a), 18A(1)(a) (s 18A added by the Civil Partnership Act 2004 Sch 4 para 25). Where the court gives such a direction, it has power, in the proceedings on the application under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 to make any order which the court would have had power to make under the provisions of the Inheritance (Provision for Family and Dependents) Act 1975 if the application made under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 had been made jointly with an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2; and the court has power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under the Inheritance (Provision for Family and Dependents) Act 1975 in the case of an application under s 2: ss 18(2), 18A(2) (s 18A(2) as so added). Where an order made under s 15(1) or s 15ZA(1) (see PARA 882) is in force with respect to a party to a marriage or civil partnership, the court may not give a direction under s 18(1) or s 18A(1) with respect to any application under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 by that party on the death of the other party: Inheritance (Provision for Family and Dependents) Act 1975 ss 18(3), 18A(3) (s 18A(3) as so added).

Where an application for an order under s 2 is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order, then, in the proceedings on that application, the court has power, if an application is duly made by that person or by the personal representative of the deceased, to vary or discharge that order or to revive the operation of any provision thereof which has been suspended: see s 16; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 695.

9 Matrimonial Causes Act 1973 s 31(8); Civil Partnership Act 2004 Sch 5 para 60(4), (5).

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475. Alienation.

Secured periodical payments are alienable and chargeable, unless the deed securing them provides against alienation¹.

¹ *Harrison v Harrison* (1888) 13 PD 180, CA; *Maclurcan v Maclurcan* (1897) 77 LT 474, CA (wife, after accepting sum for releasing husband, applied to court to set aside the deed of arrangement); *Hyde v Hyde* [1948] P 198, [1948] 1 All ER 362; *Mosey v Mosey and Barker* [1956] P 26 at 41, [1955] 2 All ER 391 at 394.

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D. LUMP SUM PAYMENTS

476. Power to make order.

Where the court¹:

- 536 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or
- 537 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order that either party to the marriage or civil partnership is to pay to the other such lump sum or sums as may be so specified (an 'order for the payment of a lump sum')⁵. Only a single order may be made which may, where appropriate, include provision for the payment of more than one lump sum as, for example, where one sum is to be paid immediately and a further sum contingently on the happening of a future event such as the falling in of a reversionary interest in an estate to which one of the parties is entitled⁶. An order for the payment of a lump sum may⁷ provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court⁸.

The court has no jurisdiction to make an interim order for the payment of a lump sum⁹; and nor may the court make an administrative order of appropriation to allocate a particular asset to meet the interim needs of either party prior to the final hearing¹⁰. There is also no power to make a lump sum order on the variation of other financial provision orders¹¹.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 23(1).

3 Civil Partnership Act 2004 Sch 5 para 1(1)(a).

4 le on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 23(1); Civil Partnership Act 2004 Sch 5 para 1(1).

5 Matrimonial Causes Act 1973 ss 21(1)(c), 23(1)(c); Civil Partnership Act 2004 Sch 5 paras 2(1)(c), (2), 80(1)(c). As to the date when the order takes effect see PARA 481; and as to pension attachments see PARA 485 et seq. As to the court's power to make periodical payments generally cf the cases cited in PARA 458 note 5. The court has no power to order payment to third parties (see eg *Milne v Milne* (1981) 2 FLR 286, CA); nor can the court dealing with an application for financial relief exercise a quasi bankruptcy jurisdiction and order one party to the marriage or civil partnership to make direct payments of debts to a third party (*Mullard v Mullard* (1981) 3 FLR 330, 12 Fam Law 63, CA; *Burton v Burton* [1986] 2 FLR 419, [1986] Fam Law 330). As to the issues of conduct to which the court is to have regard when considering matters of financial provision see the Matrimonial Causes Act 1973 s 25; the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq.

There is nothing to prevent a person who has received a lump sum in divorce or dissolution proceedings from applying subsequently for a lump sum under the Inheritance (Provision for Family and Dependents) Act 1975 (see *Re Farrow* [1987] 1 FLR 205, [1987] Fam Law 14 (wife awarded lump sum after decree of divorce subsequently awarded further lump sum under the Inheritance (Provision for Family and Dependents) Act

1975)) unless he or she is no longer entitled to make a claim by virtue of s 15: see PARA 882; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 667.

6 *de Lasala v de Lasala* [1980] AC 546 at 559, 560, [1979] 2 All ER 1146 at 1154, PC; and see *Coleman v Coleman* [1973] Fam 10, [1972] 3 All ER 886; *Carson v Carson* [1983] 1 All ER 478, [1983] 1 WLR 285, CA; *Norman v Norman* [1983] 1 All ER 486, [1983] 1 WLR 295; *Dinch v Dinch* [1987] 1 All ER 818, [1987] 1 WLR 252, HL.

7 le without prejudice to the generality of the Matrimonial Causes Act 1973 s 23(1)(c) or the Civil Partnership Act 2004 Sch 5 para 2(1)(c) (see the text and notes 1-5).

8 Matrimonial Causes Act 1973 s 23(3)(c); Civil Partnership Act 2004 Sch 5 para 3(3), (4). Such an instalment order may be varied: see the Matrimonial Causes Act 1973 s 31(2)(d); the Civil Partnership Act 2004 Sch 5 para 50(1)(e); and PARA 567. Although it has been held that the court will not permit a second lump sum to be achieved by some other proceedings since that would be inequitable (see *Minton v Minton* [1979] AC 593, [1979] 1 All ER 79, HL; *Banyard v Banyard* [1984] FLR 643, CA; *Nurcombe v Nurcombe* [1985] 1 All ER 65, [1985] 1 WLR 370, CA), the court may now make an order for the payment of a further lump sum where a periodical payments order (see PARA 458 et seq) or secured periodical payments order (see PARA 467 et seq) is discharged or such an order is varied so that payments under the order are required to be made or secured only for such further period as is determined by the court (see the Matrimonial Causes Act 1973 s 31(7B); the Civil Partnership Act 2004 Sch 5 para 53(2), (3); and PARA 569).

As to the application of the Matrimonial Causes Act 1973 s 23(3) and the Civil Partnership Act 2004 Sch 5 para 3 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

9 *Bolsom v Bolsom* (1982) 4 FLR 21, [1982] Fam Law 143, CA; *Wicks v Wicks* [1999] Fam 65, [1998] 1 All ER 977, CA.

10 *Wicks v Wicks* [1999] Fam 65, [1998] 1 All ER 977, CA.

11 See PARA 569.

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477. Lump sum provision for liabilities and expenses.

An order that a party to a marriage or civil partnership is to pay a lump sum¹ to the other party may² be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family³ before making an application for an order in his or her favour⁴.

¹ As to the meaning of 'order for the payment of a lump sum', and as to the making of such orders, see PARA 476.

² ie without prejudice to the generality of the Matrimonial Causes Act 1973 s 23(1)(c) or the Civil Partnership Act 2004 Sch 5 para 2(1)(c): see PARA 476.

³ 'Child of the family', in relation to the parties to a marriage or in relation to two people who are civil partners of each other, means a child of both of those parties and any other child, not being a child placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family: Matrimonial Causes Act 1973 s 52(1) (amended by the Children Act 1989 Sch 12 para 33); Matrimonial and Family Proceedings Act 1984 s 27; Civil Partnership Act 2004 Sch 5 para 80(2), Sch 7 para 1(4). 'Child' is defined for the purposes of the Matrimonial Causes Act 1973, in relation to one or both of the parties to a marriage, as including an illegitimate child of that party or, as the case may be, of both parties: s 52(1) (as so amended). In deciding for these purposes whether a child is a child of the family, grandparents are not in any special position: *Re A (a minor) (child of the family)* [1998] 1 FCR 458, sub nom *Re A (child of the family)* [1998] 1 FLR 347, CA.

⁴ Matrimonial Causes Act 1973 s 23(3)(a); Civil Partnership Act 2004 Sch 5 para 3(1), (4). As to lump sum provision specifically for the benefit of a child see the Matrimonial Causes Act 1973 s 23(1)(f); the Civil Partnership Act 2004 Sch 5 para 3(2)(f); and PARA 492. As to the application of the Matrimonial Causes Act 1973 s 23(3) and the Civil Partnership Act 2004 Sch 5 para 3 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

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478. Adjournments.

Although the court has an unfettered discretion to adjourn proceedings¹, the court will generally be reluctant to adjourn an application for the payment of a lump sum unless there is a real possibility of capital from a specific source and an adjournment is the only way to do justice between the parties².

1 See eg *Gibson or Scoullar or Archibald v Archibald* [1989] 1 All ER 257, [1989] 1 WLR 123, HL.

2 See *MT v MT (financial provision: lump sum)* [1991] FCR 649, [1992] 1 FLR 362; *D v D (financial provision: lump sum order)* [2001] 1 FCR 561, sub nom *D v D (lump sum: adjournment of application)* [2001] 1 FLR 633. For examples of cases where the court has agreed to an application to adjourn see *Morris v Morris* (1977) 7 Fam Law 244, CA (application relating to husband's army gratuity); *Hardy v Hardy* (1981) 2 FLR 321, 11 Fam Law 153, CA (application adjourned due to husband's inheritance expectations from father); *Davies v Davies* [1986] 1 FLR 497, [1986] Fam Law 138 (adjournment due to real possibility of future assets from partnership dissolution); *MT v MT (financial provision: lump sum)* (husband expected to inherit substantial capital from estate of his father). For examples of cases where an application for adjournment has been refused see *Rodewald v Rodewald* [1977] Fam 192, [1977] 2 All ER 609, CA (wife's application for adjournment to assist her with council house transfer); *Smith v Smith* (1982) 4 FLR 154 (wife's application for adjournment so as to await improvement in company's performance); *Scheeres v Scheeres* [1999] 2 FCR 476, [1999] 1 FLR 241 (same).

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479. Circumstances in which interest is payable.

Where the court¹ makes an order for the payment of a lump sum² and directs that payment of that sum or any part of it is to be deferred or that that sum or any part of it is to be paid by instalments, the court may order that the amount deferred or the instalments is or are to carry interest at such rate as may be specified by the order from such date, not earlier than the date of the order³, as may be so specified, until the date when payment of it is due⁴.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to the meaning of 'order for the payment of a lump sum', and as to the making of such orders, see PARA 476.

3 For these purposes, the expression 'the date of the order' refers to the date on which the court orders payment of a lump sum and not to any subsequent date: *L v L (lump sum: interest)* [1995] 1 FCR 60, [1994] 2 FLR 324.

4 Matrimonial Causes Act 1973 s 23(6) (added by the Administration of Justice Act 1982 s 16); Civil Partnership Act 2004 Sch 5 para 3(5)-(7). It is not appropriate for interest to be payable where the recipient is receiving benefits worth more than the interest which would be payable: see *H v H (lump sum: interest payable)* [2005] EWHC 1513 (Fam), [2006] 1 FLR 327.

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480. Time at which application should be made.

Although, in general, it may not be right for the court to entertain an original application for a lump sum order many years after the granting of a decree or order, it may be justified by the circumstances of the case¹. Where, however, the application is in substance an application to vary a periodical payments or secured periodical payments order², the court has refused to grant a lump sum payment³.

1 *Jones v Jones* [1971] 3 All ER 1201, CA. See also *Re W* (1975) 119 Sol Jo 439 (wife, aged 75, divorced 29 years previously, entitled to lump sum from husband's estate).

2 As to making of periodical payments orders and secured periodical payments orders see PARAS 458 et seq, 467 et seq.

3 *Powys v Powys* [1971] P 340 at 355, [1971] 3 All ER 116 at 127, 128. See also PARA 569.

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481. Date order takes effect.

Where an order for payment of a lump sum or sums is made¹ on or after granting a decree of divorce or nullity of marriage or making a dissolution or nullity order in respect of a civil partnership², neither the order nor any settlement made in pursuance of it is to take effect³ unless the decree has been made absolute or, as the case may be, the dissolution or nullity order has been made final⁴.

¹ As to the meaning of 'order for the payment of a lump sum', and as to the making of such orders, see PARA 476.

² I.e. under the Matrimonial Causes Act 1973 s 23(1)(c) or the Civil Partnership Act 2004 Sch 5 paras 1(1), 2(1)(c): see PARA 476.

³ I.e. without prejudice to the power to give a direction under the Matrimonial Causes Act 1973 s 30 or the Civil Partnership Act 2004 Sch 5 para 76 for the settlement of an instrument by conveyancing counsel: see PARA 473.

⁴ Matrimonial Causes Act 1973 s 23(5); Civil Partnership Act 2004 Sch 5 para 4. In respect of a marriage, it has been held that the court has no jurisdiction, even with consent, to make a substantive order before a decree nisi is pronounced, and that an order made before a decree nisi is pronounced cannot be rectified under the court's inherent jurisdiction or under the slip rule: see *Board (Board intervening) v Checkland* [1987] 2 FLR 257, CA, following *Munks v Munks* [1985] FLR 576, [1985] Fam Law 131, CA. However, a court may approve a draft consent order in advance of a decree nisi and direct that it should take effect at a future date: *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA. Presumably the same situation would obtain in respect of a dissolution or nullity order relating to a civil partnership.

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482. Matters to which the court is to have regard.

In deciding whether to exercise its power to make an order for payment of a lump sum or sums¹ and, if so, in what manner, the court² is to have regard to certain matters³. The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable⁴.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁵.

¹ As to the meaning of 'order for the payment of a lump sum', and as to the making of such orders, see PARA 476.

² As to the meaning of 'court' see PARA 346 note 2.

³ See the Matrimonial Causes Act 1973 s 25(1), (2); the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq. As to this requirement see generally *Rye v Rye* [2002] EWHC 956 (Fam), [2002] 2 FLR 981, [2002] All ER (D) 249 (May).

⁴ See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.

⁵ See PARA 595.

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483. Duxbury calculations.

A Duxbury calculation¹ is intended as a method of determining the lump sum that would capitalise an entitlement to maintenance. The calculation was conceived to address the Court of Appeal's observations² that the recipient of a lump sum was expected to expend it, or so much of it as was intended to meet future income needs, by drawing both on its capital as well as relying on the income it could produce and that the practice had grown up for accountants to devise a computer program which could calculate the lump sum which, if invested on various assumptions, would produce enough to meet the recipient's needs for life³.

Caution must, however, be shown when adopting a Duxbury calculation⁴. A Duxbury calculation is useful as a guide in assessing the amount of money required to provide for a person's financial needs. It is a means of capitalising an income requirement but that is all. Financial needs are only one of the factors to be taken into account in arriving at the amount of an award. The amount of capital required to provide for an older person's financial needs may well be less than the amount required to provide for a younger person's financial needs. It by no means follows that, in a case where resources exceed the parties' financial needs, the older person's award will be less than those of the younger person. Indeed the older person's award may be substantially larger⁵.

1 le so named after *Duxbury v Duxbury* (1985) [1992] Fam 62n, [1990] 2 All ER 77, CA.

2 le in *Preston v Preston* [1982] Fam 17, [1982] 1 All ER 41, CA.

3 See *B v B* [1990] FCR 105 at 110, [1990] 1 FLR 20 at 24 per Ward J.

4 See eg *Gojkovic v Gojkovic* [1992] Fam 40, [1990] 2 All ER 84, CA; *Vicary v Vicary* [1993] 1 FCR 533, [1992] 2 FLR 271, CA; *F v F (ancillary relief: substantial assets)* [1996] 2 FCR 397, [1995] 2 FLR 45; *Fournier v Fournier* [1999] 2 FCR 20, [1998] 2 FLR 990, CA; *A v A (financial provision)* [1998] 3 FCR 421, [1998] 2 FLR 180. In particular, Duxbury calculations may well be inappropriate in relation to younger partners where the marriage or civil partnership was of short duration (see *F v F (ancillary relief: substantial assets)*; *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL; and PARA 604) and also in relation to older partners (see *White v White*; and PARA 604). It has been said that a person's budget may be expected to diminish in later years: see *F v F (ancillary relief: substantial assets)*; *A v A (financial provision)*.

5 See *White v White* [2001] 1 AC 596 at 609, [2001] 1 All ER 1 at 12, HL per Lord Nicholls of Birkenhead.

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484. Alienation and bankruptcy.

A deed of assignment of rights under a lump sum order is valid as a contract for valuable consideration to assign a future chose in action, the essence of a lump sum order being that it carries all the incidents of outright ownership¹. A lump sum order is a debt provable in the bankruptcy of the person against whom the order has been made².

1 *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116 (rights assigned in favour of solicitors in consideration of the provision of legal services; agreement not champertous or otherwise contrary to public policy).

2 *Curtis v Curtis* [1969] 2 All ER 207, [1969] 1 WLR 422, CA.

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E. PENSION ATTACHMENTS

485. Power to make order.

Where, having regard to any benefits under a pension arrangement¹, the court² determines to make³ a financial provision order⁴, that order may, to the extent to which it is made having regard to any benefits under a pension arrangement, require the person responsible for the pension arrangement⁵ in question, if at any time any payment in respect of any benefits under the arrangement becomes due to the party with pension rights⁶, to make a payment for the benefit of the other party⁷. The order must express the amount of any payment required to be so made as a percentage of the payment which becomes due to the party with pension rights⁸.

Any such payment by the person responsible for the arrangement:

- 538 (1) discharges so much of his liability to the party with pension rights as corresponds to the amount of the payment⁹; and
- 539 (2) is to be treated for all purposes as a payment made by the party with pension rights in or towards the discharge of his liability under the order¹⁰.

Where the party with pension rights has a right of commutation under the arrangement, the order may require him to exercise it to any extent¹¹; but the power so conferred may not be exercised for the purpose of commuting a benefit payable to the party with pension rights to a benefit payable to the other party¹².

The powers conferred by these provisions¹³ may not be exercised in relation to a pension arrangement which is the subject of a pension sharing order¹⁴ in relation to the marriage or civil partnership or has been the subject of pension sharing between the parties to the marriage or the civil partnership¹⁵. These provisions are also modified in connection with pension payments for which responsibility has been assumed by the Board of the Pension Protection Fund¹⁶.

1 As to the duty of the court to have regard to benefits under pension arrangements see PARA 590. 'Benefits under a pension arrangement', or 'pension benefits', include benefits by way of pension, whether under a pension arrangement or not: Matrimonial Causes Act 1973 s 25B(7C) (ss 25B, 25D added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25B(3), (4), (6)(a), (7) amended, s 25B(7A)-(7C) added, ss 25B(5), 25D(3), (4) substituted, by the Welfare Reform and Pensions Act 1999 Sch 4 paras 1(1), (4)-(9), 3(1), (5)); Civil Partnership Act 2004 Sch 5 para 24(3). 'Pension arrangement' for these purposes means: (1) an occupational pension scheme; (2) a personal pension scheme; (3) a retirement annuity contract; (4) an annuity or insurance policy purchased, or transferred, for the purpose of giving effect to rights under an occupational pension scheme or a personal pension scheme; and (5) an annuity purchased, or entered into, for the purpose of discharging liability in respect of a pension credit under the Welfare Reform and Pensions Act 1999 s 29(1)(b) (see **SOCIAL SECURITY AND PENSIONS**) or under corresponding Northern Ireland legislation: Matrimonial Causes Act 1973 s 25D(3) (as so added and substituted); Civil Partnership Act 2004 Sch 5 paras 16(4), 29(2). As to the meanings of 'occupational pension scheme' and 'personal pension scheme' see the Pension Schemes Act 1993 s 1; and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARAS 701, 741 (definitions applied by the Matrimonial Causes Act 1973 s 25D(3) (as so added and substituted) and the Civil Partnership Act 2004 Sch 5 paras 16(5)). 'Retirement annuity contract' means a contract or scheme approved under the Income and Corporation Taxes Act 1988 Pt XIV Chapter III (ss 618-629 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 677 et seq)): Matrimonial Causes Act 1973 s 25D(3) (as so added and substituted); Civil Partnership Act 2004 Sch 5 paras 16(5).

2 As to the meaning of 'court' see PARA 346 note 2.

3 le under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 (see PARA 450 et seq).

4 Matrimonial Causes Act 1973 s 25B(3) (as added and amended: see note 1); Civil Partnership Act 2004 Sch 5 para 25(1). As to the application of the Matrimonial Causes Act 1973 s 25B(3)-(7B) and the Civil Partnership Act 2004 Sch 5 para 25(1)-(8) (see the text and notes 4-16) to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

5 For these purposes references to the person responsible for a pension arrangement are: (1) in the case of an occupational pension scheme or a personal pension scheme, to the trustees or managers of the scheme; (2) in the case of a retirement annuity contract or an annuity falling within note 1 head (4) or (5) above, the provider of the annuity; and (3) in the case of an insurance policy falling within note 1 head (4) above, the insurer: Matrimonial Causes Act 1973 s 25D(4) (as added and substituted: see note 1); Welfare Reform and Pensions Act 1999 s 26(2); Civil Partnership Act 2004 Sch 5 para 29(3). 'Trustees or managers', in relation to an occupational pension scheme or a personal pension scheme, means: (a) in the case of a scheme established under a trust, the trustees of the scheme; and (b) in any other case, the managers of the scheme: Matrimonial Causes Act 1973 s 25D(3) (as so added and substituted); Welfare Reform and Pensions Act 1999 s 26(1); Civil Partnership Act 2004 Sch 5 para 29(3).

6 For these purposes the 'party with pension rights' means the party to the marriage or civil partnership who has or is likely to have benefits under a pension arrangement: Matrimonial Causes Act 1973 s 25D(3) (as added and substituted: see note 1); Civil Partnership Act 2004 Sch 5 para 29(1).

7 Matrimonial Causes Act 1973 s 25B(4) (as added and amended: see note 1); Civil Partnership Act 2004 Sch 5 para 25(2). See also note 5.

8 Matrimonial Causes Act 1973 s 25B(5) (added and substituted: see note 1); Civil Partnership Act 2004 Sch 5 para 25(3). See also note 5.

9 Matrimonial Causes Act 1973 s 25B(6)(a) (as added and amended: see note 1); Civil Partnership Act 2004 Sch 5 para 25(4)(a). See also note 5.

10 Matrimonial Causes Act 1973 s 25B(6)(b) (as added: see note 1); Civil Partnership Act 2004 Sch 5 para 25(4)(b). See also note 5.

11 Matrimonial Causes Act 1973 s 25B(7) (as added and amended: see note 1); Civil Partnership Act 2004 Sch 5 para 25(5). See also note 5. The Matrimonial Causes Act 1973 s 25B and the Civil Partnership Act 2004 Sch 5 para 25 (see the text and notes 1-4, 8-16) apply to any payment due in consequence of commutation in pursuance of the order as it applies to other payments in respect of benefits under the arrangement: s 25B(7) (as so added and amended); Civil Partnership Act 2004 Sch 5 para 25(6).

12 Matrimonial Causes Act 1973 s 25B(7A) (as added: see note 1); Civil Partnership Act 2004 Sch 5 para 25(7). See also note 5.

13 le by the Matrimonial Causes Act 1973 s 25B(4), (7) and the Civil Partnership Act 2004 Sch 5 para 25(2), (5) (see the text and notes 1-4, 7).

14 As to pension sharing orders see PARA 523 et seq.

15 Matrimonial Causes Act 1973 s 25B(7B) (as added: see note 1); Civil Partnership Act 2004 Sch 5 para 25(8). See also note 5.

16 See the Matrimonial Causes Act 1973 s 25E(2)-(10) (added by the Pensions Act 2004 Sch 12 para 3; prospectively amended by the Pensions Act 2008 Sch 5 paras 1, 6); the Civil Partnership Act 2004 Sch 5 paras 31-37; the Divorce etc (Pension Protection Fund) Regulations 2006, SI 2006/1932; the Dissolution etc (Pension Protection Fund) Regulations 2006, SI 2006/1934.

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486. Lump sums.

If the benefits which a party to a marriage or a civil partnership with pension rights¹ has or is likely to have under a pension arrangement² include any lump sum payable in respect of his death, the power of the court³ to order that party to pay a lump sum to the other party⁴ includes power by order:

- 540 (1) to require the person responsible for the pension arrangement⁵, if he has power to determine the person to whom the sum, or any part of it, is to be paid, to pay the whole or part of that sum, when it becomes due, to the other party⁶;
- 541 (2) to require the party with pension rights, if he has power to nominate the person to whom the sum, or any part of it, is to be paid, to nominate the other party in respect of the whole or part of that sum⁷; and
- 542 (3) in any other case, to require the person responsible for the pension arrangement in question to pay the whole or part of that sum, when it becomes due, for the benefit of the other party instead of to the person to whom, apart from the order, it would be paid⁸.

Any payment by the person responsible for the arrangement under an order made under a financial provision order⁹ by virtue of these provisions discharges so much of his liability in respect of the party with pension rights as corresponds to the amount of the payment¹⁰. The powers conferred by these provisions may not be exercised in relation to a pension arrangement which is the subject of a pension sharing order¹¹ in relation to the marriage or civil partnership or has been the subject of pension sharing between the parties to the marriage or civil partnership¹². These provisions may also be modified in connection with pension payments for which responsibility has been assumed by the Board of the Pension Protection Fund¹³.

1 As to the party with pension rights see PARA 485 note 6.

2 As to the meaning of 'pension arrangement' see PARA 485 note 1.

3 I.e. under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 (see PARA 450 et seq). As to the meaning of 'court' see PARA 346 note 2.

4 As to making of orders for the payment of a lump sum see PARA 476.

5 As to the person responsible for a pension arrangement see PARA 485 note 5.

6 Matrimonial Causes Act 1973 s 25C(1), (2)(a) (s 25C added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25C(1)-(3) amended, s 25C(4) added, by the Welfare Reform and Pensions Act 1999 Sch 4 para 2); Civil Partnership Act 2004 Sch 5 para 26(1)-(3). As to the application of the Matrimonial Causes Act 1973 s 25C and the Civil Partnership Act 2004 Sch 5 para 26 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

7 Matrimonial Causes Act 1973 s 25C(2)(b) (as added: see note 6); Civil Partnership Act 2004 Sch 5 para 26(4).

8 Matrimonial Causes Act 1973 s 25C(2)(c) (as added and amended: see note 6); Civil Partnership Act 2004 Sch 5 para 26(5).

9 Is an order made under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 (see PARA 450 et seq).

10 Matrimonial Causes Act 1973 s 25C(3) (as added and amended: see note 6); Civil Partnership Act 2004 Sch 5 para 26(6).

11 As to pension sharing orders see PARA 523 et seq.

12 Matrimonial Causes Act 1973 s 25C(4) (as added: see note 6); Civil Partnership Act 2004 Sch 5 para 26(7).

13 See the Matrimonial Causes Act 1973 s 25E(6) (added by the Pensions Act 2004 Sch 12 para 3); the Civil Partnership Act 2004 Sch 5 para 33. At the date at which this volume states the law the regulations made under those provisions containing modifications relating to pension payments for which responsibility has been assumed by the Board of the Pension Protection Fund (ie the Divorce etc (Pension Protection Fund) Regulations 2006, SI 2006/1932, and the Dissolution etc (Pension Protection Fund) Regulations 2006, SI 2006/1934) made no modifications to any of the provisions of the Matrimonial Causes Act 1973 s 25C(4) or the Civil Partnership Act 2004 Sch 5 para 26.

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487. Acquisition of rights under new pension arrangement.

Where:

- 543 (1) a financial provision order¹ to which are attached² benefits under a pension arrangement³ imposes any requirement on the person responsible for a pension arrangement⁴ (the 'first arrangement') and the party with pension rights⁵ acquires rights under another pension arrangement (the 'new arrangement') which are derived, directly or indirectly, from the whole of his rights under the first arrangement⁶; and
- 544 (2) the person responsible for the new arrangement has been given notice in accordance with regulations made by the Lord Chancellor⁷,

the order has effect as if it had been made instead in respect of the person responsible for the new arrangement⁸.

1 le an order made under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 (see PARA 450 et seq).

2 le by virtue of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or Sch 5 para 26 (see PARAS 485, 486).

3 As to the meaning of 'pension arrangement' see PARA 485 note 1.

4 As to the person responsible for a pension arrangement see PARA 485 note 5.

5 As to the party with pension rights see PARA 485 note 6.

6 Matrimonial Causes Act 1973 s 25D(1)(a) (s 25D added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25D(1), (3) substituted, s 25D(2) amended, s 25D(2A) added, by the Welfare Reform and Pensions Act 1999 Sch 4 para 3, Sch 13); Civil Partnership Act 2004 Sch 5 para 27(a), (b).

7 Matrimonial Causes Act 1973 s 25D(1)(b) (as added: see note 6); Civil Partnership Act 2004 Sch 5 para 27(c). The person responsible for the first arrangement must give notice to the person responsible for the new arrangement and to the other party to the marriage or civil partnership: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(1), (2); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(1), (2). Both notices must be given within the period provided by the Pension Schemes Act 1993 s 99 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 958) for the person responsible for the first arrangement to carry out what the member requires and before the expiry of 21 days after the person responsible for the first arrangement has made all required payments to the person responsible for the new arrangement: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(5); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(5). The notice may be sent by fax or by ordinary first-class post to the last known address of the intended recipient and is deemed to have been received on the seventh day after the day on which it was sent: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 8; Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 8.

By virtue of the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(3) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(3), the notice to the person responsible for the new arrangement must include copies of:

- 54 (1) every financial provision order made under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 (as the case may be) imposing any requirement on the person responsible for the first arrangement in relation to the rights transferred;
- 55 (2) any order varying such an order (Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(3)(b); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(3)(b));
- 56 (3) all information or particulars which the other party has been required to supply under any provision of the Family Proceedings Rules 1991, SI 1991/1247, r 2.70 (see PARA 926 et seq) for the purpose of enabling the person responsible for the first arrangement to provide information, documents or representations to the court to enable it to decide what, if any, requirement should be imposed on that person or to comply with any order imposing such a requirement;
- 57 (4) any notice given by the other party to the person responsible for the first arrangement under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6 or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6 (see PARA 491); and
- 58 (5) where the pension rights under the first arrangement were derived wholly or partly from rights held under a previous pension arrangement, any notice given to the person responsible for the previous arrangement under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(2) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(2) on the occasion of that acquisition of rights.

By virtue of the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(4) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(4), the notice to the other party must contain:

- 59 (a) the fact that the pension rights have been transferred;
- 60 (b) the date on which the transfer takes effect;
- 61 (c) the name and address of the person responsible for the new arrangement; and
- 62 (d) the fact that the financial provision order is to have effect as if it had been made in respect of the person responsible for the new arrangement.

The Divorce etc (Pensions) Regulations 2000, SI 2000/1123, and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, are made pursuant to the powers conferred on the Lord Chancellor by the Matrimonial Causes Act 1973 s 25D(2), (2A) (as added and amended: see note 6) and the Civil Partnership Act 2004 Sch 5 para 28 to make regulations:

- 63 (i) in relation to any provision of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or Sch 5 para 26 which authorises the court making an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 to require the person responsible for a pension arrangement to make a payment for the benefit of the other party, making provision as to the person to whom, and the terms on which, the payment is to be made;
- 64 (ii) in relation to payment under a mistaken belief as to the continuation in force of a provision included in an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 by virtue of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or Sch 5 para 26 making provision about the rights or liabilities of the payer, the payee or the person to whom the payment was due;
- 65 (iii) requiring notices to be given in respect of changes of circumstances relevant to such orders which include provision made by virtue of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or Sch 5 para 26;
- 66 (iv) making provision for the person responsible for a pension arrangement to be discharged in circumstances prescribed by regulations from a requirement imposed by virtue of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or Sch 5 para 26; and
- 67 (v) making provision about calculation and verification in relation to the valuation of benefits under a pension arrangement or shareable state scheme rights, for the purposes of the court's functions in connection with the exercise of any of its powers under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) or the Civil Partnership Act 2004 Sch 5 (such regulations may include

provision for calculation or verification in accordance with guidance from time to time prepared by a prescribed person and provision by reference to regulations under the Welfare Reform and Pensions Act 1999 s 30 or s 49(4) (see **SOCIAL SECURITY AND PENSIONS**)).

As to the meaning of 'court' see PARA 346 note 2. As to 'shareable state scheme rights' see, by virtue of the Matrimonial Causes Act 1973 s 25D(3) and the Civil Partnership Act 2004 Sch 5 para 28(1)(a), the Matrimonial Causes Act 1973 s 21A(1) and the Civil Partnership Act 2004 Sch 5 para 16(3); and PARA 523.

8 Matrimonial Causes Act 1973 s 25D(1) (as added and substituted: see note 6); Civil Partnership Act 2004 Sch 5 para 27.

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488. Valuation of pension benefits.

For the purposes of the court's functions in connection with the exercise of any of its powers relating to financial relief¹, benefits under a pension arrangement² are to be calculated and verified in the manner set out for the purposes of pensions legislation³, and:

- 545 (1) the benefits are to be valued as at a date to be specified by the court, being not earlier than one year before the date of the petition⁴ and not later than the date on which the court is exercising its power⁵; and
- 546 (2) in determining that value, the court may have regard to information furnished⁶ by the person responsible for the pension arrangement⁷.

1 Ie under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) or the Civil Partnership Act 2004 Sch 5: see PARA 450 et seq.

2 As to the meaning of 'pension arrangement' see PARA 485 note 1 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

3 Ie set out in the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048, reg 3 (see **SOCIAL SECURITY AND PENSIONS**).

4 As to petitions and applications see PARA 321 note 1.

5 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 3(1)(a); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 3(1)(a). In specifying a date for this purpose the court may have regard to the date specified in any information furnished as mentioned in head (2) in the text: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 3(1)(c); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 3(1)(c).

6 Ie pursuant to the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048 (see **SOCIAL SECURITY AND PENSIONS**), the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 5, Sch 2 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 800), the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 11, Sch 1 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 960), the Pension Schemes Act 1993 s 93A (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 952) or s 94(1)(a) or (aa) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 953), the Pension Schemes Act 1993 s 94(1)(b) or the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 5(1), Sch 2 para 2(a) or, where applicable, Sch 2 para 2(b) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 963): Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 3(2); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 3(2).

7 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 3(1)(b); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 3(1)(b). As to the person responsible for a pension arrangement see PARA 485 note 5 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

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489. Reduction in benefits.

Where:

- 547 (1) a financial provision order to which are attached benefits under a pension arrangement has been made¹ imposing any requirement on the person responsible for the pension arrangement²; and
- 548 (2) an event has occurred³ which is likely to result in a significant reduction in the benefits payable under the arrangement⁴,

the person responsible for the arrangement must, within 14 days of the occurrence of such event, give notice to the other party of that event and the likely extent of the reduction in the benefits payable under the arrangement⁵. Where the event consists of a transfer of some but not all of the rights of the party with pension rights from the arrangement, the person responsible for the first arrangement must, within 14 days of the transfer, give notice to the other party of the name and address of the person responsible for any pension arrangement under which the party with pension rights has acquired rights as a result of that event⁶.

¹ ie where an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 (see PARA 450 et seq), or the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), has been made by virtue of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or Sch 5 para 26 (see PARAS 485, 486). As to the meaning of 'pension arrangement' see PARA 485 note 1 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

² Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 5(1)(a); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 5(1)(a). As to the person responsible for a pension arrangement see PARA 485 note 5 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

³ ie an event other than the transfer from the arrangement of all the rights of the party with pension rights in the circumstances set out in the Matrimonial Causes Act 1973 s 25D(1)(a) or the Civil Partnership Act 2004 Sch 5 para 27 (see PARA 487) or a reduction in the value of assets held for the purposes of the arrangement by reason of a change in interest rates or other market conditions: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 5(1)(b)(i), (ii); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 5(1)(b)(i), (ii). As to the party with pension rights see PARA 485 note 6 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

⁴ Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 5(1)(b); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 5(1)(b).

⁵ Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 5(2); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 5(2). The notice may be sent by fax or by ordinary first-class post to the last known address of the intended recipient and is deemed to have been received on the seventh day after the day on which it was sent: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 8; Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 8.

⁶ Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 5(3); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 5(3).

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490. Change of circumstances.

Where:

- 549 (1) a financial provision order to which are attached benefits under a pension arrangement has been made¹ imposing any requirement on the person responsible for the pension arrangement²; and
- 550 (2) either any of the particulars supplied by the other party³ for any specified purpose⁴ has ceased to be accurate⁵ or the order has ceased to have effect by reason of the remarriage or the formation of a subsequent civil partnership or subsequent marriage by the other party or otherwise⁶,

the other party must, within 14 days of the event, give notice of it to the person responsible for the arrangement⁷.

Where, because of the inaccuracy of the particulars supplied by the other party⁸ or because the other party has failed to give notice of their having ceased to be accurate, it is not reasonably practicable for the person responsible for the pension arrangement to make a payment to the other party as required by the order, it may instead make that payment to the party with pension rights⁹ and it is then discharged of liability to the other party to the extent of that payment¹⁰. Where an applicable event¹¹ has occurred and, because the other party has failed to give such notice¹², the person responsible for the pension arrangement makes a payment to the other party as required by the order, its liability to the party with pension rights is discharged to the extent of that payment and the other party must, within 14 days of the payment being made, make a payment to the party with pension rights to the extent of that payment¹³.

1 Ie where an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1-5 (see PARA 450 et seq), or the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), has been made by virtue of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or Sch 5 para 26 (see PARAS 485, 486). As to the meaning of 'pension arrangement' see PARA 485 note 1 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

2 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(1)(a); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(1)(a). As to the person responsible for a pension arrangement see PARA 485 note 5 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

3 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.70: see PARA 927 et seq.

4 Ie any purpose mentioned in the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(3)(c) or, as the case may be, the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(3)(c): see PARA 487.

5 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(1)(b), (2)(a); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(1)(b), (2)(a).

6 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(1)(b), (2)(b) (amended by SI 2005/2114); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(1)(b), (2)(b). As to references to remarriage, to a subsequent marriage and to the formation of a subsequent civil partnership see PARA 452 note 1.

7 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(3); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(3). The notice may be sent by fax or by ordinary first-class post to the last known address of the intended recipient and is deemed to have been received on the seventh day after the day on which it was sent: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 8; Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 8.

8 See note 3.

9 As to the party with pension rights see PARA 485 note 6 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

10 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(4); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(4).

11 Ie an event described in the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(2)(b) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(2)(b) (see the text and note 6).

12 Ie in accordance with the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(3) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(3) (see the text and notes 1-7).

13 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(5); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(5).

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491. Transfer of rights.

Where:

- 551 (1) a transfer of rights has¹ taken place²;
- 552 (2) notice has been duly³ given⁴;
- 553 (3) any of the specified events⁵ has occurred⁶;
- 554 (4) the other party has not, before receiving notice⁷, given notice of that event⁸ to the person responsible for the first arrangement⁹,

the other party must, within 14 days of the event, give notice of it to the person responsible for the new arrangement¹⁰.

Where, because of the inaccuracy of the particulars supplied by the other party¹¹ for any specified purpose¹² or because the other party has failed to give notice of their having become inaccurate, it is not reasonably practicable for the person responsible for the new arrangement to make a payment to the other party as required by the order, it may instead make that payment to the party with pension rights¹³ and it is then discharged of liability to the other party to the extent of that payment¹⁴. Where the other party, within one year from the transfer, gives to the person responsible for the first arrangement notice of the specified event¹⁵ in purported compliance with these provisions¹⁶, the person responsible for the first arrangement must send that notice to the person responsible for the new arrangement and give the other party a second notice¹⁷; and the other party is deemed to have given notice under these provisions¹⁸ to the person responsible for the new arrangement¹⁹.

1 Ie in the circumstances set out in the Matrimonial Causes Act 1973 s 25D(1)(a) or the Civil Partnership Act 2004 Sch 5 para 27: see PARA 487.

2 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(1)(a); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(1)(a).

3 Ie in accordance with the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(2)(a), (b) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(2)(a), (b): see PARA 487.

4 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(1)(b); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(1)(b).

5 Ie any of the events specified in the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(2) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(2): see PARA 490.

6 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(1)(c); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(1)(c).

7 Ie under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(2)(b) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(2)(b): see PARA 487.

8 Ie under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(3) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(3): see PARA 490.

9 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(1)(d); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(1)(d). As to the person responsible for a pension arrangement see PARA 485 note 5 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

10 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(2); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(2). The notice may be sent by fax or by ordinary first-class post to the last known address of the intended recipient and is deemed to have been received on the seventh day after the day on which it was sent: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 8; Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 8.

11 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.70: see PARA 927 et seq.

12 Ie any purpose mentioned in the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(3)(c) or, as the case may be, the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(3)(c): see PARA 487.

13 As to the party with pension rights see PARA 485 note 6 (definition applied by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 2(d) and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 2(d)).

14 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(3); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(3).

15 Ie any of the events specified in the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(2) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(2): see PARA 490.

16 Ie in purported compliance with the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(2) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(2) (see the text and notes 1-10).

17 Ie under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4(2)(b) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4(2)(b): see PARA 487.

18 Ie under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(2) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(2) (see the text and notes 1-10).

19 Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(4); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(4). On complying with this requirement, the person responsible for the first arrangement is, however, discharged from any further obligation under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 4 or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 4, whether in relation to the event in question or any further event specified in the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 6(2) or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 6(2), which may be notified to it by the other party: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 7(5); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 7(5).

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F. ORDERS FOR THE BENEFIT OF CHILDREN

492. Power to make financial provision orders for the benefit of children.

Where the court¹:

- 555 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or
- 556 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order:

- 557 (a) that a party to the marriage or civil partnership is to make to such person as may be specified in the order for the benefit of a child of the family⁵, or to such a child, such periodical payments, for such term, as may be so specified (a 'periodical payments order')⁶;
- 558 (b) that a party to the marriage or civil partnership is to secure to such person as may be so specified for the benefit of a child of the family, or to such a child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified (a 'secured periodical payments order')⁷; or
- 559 (c) that a party to the marriage or civil partnership is to pay to such person as may be so specified for the benefit of a child of the family, or to such a child, such lump sum as may be so specified (an 'order for the payment of a lump sum')⁸.

The court may also make any one or more of the orders mentioned in heads (a) to (c) above:

- 560 (i) in any proceedings for divorce, dissolution, nullity of marriage or civil partnership or judicial or legal separation, before granting a decree or making the order⁹; and
- 561 (ii) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal¹⁰.

No such order may be made in favour of a child who has attained the age of 18¹¹ unless he is in full time education¹² or there are special circumstances which justify the making of an order¹³. The court will not make a clean break order terminating a parent's responsibility to maintain children¹⁴.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 23(1).

3 Civil Partnership Act 2004 Sch 5 para 1(1)(a).

4 le on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 23(1); Civil Partnership Act 2004 Sch 5 para 1(1). The power of the court to make an order in favour of a child of the family is exercisable from time to time: Matrimonial Causes Act 1973 s 23(4); Civil Partnership Act 2004 Sch 5 para 1(3). As to the matters to which the court is to have regard in deciding how to exercise its powers to make orders for the benefit of children see PARAS 597, 598; and as to the duration of orders in favour of children see PARA 495. In deciding the amount of an order for or to a child, the court may consider the rate of foster care allowance that would be applicable to the child (see eg *Cresswell v Eaton* [1991] 1 All ER 484, [1991] 1 WLR 1113) or the child support rate for the child (see eg *E v C (calculation of child maintenance)* [1996] 1 FCR 612, sub nom *E v C (child maintenance)* [1996] 1 FLR 472). However, none of those approaches is necessarily determinative and the court retains a broad discretion in relation to the quantification of maintenance for a child. Where, however, the court does have jurisdiction, it will regard the parents' obligation to maintain children as a primary responsibility: see *R v R (financial provision)* [1988] FCR 307 at 315, sub nom *R v R* [1988] 1 FLR 89 at 97, CA per Slade LJ; *Freeman v Swatridge* [1984] FLR 762, [1984] Fam Law 215, CA.

5 As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

6 Matrimonial Causes Act 1973 ss 21(1)(a), 23(1)(d); Civil Partnership Act 2004 Sch 5 paras 2(1)(d), (2), 80(1)(a). As to periodical payments orders see PARA 458 et seq. Orders for periodical payments may be reduced by sums payable as child support maintenance pursuant to the Child Support Act 1991: see PARA 497.

7 Matrimonial Causes Act 1973 ss 21(1)(b), 23(1)(e); Civil Partnership Act 2004 Sch 5 paras 2(1)(e), (2), 80(1)(b). As to secured periodical payments orders see PARA 467 et seq. Where the court has made an order for a secured periodical payments order or an order for the payment of a lump sum (see the text and note 8), it may, on making the order or at any time thereafter, make a further order for the sale of such property as may be specified in the order: see the Matrimonial Causes Act 1973 s 24A; the Civil Partnership Act 2004 Sch 5 para 10; and PARA 520.

8 Matrimonial Causes Act 1973 ss 21(1)(c), 23(1)(f); Civil Partnership Act 2004 Sch 5 paras 2(1)(f), (2), 80(1)(c). As to orders for the payment of a lump sum see PARA 476 et seq. An order for the payment of a lump sum to or for the benefit of a child of the family may be made for the purposes of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for a financial provision order in his favour to be met: Matrimonial Causes Act 1973 s 23(3)(b); Civil Partnership Act 2004 Sch 5 para 3(2). An order for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court: Matrimonial Causes Act 1973 s 23(3)(c); Civil Partnership Act 2004 Sch 5 para 3(3). As to the application of the Matrimonial Causes Act 1973 ss 23(3), 29 and the Civil Partnership Act 2004 Sch 5 paras 3, 5, 49 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537. As to the court's power to adjourn proceedings see PARA 478.

Where the court makes an order for the payment of a lump sum and directs that payment of that sum or any part of it is to be deferred or that that sum or any part of it is to be paid by instalments, the court may order that the amount deferred or the instalments is or are to carry interest at such rate as may be specified by the order from such date, not earlier than the date of the order, as may be so specified, until the date when payment of it is due: Matrimonial Causes Act 1973 s 23(6) (added by the Administration of Justice Act 1982 s 16); Civil Partnership Act 2004 Sch 5 para 3(5)-(7). For these purposes, the expression 'the date of the order' refers to the date on which the court orders payment of a lump sum and not to any subsequent date: *L v L (lump sum: interest)* [1995] 1 FCR 60, [1994] 2 FLR 324. It is not appropriate for interest to be payable where the recipient is receiving benefits worth more than the interest which would be payable: see *H v H (lump sum: interest payable)* [2005] EWHC 1513 (Fam), [2006] 1 FLR 327.

It is rare for the court to make an order for the payment of a lump sum in favour of a child: see eg *Chamberlain v Chamberlain* [1974] 1 All ER 33, [1973] 1 WLR 1557, CA; *Griffiths v Griffiths* [1984] Fam 70, [1984] 2 All ER 626, CA; *Kiely v Kiely* [1988] 1 FLR 248, [1988] Fam Law 51, CA. It is wrong to make an order for the payment of a lump sum in favour of a child so as to avoid the statutory charge which arises under what is now the Access to Justice Act 1999 s 10(7) (see **LEGAL AID** VOL 65 (2008) PARA 97): *Draskovic v Draskovic* (1980) 11 Fam Law 87. Further, the court cannot remedy any perceived absurdities that arise under the Child Support Act 1991 by making capital provision for children: *Phillips v Pearce* [1996] 2 FCR 237, sub nom *Phillips v Peace* [1996] 2 FLR 230.

9 Matrimonial Causes Act 1973 s 23(2)(a); Civil Partnership Act 2004 Sch 5 para 1(2)(a). See also *P (LE) v P (JM)* [1971] P 318, [1971] 2 All ER 728.

10 Matrimonial Causes Act 1973 s 23(2)(b); Civil Partnership Act 2004 Sch 5 para 1(2)(b). Where the court makes an order in favour of a child under this provision it may from time to time, subject to the restrictions imposed on the making of financial provision orders in favour of children who have attained the age of 18 (see the text and notes 11-13), make a further order in his favour of any of the kinds mentioned in the text and notes 4-8: Matrimonial Causes Act 1973 s 23(4); Civil Partnership Act 2004 Sch 5 para 1(4).

11 Matrimonial Causes Act 1973 s 29(1); Civil Partnership Act 2004 Sch 5 paras 5, 49(1)(a).

12 Ie unless it appears to the court that the child is, or will be, or if an order were made without complying with the Matrimonial Causes Act 1973 s 29(1) or the Civil Partnership Act 2004 Sch 5 para 49(1)(a) (see the text and note 11) would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment: Matrimonial Causes Act 1973 s 29(3)(a); Civil Partnership Act 2004 Sch 5 para 49(5)(a). As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing (Downing intervening)* [1976] Fam 288, [1976] 3 All ER 474.

13 Matrimonial Causes Act 1973 s 29(3)(b); Civil Partnership Act 2004 Sch 5 para 49(5)(b). Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

14 See *Crozier v Crozier* [1994] Fam 114, [1996] 2 All ER 362.

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493. Application by parent, guardian etc for financial relief in respect of children.

Any of the following persons, namely:

- 562 (1) a parent or guardian of any child of the family¹;
- 563 (2) any person in whose favour a residence order² has been made with respect to a child of the family, and any applicant for such an order³;
- 564 (3) any other person who is entitled to apply for a residence order with respect to a child⁴;
- 565 (4) a local authority, where an order has been made⁵ placing a child in the care of a local authority⁶;
- 566 (5) the Official Solicitor, if appointed⁷ the litigation friend of a child of the family⁸; and
- 567 (6) a child of the family who has been given leave to intervene in the cause for the purpose of applying for relief⁹,

may apply for an order for relief as respects that child by notice in the prescribed form¹⁰.

1 Family Proceedings Rules 1991, SI 1991/1247, r 2.54(1)(a). As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

2 As to the meaning of 'residence order' see the Children Act 1989 s 8(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 262 (definition applied by the Family Proceedings Rules 1991, SI 1991/1247, r 2.54(2)).

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.54(1)(b).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.54(1)(c).

5 Ie under the Children Act 1989 s 31(1)(a) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 271).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.54(1)(d) (amended by SI 2005/2922).

7 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 9.5 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 231).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.54(1)(e).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.54(1)(f).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.54(1) (amended by SI 1999/3491). For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form A (added by SI 1999/3491; substituted by SI 2000/2267). As to procedure see PARA 902. Only rarely will a child be involved as a party to proceedings for financial relief. Applications are, however, sometimes made by children in order to secure the payment of educational expenses: see eg *Downing v Downing (Downing intervening)* [1976] Fam 288, [1976] 3 All ER 474 (daughter obtained leave to intervene in order to seek a maintenance order in her own favour to meet her educational expenses); *B v B (financial provision for child)* [1998] 1 FCR 49, sub nom *B v B (adult student: liability to support)* [1998] 1 FLR 373, CA (father's argument that maintenance for his daughter should end when she became a grant-aided student rejected).

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494. Matters to which the court is to have regard.

In deciding whether to exercise its power to make a periodical payments order¹, a secured periodical payments order² or an order for the payment of a lump sum³ in respect of a child⁴ and, if so, in what manner, the court⁵ is to have regard to certain matters⁶. In the case of secured periodical payments, the court will take into account the effect on the payer of tying up the asset that provides the security⁷ and also the need to have security for the payment of maintenance⁸; and the court has an unfettered discretion in deciding whether to make such an order and, if so, on what terms⁹.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case¹⁰.

1 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

2 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

3 As to the meaning of 'order for the payment of a lump sum', and as to the making of such orders, see PARA 476.

4 As to the making of financial orders in favour of children see PARA 492 et seq. As to the meaning (for the purposes of the Matrimonial Causes Act 1973) of 'child' see PARA 477 note 3.

5 As to the meaning of 'court' see PARA 346 note 2.

6 See the Matrimonial Causes Act 1973 s 25(1)-(3); the Civil Partnership Act 2004 Sch 5 paras 20-22; and PARA 589 et seq. As to this requirement see generally *Rye v Rye* [2002] EWHC 956 (Fam), [2002] 2 FLR 981, [2002] All ER (D) 249 (May).

7 *Shearn v Shearn* [1931] P 1.

8 Eg because the payer may leave the jurisdiction or prove to be unreliable in the payment of normal maintenance: see *Barker v Barker* [1952] P 184, [1952] 1 All ER 1128, CA; *Chichester v Chichester* [1936] P 129, [1936] 1 All ER 271.

9 *Shearn v Shearn* [1931] P 1.

10 See PARA 595.

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495. Duration of orders.

The term to be specified in a periodical payments¹ or secured periodical payments² order in favour of a child³ must not extend beyond the date of the child's eighteenth birthday⁴, unless he is in full time education⁵ or there are special circumstances which justify the making of an order⁶. The term may begin with the date of the making of an application for the order in question or any later date⁷, subject to the proviso that a term beginning on such date must not extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age⁸ unless the court considers that in the circumstances of the case the welfare of the child requires that it should extend to a later date⁹. Alternatively, where a maintenance calculation¹⁰ (the 'current calculation') is in force with respect to a child¹¹ and an application is made¹² for a periodical payments or secured periodical payments order in favour of that child¹³ before the end of the period of six months beginning with the making of the current calculation¹⁴, the term to be specified in any such order made on that application may be expressed to begin on, or at any time after, whichever is the later of the date six months before the application is made¹⁵ and the date on which the current calculation took effect or, where successive maintenance calculations have been continuously in force with respect to a child, on which the first of those calculations took effect¹⁶. If a maintenance calculation ceases to have effect¹⁷ and an application is made, before the end of the period of six months beginning with the date on which the calculation so ceased¹⁸, for a periodical payments or secured periodical payments order in favour of a child with respect to whom that maintenance calculation was in force immediately before it ceased to have effect, the term to be specified in any such order made on that application may begin with the date on which that maintenance calculation ceased to have effect or any later date¹⁹.

1 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

2 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

3 As to the making of financial orders in favour of children see PARA 492 et seq. As to the meaning (for the purposes of the Matrimonial Causes Act 1973) of 'child' see PARA 477 note 2.

4 Matrimonial Causes Act 1973 s 29(2)(b); Civil Partnership Act 2004 Sch 5 para 49(3)(b).

5 Ie unless it appears to the court that the child is, or will be, or if an order were made without complying with the Matrimonial Causes Act 1973 s 29(2)(b) or the Civil Partnership Act 2004 Sch 5 para 49(3)(b) (see the text and note 15) would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment: Matrimonial Causes Act 1973 s 29(3)(a); Civil Partnership Act 2004 Sch 5 para 49(5)(a). As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing (Downing intervening)* [1976] Fam 288, [1976] 3 All ER 474.

6 Matrimonial Causes Act 1973 s 29(3)(b); Civil Partnership Act 2004 Sch 5 para 49(5)(b). Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

7 Matrimonial Causes Act 1973 s 29(2); Civil Partnership Act 2004 Sch 5 para 49(2)(a).

8 As to compulsory school age see the Education Act 1996 s 8; and **EDUCATION** vol 15(1) (2006 Reissue) PARA 15.

9 Matrimonial Causes Act 1973 s 29(2)(a) (amended by the Matrimonial and Family Proceedings Act 1984 s 5(4); and the Education Act 1996 Sch 37 para 136); Civil Partnership Act 2004 Sch 5 para 49(3)(a), (4).

10 For these purposes 'maintenance calculation' has the same meaning as it has in the Child Support Act 1991 by virtue of s 54 as read with any regulations in force thereunder (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 554); Matrimonial Causes Act 1973 s 52(1) (definition added by SI 1993/623; and amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 3); Civil Partnership Act 2004 Sch 5 para 49(11).

11 Matrimonial Causes Act 1973 s 29(5)(a) (s 29(5)-(8) added by SI 1993/623; amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 3); Civil Partnership Act 2004 Sch 5 para 49(7)(a).

12 *le* under the Matrimonial Causes Act 1973 Pt II (ss 25-40A) or the Civil Partnership Act 2004 Sch 5 (see PARA 467 *et seq*).

13 *le* in accordance with the Child Support Act 1991 s 8 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 556, 560).

14 Matrimonial Causes Act 1973 s 29(5)(b) (as added and amended: see note 11); Civil Partnership Act 2004 Sch 5 para 49(7)(b).

15 Matrimonial Causes Act 1973 s 29(2), (6)(a) (as added and amended: see note 11); Civil Partnership Act 2004 Sch 5 para 49(2)(b), (8)(a).

16 Matrimonial Causes Act 1973 s 29(6)(b) (as added and amended: see note 11); Civil Partnership Act 2004 Sch 5 para 49(8)(b).

17 *le* by or under any provision of the Child Support Act 1991.

18 Matrimonial Causes Act 1973 s 29(8) (as added and amended: see note 11); Civil Partnership Act 2004 Sch 5 para 49(10).

19 Matrimonial Causes Act 1973 s 29(7) (as added and amended: see note 11); Civil Partnership Act 2004 Sch 5 para 49(9).

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496. Death of person paying.

Any periodical payments order in favour of a child¹ ceases to have effect, notwithstanding anything in the order, on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of the death².

1 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458. As to the making of financial orders in favour of children see PARA 492 et seq. As to the meaning (for the purposes of the Matrimonial Causes Act 1973) of 'child' see PARA 477 note 2.

2 Matrimonial Causes Act 1973 s 29(4); Civil Partnership Act 2004 Sch 5 para 49(6).

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497. Child support.

Where a child has an absent or non-resident parent, each of those parents is responsible for maintaining him and is to be taken to have met this by making periodical payments of maintenance with respect to the child of such amount, and at such intervals, as may be determined in accordance with the provisions of the Child Support Act 1991¹.

Where a maintenance calculation requires the making of periodical payments², it is the duty of the non-resident parent with respect to whom the calculation was made to make those payments³. The court may make an order under which one party is to make periodical payments to the other, such payments to be reduced pro tanto by any sums payable as child support maintenance pursuant to the Child Support Act 1991 (a 'Segal order'); however, in order to preserve the legitimacy of such an order it is crucial that the order contains a substantial ingredient of spousal support⁴.

¹ See the Child Support Act 1991 ss 1(1), (2), 3(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 555.

² As to periodical payments orders see PARA 458 et seq. As to secured periodical payments orders see PARA 467 et seq.

³ See the Child Support Act 1991 s 1(3); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 555.

⁴ *Dorney-Kingdom v Dorney-Kingdom* [2000] 3 FCR 20, [2000] 2 FLR 855, CA.

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(ii) Property Adjustment Orders

A. SCOPE AND EFFECT OF ORDERS

498. Meaning of 'property adjustment order'.

A 'property adjustment order' is an order dealing with property rights available¹ for the purpose of adjusting the financial position of the parties to a marriage or civil partnership and any children of the family² on or after the grant of a decree of divorce, nullity of marriage or judicial separation or the making of an order of dissolution, nullity of civil partnership or legal separation, that is to say:

- 568 (1) any order for a transfer of property³;
- 569 (2) any for a settlement of property⁴; and
- 570 (3) any order for a variation of settlement⁵.

Either party to a marriage or civil partnership may apply for a property adjustment order⁶.

¹ I.e. subject to the provisions of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004: see the Matrimonial Causes Act 1973 s 21(2) and the Civil Partnership Act 2004 Sch 5 para 7. As to the relationship between property adjustment orders and financial provision orders see PARA 451. As to the making of property orders for the benefit of children see PARAS 518-519. As to the effect of a subsequent marriage or civil partnership on a property adjustment order see PARA 452. As to the making of property orders in nullity proceedings see PARA 453. As to the making of property adjustment orders against or in favour of persons suffering from mental disorder see PARA 455. As to orders under former legislation see PARA 457. Provision for adjusting the financial position of the parties to a marriage or civil partnership may also be made by way of a Mesher or Martin order: see PARA 316. As to the implementation of property orders and orders for sale in ancillary proceedings where one of the parties is under mental incapacity see *Practice Note (ancillary relief orders: conveyancing for mentally incapacitated adults)* [2006] 1 FLR 480.

² As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

³ I.e. any order under the Matrimonial Causes Act 1973 s 24(1)(a) or the Civil Partnership Act 2004 Sch 5 para 7(1)(a): see PARAS 499, 518.

⁴ I.e. any order under the Matrimonial Causes Act 1973 s 24(1)(b) or the Civil Partnership Act 2004 Sch 5 para 7(1)(b): see PARAS 506, 518.

⁵ I.e. any order under the Matrimonial Causes Act 1973 s 24(1)(c) or the Civil Partnership Act 2004 Sch 5 para 7(1)(c): see PARAS 510, 518.

⁶ See the Matrimonial Causes Act 1973 s 24; the Civil Partnership Act 2004 Sch 5 paras 6, 7; and PARA 499 et seq. For applications by husbands against their wives see *Griffiths v Griffiths* [1974] 1 All ER 932, [1974] 1 WLR 1350, CA; *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333, CA; *P v P (financial provision: lump sum)* [1978] 3 All ER 70, [1978] 1 WLR 483, CA; *B v B (financial provision)* (1982) 3 FLR 298, sub nom *B v B* 12 Fam Law 92, CA. In seeking to achieve a fair outcome, there is no place for discrimination between the parties: *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL; applied in *Dharamshi v Dharamshi* [2001] 1 FCR 492, [2001] 1 FLR 736, CA; *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FCR 331.

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B. TRANSFERS OF PROPERTY

499. Power to order transfer of property.

Where the court¹:

- 571 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or
- 572 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order that a party to the marriage or civil partnership is to transfer to the other party, to any child of the family⁵ or to such person as may be specified in the order for the benefit of such a child such property⁶ as may be so specified⁷. This is subject to the restrictions imposed⁸ on the making of orders for a transfer of property in favour of children who have attained the age of 18⁹.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 24(1).

3 Civil Partnership Act 2004 Sch 5 para 6(1)(a).

4 le on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 24(1); Civil Partnership Act 2004 Sch 5 para 6(1).

5 As to the meaning of 'child of the family' see PARA 477 note 3.

6 le property to which the first-mentioned party is entitled, either in possession or reversion: Matrimonial Causes Act 1973 s 24(1)(a); Civil Partnership Act 2004 Sch 5 para 7(1)(a), (3). As to the property that may be the subject of a property adjustment order see PARA 500. From the moment it takes effect, a transfer of property order confers an equitable interest in the property on the person to whom it is ordered to be transferred, and such an interest is a 'right' to which the other party's estate is subject for the purposes the Insolvency Act 1986 s 283(5) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216): see *Mountney v Treharne* [2002] EWCA Civ 1174, [2003] Ch 135, [2002] 3 WLR 1760 (husband made bankrupt one day after making of property adjustment order; trustee in bankruptcy took property subject to wife's equitable interest under order and she was therefore entitled to enforce order against trustee).

7 Matrimonial Causes Act 1973 s 24(1)(a); Civil Partnership Act 2004 Sch 5 para 7(1)(a). As to the date when the order takes effect see PARA 502; as to the care needed in drafting orders see PARA 933; as to the effect of a subsequent marriage or civil partnership see PARA 452; and as to the evidence required on an application for a property transfer order where the application relates to land see PARA 918. In considering the assets of the parties, the court will usually have regard to their net values: see *White v White* [2001] 1 AC 596 at 612, [2001] 1 All ER 1 at 15, HL per Lord Nicholls of Birkenhead; *O'D v O'D* [1976] Fam 83, sub nom *O'Donnell v O'Donnell* [1975] 2 All ER 993, CA.

If it is intended that an order should deal finally and conclusively with all applications for capital relief, including property adjustment, it should specifically say so (*Dinch v Dinch* [1987] 1 All ER 818, [1987] 1 WLR 252, HL); and, if an order is expressed to deal conclusively with all forms of property adjustment, a subsequent application for a property adjustment order cannot be made (*Carson v Carson* [1983] 1 All ER 478, [1983] 1 WLR 285, CA; *Norman v Norman* [1983] 1 All ER 486, [1983] 1 WLR 295; *Sandford v Sandford* [1986] 1 FLR 412,

[1986] Fam Law 104, CA; *Dinch v Dinch*). Where an order is made under the Matrimonial Causes Act 1973 s 24(1)(a), (b), (c) or (d) or, presumably, the Civil Partnership Act 2004 Sch 5 para 7(1)(a), (b), (c) or (d), this does not, in the absence of express provision in the order, prevent a later claim for an order under another of those provisions from being made: *Carson v Carson* [1983] 1 All ER 478, [1983] 1 WLR 285, CA.

8 le by the Matrimonial Causes Act 1973 s 29(1), (3) and the Civil Partnership Act 2004 Sch 5 para 49(1), (5): see PARA 518.

9 Matrimonial Causes Act 1973 s 24(1)(a); Civil Partnership Act 2004 Sch 5 para 9.

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500. Property that may be the subject of a property adjustment order.

No limitation is imposed as to the nature of the property in respect of which the jurisdiction to make a property adjustment order¹ may be exercised; and, provided that the property is sufficiently identifiable to be susceptible of specification in the order, it may be made the subject of a property adjustment order². A share or interest in property is itself property for these purposes. Thus, a periodic tenancy may be the subject of a transfer of property order³, as will property acquired after the end of the marriage or civil partnership⁴.

Where property is situated abroad, the court has jurisdiction in personam between the parties but it will not have jurisdiction in rem⁵. Even though the court may have jurisdiction in relation to property abroad, it may, in its discretion, decline to exercise that jurisdiction where any order would be unenforceable⁶.

The court cannot exercise its power of transfer in derogation of the rights of third parties; it can only deal with property to the extent that one of the parties is entitled to it, whether in possession or in reversion. Third parties who may be affected by a property adjustment order made in proceedings for financial relief should be given notice of the proceedings and be afforded the right to make representations before they suffer any prejudice⁷. Where a third party does intervene, the court may determine the extent of that party's interest in any property under dispute as part of the proceedings for relief⁸. The court does not, however, lose its power to make a property adjustment order in respect of property which is also the subject of an application to enforce a confiscation or similar order under criminal proceedings⁹.

1 As to the meaning of 'property adjustment order' see PARA 498.

2 See the Matrimonial Causes Act 1973 s 24(1)(a); the Civil Partnership Act 2004 Sch 5 para 7(1)(a); and PARA 499.

3 See *Jones v Jones* [1997] Fam 59, [1997] 2 WLR 373, CA; *Newlon Housing Trust v Alsulamein* [1999] 1 AC 313, [1998] 4 All ER 1, HL. As to the transfer of tenancies generally see PARA 310 et seq.

4 See eg *Schuller v Schuller* [1990] FCR 626, [1990] 2 FLR 193. Whilst assets acquired prior to the marriage or civil partnership may be the subject of a property adjustment order, the origin of the property may be relevant when the court decides how to exercise its statutory jurisdiction under the Matrimonial Causes Act 1973 s 25(2) or the Civil Partnership Act 2004 Sch 5 para 20 (see PARA 589): see *White v White* [2001] 1 AC 596 at 610, [2001] 1 All ER 1 at 13, 14, HL per Lord Nicholls of Birkenhead.

5 See *Hamlin v Hamlin* [1986] Fam 11, [1985] 2 All ER 1037, CA.

6 *Hamlin v Hamlin* [1986] Fam 11, [1985] 2 All ER 1037, CA; and see *Nunnely v Nunnely and Marrian* (1880) 15 PD 186; *Forsyth v Forsyth* [1891] P 363; *Tallack v Tallack and Broekema* [1927] P 211; *Goff v Goff* [1934] P 107; *Whyler v Lyons* [1963] P 274, [1963] 1 All ER 821; *Razelos v Razelos* [1969] 3 All ER 929, sub nom *Razelos v Razelos (No 2)* [1970] 1 WLR 392.

7 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.59; and PARA 918.

8 *Tebbutt v Haynes* [1981] 2 All ER 238, CA; *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA.

9 See *Customs and Excise Comrs v A* [2002] EWCA Civ 1039, [2003] Fam 55 [2003] 2 All ER 736. There is, however, a strong public policy argument against distributing the proceeds of crime via a property adjustment

order, particularly if the party applying for the order knew of the criminal activity: see *Richards v Richards* [2006] EWCA Civ 849, [2006] 2 FCR 452, [2006] 2 FLR 1220.

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501. No power to make an interim property adjustment order.

The court has no jurisdiction to make an interim property adjustment order¹. Further, the court does not have an administrative power of appropriation to allocate a particular asset to meet the interim needs of either party before the final hearing².

1 See *Bolsom v Bolsom* (1982) 4 FLR 21, 12 Fam Law 143, CA; *Wicks v Wicks* [1999] Fam 65, [1998] 1 All ER 977, CA (the Family Proceedings Rules 1991, SI 1991/1247, rr 2.64(2), 2.69F (see PARAS 923, 933) both permit applications for maintenance pending suit or the outcome of proceedings, interim periodical payments and interim variation orders only). As to the meaning of 'property adjustment order' see PARA 498.

2 *Wicks v Wicks* [1999] Fam 65, [1998] 1 All ER 977, CA.

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502. Date order takes effect.

Where a transfer of property order is made on or after granting a decree of divorce or nullity of marriage or making a dissolution or nullity order in respect of a civil partnership¹, neither the order nor any settlement made in pursuance of it is to take effect² unless the decree has been made absolute or, as the case may be, the dissolution or nullity order has been made final³.

1 le under the Matrimonial Causes Act 1973 s 24(1)(a) or the Civil Partnership Act 2004 Sch 5 para 7(1)(a): see PARA 499.

2 le without prejudice to the power to give a direction under the Matrimonial Causes Act 1973 s 30 or the Civil Partnership Act 2004 Sch 5 para 76 for the settlement of an instrument by conveyancing counsel: see PARA 473.

3 Matrimonial Causes Act 1973 s 24(3); Civil Partnership Act 2004 Sch 5 para 8. In respect of a marriage, it has been held that the court has no jurisdiction, even with consent, to make a substantive order before a decree nisi is pronounced, and that an order made before a decree nisi is pronounced cannot be rectified under the court's inherent jurisdiction or under the slip rule: see *Board (Board intervening) v Checkland* [1987] 2 FLR 257, CA, following *Munks v Munks* [1985] FLR 576, [1985] Fam Law 131, CA. However, a court may approve a draft consent order in advance of a decree nisi and direct that it should take effect at a future date: *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA. Presumably the same situation would obtain in respect of a dissolution or nullity order relating to a civil partnership.

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503. Matters to which the court is to have regard.

In deciding whether to exercise its power to make a transfer of property order and, if so, in what manner, the court¹ is to have regard to certain matters². The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable³.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁴.

1 As to the meaning of 'court' see PARA 346 note 2.

2 See the Matrimonial Causes Act 1973 s 25(1), (2); the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589. As to the matters to which the court is to have regard in the case of children of the family see PARAS 597-598.

3 See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.

4 See PARA 595.

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504. Deed of transfer.

Where the court¹ decides to make a property adjustment order² requiring any payments to be secured, it may direct that the matter be referred to one of the conveyancing counsel for him to settle a proper instrument to be executed by all necessary parties³. Where the order is to be made in proceedings for divorce, dissolution, nullity of marriage civil partnership or judicial or legal separation, the court may, if it thinks fit, defer the grant of the decree or the making of the order in question until the instrument has been duly executed⁴.

The court may order the lodgment of documents for the purpose of settling the deed⁵. Where a person refuses or neglects to execute a deed securing payments as ordered by the court, the court may order that execution be effected by such person as it nominates for that purpose, and a deed so executed operates as if executed by the party originally directed to execute it⁶.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to the meaning of 'property adjustment order' see PARA 498.

3 Matrimonial Causes Act 1973 s 30(a); Civil Partnership Act 2004 Sch 5 para 76(1)(a), (2).

4 Matrimonial Causes Act 1973 s 30(b); Civil Partnership Act 2004 Sch 5 para 76(3). There is only one decree in suits for judicial separation (see *M v M* [1928] P 123 at 126, 127) and no transfer of property order may be made in judicial separation proceedings before the decree has been granted (see the Matrimonial Causes Act 1973 s 24(1)).

5 *Bartlett v Bartlett* (1918) 34 TLR 518.

6 See the Supreme Court Act 1981 s 39; the County Courts Act 1984 s 38; and PARA 641. See also *Howarth v Howarth* (1886) 11 PD 68 at 95, CA; cf *De Ricci v De Ricci* [1891] P 378 (application arising out of a compromise, which had become a rule of court).

UPDATE

504 Deed of transfer

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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505. Bankruptcy of transferor.

From the moment it takes effect, a transfer of property order¹ confers an equitable interest in the property on the person to whom it is ordered to be transferred, and such an interest is a 'right' to which the other party's estate is subject² for the purposes of establishing what constitutes his estate³. The fact that a transfer of property had to be made in order to comply with a property adjustment order⁴ does not prevent that settlement or transfer from being a transaction in respect of which an order may be made under the statutory provisions relating to transfers at an undervalue and preferences⁵.

1 See PARA 499 et seq.

2 I.e. pursuant to the Insolvency Act 1986 s 283(5) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216).

3 See *Mountney v Treharne* [2002] EWCA Civ 1174, [2003] Ch 135, [2002] 3 WLR 1760 (husband made bankrupt one day after making of property adjustment order; trustee in bankruptcy took property subject to wife's equitable interest under order and she was therefore entitled to enforce order against trustee).

4 As to the meaning of 'property adjustment order' see PARA 498.

5 Matrimonial Causes Act 1973 s 39 (amended by the Insolvency Act 1985 Sch 8 para 23 and the Insolvency Act 1986 Sch 14); Civil Partnership Act 2004 Sch 5 para 77. As to the statutory provisions relating to transfers at an undervalue and preferences see the Insolvency Act 1986 ss 339, 340; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq. As to the application of these provisions to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

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C. SETTLEMENTS OF PROPERTY

506. Power to settle property.

Where the court¹:

573 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or

574 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order that a settlement of such property⁵ as may be so specified be made to the satisfaction of the court for the benefit of the other party to the marriage or civil partnership and of the children of the family⁶ or either or any of them⁷.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 24(1).

3 Civil Partnership Act 2004 Sch 5 para 6(1)(a).

4 I.e. on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 24(1); Civil Partnership Act 2004 Sch 5 para 6(1).

5 I.e. property to which the first-mentioned party is entitled, either in possession or reversion: Matrimonial Causes Act 1973 s 24(1)(b); Civil Partnership Act 2004 Sch 5 para 7(1)(b).

6 As to the meaning of 'child of the family' see PARA 477 note 3.

7 Matrimonial Causes Act 1973 s 24(1)(b); Civil Partnership Act 2004 Sch 5 para 7(1)(b). As to when a settlement of property order takes effect see PARA 507. As to the care needed in drafting orders see PARA 933.

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507. Date order takes effect.

Where an order is made for a settlement of property¹ on or after granting a decree of divorce or nullity of marriage or making a dissolution or nullity order in respect of a civil partnership², neither the order nor any settlement made in pursuance of it is to take effect³ unless the decree has been made absolute or, as the case may be, the dissolution or nullity order has been made final⁴.

1 le under the Matrimonial Causes Act 1973 s 24(1)(b): see PARA 506.

2 le under the Civil Partnership Act 2004 Sch 5 para 7(1)(b): see PARA 506.

3 le without prejudice to the power to give a direction under the Matrimonial Causes Act 1973 s 30 or the Civil Partnership Act 2004 Sch 5 para 76 for the settlement of an instrument by conveyancing counsel: see PARA 473.

4 Matrimonial Causes Act 1973 s 24(3); Civil Partnership Act 2004 Sch 5 para 8. In respect of a marriage, it has been held that the court has no jurisdiction, even with consent, to make a substantive order before a decree nisi is pronounced, and that an order made before a decree nisi is pronounced cannot be rectified under the court's inherent jurisdiction or under the slip rule: see *Board (Board intervening) v Checkland* [1987] 2 FLR 257, CA, following *Munks v Munks* [1985] FLR 576, [1985] Fam Law 131, CA. However, a court may approve a draft consent order in advance of a decree nisi and direct that it should take effect at a future date: *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA. Presumably the same situation would obtain in respect of a dissolution or nullity order relating to a civil partnership.

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508. Matters to which the court is to have regard.

In deciding whether to exercise its power to make a property order and, if so, in what manner, the court¹ is to have regard to certain matters². The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable³.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁴.

1 As to the meaning of 'court' see PARA 346 note 2.

2 See the Matrimonial Causes Act 1973 s 25(1), (2); the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589. As to the matters to which the court is to have regard in the case of children of the family see PARAS 597-598.

3 See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.

4 See PARA 595.

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509. Bankruptcy of settlor.

The fact that a settlement of property had to be made in order to comply with a property adjustment order¹ does not prevent that settlement or transfer from being a transaction in respect of which an order may be made under the statutory provisions relating to transfers at an undervalue and preferences².

1 As to the meaning of 'property adjustment order' see PARA 498.

2 Matrimonial Causes Act 1973 s 39 (amended by the Insolvency Act 1985 Sch 8 para 23 and the Insolvency Act 1986 Sch 14); Civil Partnership Act 2004 Sch 5 para 77. As to the statutory provisions relating to transfers at an undervalue and preferences see the Insolvency Act 1986 ss 339, 340; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq. As to the application of these provisions to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

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D. VARIATION OF SETTLEMENTS

(A) POWERS OF THE COURT

510. Order for variation of settlement.

Where the court¹:

- 575 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or
- 576 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order:

- 577 (a) varying for the benefit of the parties to the marriage or civil partnership and of the children of the family⁵ or either or any of them any relevant settlement⁶;
- 578 (b) extinguishing or reducing the interest of either of the parties to the marriage or civil partnership under such a settlement⁷.

A settlement, in so far as it is not varied by an order of the court, remains unaffected by a decree or order of dissolution⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 24(1).

3 Civil Partnership Act 2004 Sch 5 para 6(1)(a).

4 Ie on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 24(1); Civil Partnership Act 2004 Sch 5 para 6(1). As to the effect of this see *Charalambous v Charalambous* [2004] EWCA Civ 1030, [2004] 2 FCR 721, [2004] 2 FLR 1093. As to the effect of a subsequent marriage or civil partnership on the courts' power to make or vary financial or property orders see PARA 452.

5 As to the meaning of 'child of the family' see PARA 477 note 3. The court may make an order under head (a) in the text notwithstanding that there are no children of the family: Matrimonial Causes Act 1973 s 24(2); Civil Partnership Act 2004 Sch 5 para 7(2).

Where an application is made to the High Court or a designated county court for an order for a variation of settlement, the court must, unless it is satisfied that the proposed variation does not adversely affect the rights or interests of any children concerned, direct that the children be separately represented on the application, either by a solicitor or by a solicitor and counsel, and may appoint the Official Solicitor or other fit person to be the litigation friend of the children for the purpose of the application: Family Proceedings Rules 1991, SI 1991/1247, r 2.57(1) (amended by SI 2005/2922). On any other application for ancillary relief the court may give such a direction or make such appointment as it is empowered to give or make by this provision: Family Proceedings Rules 1991, SI 1991/1247, r 2.57(2). Before a person other than the Official Solicitor is so appointed litigation friend, there must be filed a certificate by the solicitor acting for the children that the person proposed as guardian has no interest in the matter adverse to that of the children and that he is a

proper person to be such guardian: r 2.57(3). As to the meaning of 'designated county court' see PARA 737 note 3.

6 Matrimonial Causes Act 1973 s 24(1)(c) (s 24(1)(c), (d) amended by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 3); Civil Partnership Act 2004 Sch 5 para 7(1)(c). The relevant settlements for these purposes are ante-nuptial and post-nuptial settlements and, in relation to civil partnerships, settlements made on the civil partners during the subsistence of a civil partnership or in anticipation of its formation; settlements made by will or codicil are included, but not settlements in the form of a pension arrangement (within the meaning of either the Matrimonial Causes Act 1973 s 25D or the Civil Partnership Act 2004 Sch 5 para 16(4), as the case may be (see PARA 487)); Matrimonial Causes Act 1973 s 24(1)(c) (as so amended); Civil Partnership Act 2004 Sch 5 para 7(3) (although see *Brooks v Brooks* [1996] AC 375, [1995] 3 ALL ER 257, HL, where a pension scheme was held to be a post-nuptial settlement for the purposes of the Matrimonial Causes Act 1973 s 24(1)(c)). In order to determine what is an ante-nuptial or a post-nuptial settlement, the court is entitled to take into consideration the relevant facts to ascertain what was the substance of the transaction (*Parrington v Parrington* [1951] 2 All ER 916), but the motive in entering into a settlement is irrelevant (*Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 268, [1958] 3 All ER 55, CA, revsg [1958] P 260, [1958] 1 All ER 824; and see PARA 511 note 2). As to the settlements with which the court can deal under these provisions see further PARA 511. As to when a variation of settlement order takes effect see PARA 516. As to the court's power to make orders attaching pension benefits see PARA 485 et seq; and as to the court's power to make pension-sharing orders see PARA 523 et seq.

7 Matrimonial Causes Act 1973 s 24(1)(d) (as amended: see note 6); Civil Partnership Act 2004 Sch 5 para 7(1)(d). As to the relevant settlements for these purposes see note 6. See further PARA 513.

8 *Fitzgerald v Chapman* (1875) 1 ChD 563.

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511. Settlements with which the court can deal.

The power conferred on the court to vary a settlement¹ is a power enabling it to make orders with reference to the application of property settled not by any instrument under which the parties take a beneficial interest but by settlements and settlements only, made either in contemplation of, or during, the marriage or civil partnership of the parties whose marriage or civil partnership is in question². In deciding whether to vary a settlement as an ante-nuptial or post-nuptial settlement, the court should give a broad interpretation to the meaning of those terms³. The court has no power to vary a settlement which is made by either party in general terms and not after, in contemplation of or identifiable with the marriage or civil partnership before the court, but which merely gives the settlor power to appoint an interest to any future party⁴; nor may it vary an annuity purchased by one party for another⁵.

'Property' for these purposes includes not only income⁶ but capital with which the court may also deal⁷, and settled property is to be taken to mean the property of which, under the settlement, the parties, or their children, are the beneficiaries⁸. Certain types of annuity may be included⁹, as may moneys payable under a policy of life assurance in which the petitioner has a contingent interest¹⁰, property taken under a settlement in a representative capacity¹¹, and an expectancy which has been settled¹². A life policy taken out by a husband after marriage so as to benefit his wife has been held to be a post-nuptial settlement which the court can vary, even though not expressly issued under the Married Women's Property Act 1882¹³, with the result that the husband did not become the trustee for the wife under the policy¹⁴. Where third persons enter into covenants to pay an annuity to the parties to the marriage or civil partnership, that annuity is settled property for the purposes of the statutory provisions¹⁵. A settled estate, contrasted with an estate in fee simple, must be understood to be one in which the usual powers of alienation, of devising, and transmitting are restrained by the limitations of the settlement¹⁶. Heirlooms may be dealt with¹⁷. Absolute gifts which involve no periodical payments cannot be varied under the statutory provisions¹⁸, but, if there are periodical payments still to be made at the time when the court has to inquire into the existence of the settlement, then, provided that the nuptial (or corresponding civil partnership) element is present, there can be a settlement¹⁹.

Covenants in a settlement by persons who are not the parties to the marriage or civil partnership are subject to variation by the court²⁰. The court inquires into settlements as they were at the date of the divorce or dissolution²¹, but varies them in the light of circumstances as they exist at the time of the application to vary²²; in making the inquiry, the court must ascertain what is the actual (not the gross) income of the trust fund²³. A conveyance by which the wife gave to the husband a half share in a house of which she owned the freehold was held to be a settlement which the court could vary²⁴; but this decision has been criticised by the Court of Appeal as going beyond the latitude which the authorities have conferred on the interpretation of the words 'settled property' under the provisions applicable to the variation of settlements²⁵. In any event, one must now have regard to the powers of the court to order transfers and settlements of property²⁶, and all the cases must be considered in the light of these powers. Where land and a house on it were conveyed to the husband and wife as purchasers in fee simple on trust for sale, the net rents and profits until sale and the proceeds of sale to be held on trust for themselves as joint tenants, both parties having contributed, the Court of Appeal held that there was power to vary the conveyance as it was a settlement made

by the parties on themselves, the legal interests and beneficial interests being such as to give it the attributes of a settlement²⁷. Further, where the wife contributed to the purchase price of the matrimonial home, which was conveyed into the name of the husband only, there was a resulting trust in favour of the wife to the extent she had contributed and, as there was a nuptial element present, it was held that the transaction constituted a post-nuptial settlement which the court had power to vary²⁸. Where the conveyance of property originally constituted a nuptial settlement, the nuptial element was not lost by one party giving to the other notice of severance after decree nisi²⁹. A deed transferring a house to the wife in consideration for a certain sum, part of which was paid, and a bond by the wife to pay the balance to the husband by instalments, were together held to constitute a settlement which could be varied³⁰.

1 See PARA 510.

2 *Loraine v Loraine and Murphy* [1912] P 222, CA. However, in *Worsley v Worsley and Wignall* (1869) LR 1 P & D 648 at 651, Lord Penzance said: 'The court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement . . . the substantial feature to bring the case within the clause of the statute is that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife'; cf *Prinsep v Prinsep* [1929] P 225 at 232 per Hill J. See also *Young v Young* [1962] P 27, [1961] 3 All ER 695, CA (deed executed after decree nisi and before decree absolute by which husband covenanted to pay maintenance for wife and children; not a post-nuptial settlement within the contemplation of the statute, as on a true construction of the deed the nuptial element was lacking, the deed being executed on the footing that the marriage was to be dissolved); although cf *Charalambous v Charalambous* [2004] EWCA Civ 1030, [2004] 2 FCR 721, [2004] 2 FLR 1093 (the court may vary a post-nuptial settlement even if the features which had made it 'nuptial' have been removed). In order to be variable, a settlement must be one in relation to the marriage or civil partnership which is the subject of the decree or order: *Burnett v Burnett* [1936] P 1; and see *Joss v Joss* [1943] P 18, [1943] 2 All ER 102. The expression 'post-nuptial settlement' has been very widely interpreted, and it has been held that the mere wording of the instrument is immaterial: *Bosworthick v Bosworthick* [1927] P 64, CA (bond securing an annuity to husband); *Gulbenkian v Gulbenkian* [1927] P 237 (life policy effected after marriage with a contingent interest of the other party in the policy moneys); *Janion v Janion* (1926) [1929] P 237n (settlement by husband with trusts in favour of himself and any wife or issue as the Public Trustee in his discretion should think fit; cf *Hargreaves v Hargreaves* [1926] P 42); *Melvill v Melvill and Woodward* [1930] P 99; revsd [1930] P 159, CA (settlement by a wife on herself and her children after her husband had filed a petition for divorce). It is clear that the property need not have been settled by the parties, if it was settled on them: *Paul v Paul and Farquhar* (1870) LR 2 P & D 93 (property settled by the father of the respondent); *Nepean (otherwise Lee Warner) v Nepean* [1925] P 97 (covenants by petitioner's parents); *Prinsep v Prinsep* [1929] P 225; on appeal [1930] P 35, CA (settlements made by husband's mother in favour of husband and his issue); *Gunner v Gunner and Stirling* [1949] P 77, [1948] 2 All ER 771; *Bown v Bown and Weston* [1949] P 91, [1948] 2 All ER 778 (life insurance policy taken out by husband after marriage for benefit of wife held to be a settlement which may be dealt with); *Brown v Brown* [1959] P 86 [1959] 2 All ER 266, CA (house conveyed to spouses as purchasers in fee simple on trust for sale, net rents and profits before sale and proceeds of sale 'upon trust for themselves as joint tenants'; conveyance held to be a settlement). An absolute assignment of property, however, is not a settlement, and the court has no jurisdiction to vary its provisions: *Hubbard (otherwise Rogers) v Hubbard* [1901] P 157, CA, applied in *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 268, [1958] 3 All ER 55, CA; revsg [1958] P 260, [1958] 1 All ER 824 (cited in note 19); *Chalmers v Chalmers* (1892) 68 LT 28. As to the need for a periodical payment see *Hindley v Hindley* [1957] 2 All ER 653, [1957] 1 WLR 898; *Prescott (formerly Fellowes) v Fellowes*; *Young v Young* (1973) 117 Sol Jo 204 (indivisible deed as to use of house owned by husband and his brother and as to periodical payments from husband to wife; no jurisdiction to vary under the Matrimonial Causes Act 1973 s 24, nor was the deed a maintenance agreement within ss 34, 35).

3 *Brooks v Brooks* [1996] AC 375, [1995] 3 All ER 257, HL.

4 *Hargreaves v Hargreaves* [1926] P 42.

5 *Brown v Brown* [1937] P 7, [1936] 2 All ER 1616; *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 268, [1958] 3 All ER 55, CA (an absolute gift is not a settlement which can be varied); but cf the cases referred to in note 2.

6 Income received in the United Kingdom from land owned abroad is 'property': *Style v Style and Keiller* [1954] P 209 at 212, [1953] 2 All ER 836 at 838; overruled on other grounds [1954] P 209 at 215, [1954] 1 All ER 442, CA; cf *Hunter v Hunter and Waddington* [1962] P 1, [1961] 2 All ER 121.

7 *Ponsonby v Ponsonby* (1884) 9 PD 58; affd 9 PD 122, CA.

8 *Dormer (otherwise Ward) v Ward* [1900] P 130; on appeal [1901] P 20, CA. An appointment in exercise of a power to appoint a life interest in property for the benefit of any party who might survive the appointor becomes ineffectual on a dissolution: *Re Williams' Settlement, Greenwell v Humphries* [1929] 2 Ch 361, CA.

9 *Jump v Jump* (1883) 8 PD 159; *Bosworthick v Bosworthick* [1927] P 64, CA (bond securing husband an immediate annuity); but cf *Brown v Brown* [1937] P 7, [1936] 2 All ER 1616 (absolute gift of annuity); and see the cases referred to in note 2.

10 *Gulbenkian v Gulbenkian* [1927] P 237.

11 *Blood v Blood* [1902] P 190, CA.

12 *E v E (otherwise T)* (1902) 18 TLR 643.

13 Ie under the Married Women's Property Act 1882 s 11: see PARA 277 et seq. Note that s 11 has been expressly extended to include policies of assurance effected by civil partners (see the Civil Partnership Act 2004 s 70; and PARA 277 et seq).

14 *Bown v Bown and Weston* [1949] P 91, [1948] 2 All ER 778, distinguishing *Gunner v Gunner and Stirling* [1949] P 77, [1948] 2 All ER 771. See also *Lort-Williams v Lort-Williams* [1951] P 395, [1951] 2 All ER 241, CA (where it was held that a life policy did not cease to be variable merely because the provision is contingent rather than absolute, nor yet because it might, by its terms, be applicable for the benefit of a wife by a subsequent marriage, the words used in the policy being 'for the benefit of the widow or children or any of them'); and note 13.

15 *Nepean (otherwise Lee Warner) v Nepean* [1925] P 97.

16 *Micklethwait v Micklethwait* (1859) 4 CBNS 790. See also *MacLean v MacLean* [1951] 1 All ER 967, CA (reversionary interest).

17 *Beauchamp v Beauchamp and Watt* (1904) 20 TLR 273, CA.

18 Ie under the Matrimonial Causes Act 1973 s 24(1)(c) or the Civil Partnership Act 2004 Sch 5 para 7(1)(c): see PARA 510.

19 *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 268, [1958] 3 All ER 55, CA (ante-nuptial deed; wife agreed 'in consideration of' intended marriage to transfer to husband 'as an absolute gift unaffected by anything hereinafter contained' £15,000 securities; securities transferred shortly after marriage, which was subsequently dissolved; it was held that the material date was the decree absolute; the transfer of securities was then a completed transaction and no periodical payments were involved; the securities were, therefore, not settled property), applying *Hubbard (otherwise Rogers) v Hubbard* [1901] P 157, CA and doubting *Smith v Smith* [1945] 1 All ER 584 and *Halpern v Halpern* [1951] P 204, [1951] 1 All ER 315.

20 *Nepean (otherwise Lee Warner) v Nepean* [1925] P 97; *Prinsep v Prinsep* [1929] P 225; on appeal [1930] P 35, CA.

21 *Jacobs v Jacobs* [1943] P 7, [1942] 2 All ER 471, CA; cf *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 268, [1958] 3 All ER 55, CA.

22 *Johnson v Johnson* [1950] P 23, [1949] 2 All ER 247, CA.

23 *Savary v Savary* (1898) 79 LT 607, CA.

24 *Halpern v Halpern* [1951] P 204, [1951] 1 All ER 315, criticised in *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 268, [1958] 3 All ER 55, CA; *Smith v Smith* [1945] 1 All ER 584. See also *Bacon v Bacon* [1947] P 151, [1947] 2 All ER 327. Cf *Sievwright v Sievwright* [1956] 3 All ER 616, [1956] 1 WLR 1452 (where the house was sold after decree absolute, the proceeds to be held in trust by solicitors pending determination of outstanding questions; the wife then authorised part payment of the proceeds of sale to the husband; four years later, she applied out of time to vary the settlement and sought to have included as part of the settlement funds the amount paid over to the husband; it was held that it could not be so included as it was no longer traceable, and the husband had not received it in a fiduciary capacity; remaining proceeds of sale did form part of settlement funds).

25 *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 280, [1958] 3 All ER 55 at 61, CA per Hodson LJ.

26 See PARAS 499 et seq, 506 et seq.

27 *Brown v Brown* [1959] P 86, [1959] 2 All ER 266, CA (the wife was making substantial contributions in respect of mortgage repayments etc, but this fact itself did not give the conveyance the attributes of settlement, since none of the payments had to be made by virtue of the conveyance). See also *Bedson v Bedson* [1965] 2 QB 666, [1965] 3 All ER 307, CA.

28 *Cook v Cook* [1962] P 181, [1962] 2 All ER 262; affd [1962] P 235, [1962] 2 All ER 811, CA.

29 See *Radziej (otherwise Sierkowska) v Radziej* [1967] 1 All ER 944, [1967] 1 WLR 659; affd [1968] 3 All ER 624, [1968] 1 WLR 1928, CA; *Bedson v Bedson* [1965] 2 QB 666, [1965] 3 All ER 307, CA. Cf *Young v Young* (1973) 117 Sol Jo 204 (cited in note 2).

30 *Parrington v Parrington* [1951] 2 All ER 916.

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512. Legitimacy not decided in variation of settlement proceedings.

In proceedings for variation of a marriage settlement¹ the court will not decide a question of legitimacy², but it may direct the Official Solicitor to petition, on behalf of the child, for a declaration of parentage, legitimacy or legitimation³, if it is for the child's benefit⁴ (the variation proceedings meanwhile standing over), or that the issue be tried separately, with the applicant as claimant and the trustees, the Official Solicitor (as litigation friend) and the respondent as defendants⁵. Usually, however, any question of paternity or status of a child will now be considered by the judge at or before the hearing of the divorce or nullity suit⁶, and certainly, where it is reasonably possible, before a variation of settlement is considered.

1 See PARA 510.

2 *Pryor v Pryor and Shelford* (1887) 12 PD 165.

3 See under the Family Law Act 1986 s 56: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 122. See also *Douglas v Douglas and Trevor* (1897) 78 LT 88.

4 *Re Chaplin's Petition* (1867) LR 1 P & D 328.

5 *Evans v Evans and Blyth* [1904] P 274, [1904] P 378.

6 *Practice Direction* [1965] 1 All ER 905, [1965] 1 WLR 600.

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513. Extinguishing or reducing a party's interests and powers.

Under the statutory power of the court to make an order extinguishing or reducing the interest of either of the parties to a marriage or civil partnership under a settlement¹, a party's rights, powers and interests, including derivative interests², in the fund brought into settlement by the other party, may be extinguished as if that party were dead³. The effect of the inclusion in the order of the words 'as if he were now dead' (or such corresponding wording as may apply in the case of a civil partnership) is not only to extinguish that party's interests; it involves by necessary implication the proposition that the applicant is to be treated as the survivor of the parties, notwithstanding that both are living⁴. As regards the funds brought into settlement by the respondent, the whole, or part⁵, of the respondent's income may be diverted to the children⁶, or to the applicant and the children⁷, and, in exceptional circumstances, the respondent's interests, even in his or her own fund, may be extinguished⁸. Similarly a respondent's powers of appointment over his or her own fund may, though not in every case⁹, be extinguished on the ground that the opportunity of judging the children's requirements no longer exists¹⁰; or an applicant's powers may be postponed¹¹; but extinguishing the power of appointing new trustees is on a different footing, and, if the respondent has still an interest in the fund, the court usually¹² refuses to do so¹³. The court may take into account the future maintenance of a wife or civil partner and children of the family when dealing with the variation of settlement¹⁴. A life interest of a wife, after the husband's life interest, 'until she shall marry again' meant her remarriage after the death of the husband not her remarriage after divorcing him¹⁵.

1 See the Matrimonial Causes Act 1973 s 24(1)(d); the Civil Partnership Act 2004 Sch 5 para 7(1)(d); and PARA 510.

2 *Blood v Blood* [1902] P 78; affd [1902] P 190, CA.

3 *Pearce v Pearce and French* (1861) 30 LJPM & A 182; *Pryor v Pryor and Shelford* (1887) 12 PD 165; *Whitton v Whitton* [1901] P 348; and *Blood v Blood* [1902] P 78; affd [1902] P 190, CA. Where a respondent's power to appoint is extinguished, it is desirable to include in the order a clause conferring on the petitioner 'such power of appointment as she would have had if the respondent were dead and she had survived him'. See also *Wadham v Wadham* [1938] 1 All ER 206. Cf *Re Allsopp's Marriage Settlement Trusts, Public Trustee v Cherry* [1959] Ch 81, [1958] 2 All ER 393 (effect of extinguishing respondent's interest on discretionary trust connected therewith); *Re Poole's Settlements' Trusts, Poole v Poole* [1959] 2 All ER 340, [1959] 1 WLR 651 (see note 4); *Spizewski v Spizewski and Krywanski* [1970] 1 All ER 794n, [1970] 1 WLR 522, CA (wife's interest extinguished subject to her receiving just compensation); *Jones v Jones* [1972] 3 All ER 289, [1972] 1 WLR 1269 (the practice whereby a settlement was ordered to be varied by extinguishing the rights of one party thereunder as if he were 'now dead' and the other party had survived him was not appropriate where the interests of the beneficiaries were those of tenants in common; the order should be that the property 'shall as from the date of this order be held on trust for the (wife) absolutely').

4 *Re Poole's Settlements' Trusts, Poole v Poole* [1959] 2 All ER 340, [1959] 1 WLR 651 (usual order extinguishing respondent's rights, powers and interests 'as if she were now dead'; husband's subsequent exercise of power of appointment as the survivor under the principal settlement held to be valid, though the order did not state that the settlement was to have effect as if she had died); and see *Smith v Smith* [1970] 1 All ER 244, [1970] 1 WLR 155, CA.

5 *Tupper v Tupper and Terrell* (1890) 62 LT 665.

6 *Webster v Webster and Mitford* (1862) 3 Sw & Tr 106.

7 *Noel v Noel* (1885) 10 PD 179.

8 *Kaye v Kaye* (1902) 86 LT 638, CA (where there was one child, and an income of only £45 per annum); cf *Ponsonby v Ponsonby* (1884) 9 PD 58.

9 *Davies v Davies and M'Carthy* (1868) 37 LJ P & M 17; *Maudslay v Maudslay* (1877) 2 PD 256; *Nevill v Nevill* (1893) 69 LT 463.

10 *Noel v Noel* (1885) 10 PD 179 (wife's power of appointment not to take effect until after husband's death since she did not have care and control of the children and did not have the opportunity of exercising a judgment as to the propriety of making dispositions of her property among them); *Pryor v Pryor and Shelford* (1887) 12 PD 165; *Bosvile v Bosvile and Craven* (1888) 13 PD 76.

11 *Evered v Evered and Graham* (1874) 31 LT 101 (in favour of the child of the marriage).

12 *Ie* but not in *Oppenheim v Oppenheim and Ricotti* (1884) 9 PD 60, which does not conflict with *Davies v Davies and M'Carthy* (1868) 37 LJP & M 17; in *Maudslay v Maudslay* (1877) 2 PD 256, the power was extinguished by consent.

13 *Hope v Hope and Erdody* (1874) LR 3 P & D 226; *Pryor v Pryor and Shelford* (1887) 12 PD 165; *Bosvile v Bosvile and Craven* (1888) 13 PD 76; *Tupper v Tupper and Terrell* (1890) 62 LT 665.

14 *Smith v Smith* [1970] 1 All ER 244, [1970] 1 WLR 155, CA (husband's interest in house extinguished but wife to make no further application for maintenance or financial provision).

15 *Re Monro's Settlement, Monro v Hill* [1933] Ch 82.

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514. Effect of decree or order of nullity on settled property.

A decree or order of nullity granted or made in respect of a voidable marriage or civil partnership¹ operates to annul the marriage or civil partnership only as respects any time after the decree has been made absolute or the order has been made final, and the marriage or civil partnership is to be treated, notwithstanding the decree or order, as if it had existed up to that time². The court has power³ to make orders with reference to the application of the property settled by a relevant settlement⁴ in existence at the time of the decree or order, and for these purposes the court may deal with the provisions of the settlement as if they were extended and varied so as to make the words 'parties to the marriage' (or, presumably, 'parties to the civil partnership') connote parties whose marriage or civil partnership was no marriage or civil partnership, and the words 'children' and 'respective parents' construed accordingly⁵. Moreover, the court has power to order that covenants to pay an annuity by the 'husband' or 'wife' or other persons who were parties to the settlement remain in force, either wholly or in part, for the benefit of the parties to the avoided 'marriage' (or civil partnership), or of their children⁶; and the court may direct that the settled property be conveyed to the respective settlors, freed from the trusts of the settlement⁷.

A decree absolute annulling a voidable marriage on the ground of incapacity did not render void a separation agreement containing a maintenance clause⁸.

1 As to voidable marriages and civil partnerships see PARA 331 et seq.

2 See the Matrimonial Causes Act 1973 s 16; the Civil Partnership Act 2004 s 37(3); and PARA 320.

3 Ie by virtue of the Matrimonial Causes Act 1973 s 24(1)(c), (d) and the Civil Partnership Act 2004 Sch 5 para 7(1)(c), (d); see PARA 510.

4 See PARA 510 note 6; and as to the settlements with which the court can deal see PARA 511.

5 *Dormer (otherwise Ward) v Ward* [1901] P 20 at 33, CA per Vaughan Williams LJ (but in this case the husband was the settlor: see *Re Ames' Settlement, Dinwiddy v Ames* [1946] Ch 217 at 221, [1946] 1 All ER 689 at 692); and see *Attwood (otherwise Pomeroy) v Attwood* [1903] P 7; *Sharpe (otherwise Morgan) v Sharpe* [1909] P 20. It was formerly specifically enacted that children of the parties to a voidable marriage, if they would have been legitimate had the marriage been dissolved, are deemed to be legitimate notwithstanding the annulment: see the Matrimonial Causes Act 1965 s 11, now repealed as no longer necessary in view of what is now the Matrimonial Causes Act 1973 s 16 (see PARA 320).

6 *Dormer (otherwise Ward) v Ward* [1901] P 20, CA; *Nepean (otherwise Lee Warner) v Nepean* [1925] P 97.

7 *Leeds v Leeds* (1886) 57 LT 373; *A v M* (1884) 10 PD 178; *Attwood (otherwise Pomeroy) v Attwood* [1903] P 7.

8 *Adams v Adams* [1941] 1 KB 536, [1941] 1 All ER 334, CA.

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(B) DURATION AND EFFECT

515. When the court will revise its order.

The court can, in a proper case, revise its own order but in respect only of matters arising before making it¹, as where a mistake was made, common to all parties, in drawing up the order², even though the applicant is appealing³ against the order as made; or by reason of facts existing at the date of its order but not brought to its notice at the time⁴. Where, however, the mistake is not one of expression but of substance, and has been acquiesced in by the parties, the court will not make an order for further variation of the settlement⁵.

The court must not exercise its power to vary or discharge an order for settlement of property⁶ or temporarily to suspend or, where suspended, revive any provision of such an order except on an application made in proceedings for the rescission of the decree of judicial separation or the separation order by reference to which the order was made or for the dissolution of the marriage or civil partnership in question⁷. The restricted powers of variation, discharge, suspension and revival applicable to an order for settlement apply also in relation to any instrument executed in pursuance of the order⁸.

1 *Gladstone v Gladstone* (1876) 1 PD 442; *Benyon v Benyon and O'Callaghan* (1890) 15 PD 29; on appeal 15 PD 54, CA.

2 *Arkwright v Arkwright* (1895) 73 LT 287; and see *Garratt v Garratt and Garratt* [1922] P 230.

3 *E v E (otherwise T)* [1903] P 88.

4 *Newte v Newte and Keen* [1933] P 117.

5 *Taylor v Taylor* (1926) 161 LT Jo 236 (court rejected motion to vary an order made 34 years previously, by which no provision was made for the petitioning wife after the respondent's death, though the settlement contained a provision to that effect).

6 I.e. an order under the Matrimonial Causes Act 1973 s 24(1)(b)-(d) or the Civil Partnership Act 2004 Sch 5 para 7(1)(b)-(d) (see PARAS 506, 510, 518).

7 Matrimonial Causes Act 1973 s 31(1), (2)(e), (4); Civil Partnership Act 2004 Sch 5 para 56. As to the matters to which the court is to have regard in considering such an application see PARA 568.

8 Matrimonial Causes Act 1973 s 31(3); Civil Partnership Act 2004 Sch 5 para 50(3).

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516. When order takes effect.

Up to the operative date¹ of an order for variation of a settlement, dividends due and payable pass under the original settlement², but the order should not be made retrospective if this involves the trustees in refund of sums paid since the decree absolute or final order. Regard must be had for the rights of persons who were in the position of mortgagees³ before the application⁴, though thereafter it is in the nature of a pending suit, and it has been held that nothing done after the application has been filed, but before it has been heard, diminishes the power of the court over the settlement⁵.

1 In proceedings for divorce, dissolution or nullity, this must be after the decree is made absolute or the order is made final: see PARA 507.

2 *Paul v Paul and Farquhar* (1870) LR 2 P & D 93.

3 *Nevill v Nevill* (1893) 69 LT 463 (trustee in bankruptcy); *Smith v Smith* [1945] 1 All ER 584 (mortgagee).

4 *Wigney v Wigney* (1882) 7 PD 228; and see *Chalmers v Chalmers* (1892) 68 LT 28.

5 *Constantinidi v Constantinidi and Lance* [1904] P 306, CA; *Clarke v Clarke and Lindsay* [1911] P 186 at 189, CA; but see *Morgan v Morgan and Kirby* [1923] P 1.

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517. Injunctions.

Even before there was statutory power to do so, injunctions were granted in suitable cases restraining the respondent from disposing of the funds of a settlement prior to the application for variation, but the court had to be satisfied that *prima facie* there was a settlement¹. Where the court is satisfied that there is about to be or has been a disposition intended to prevent or reduce the court's power to vary a settlement, it has statutory power to make a restraining or protecting or setting aside order².

¹ *Hindley v Hindley* [1957] 2 All ER 653, [1957] 1 WLR 898, distinguishing *Scott v Scott* [1951] P 193, [1950] 2 All ER 1154, CA, on the ground that if there was a settlement, the funds were not property out of which the respondent might have to satisfy an order; it was held, on the facts, that there was no *prima facie* settlement, there being no 'element of periodicity'. See also *Bosworthick v Bosworthick* [1927] P 64 at 72, CA; *Parrington v Parrington* [1951] 2 All ER 916 at 920.

² See the Matrimonial Causes Act 1973 s 37; the Civil Partnership Act 2004 Sch 5 paras 74, 75; and PARA 586.

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E. ORDERS FOR THE BENEFIT OF CHILDREN

518. Power to make property adjustment orders for the benefit of children.

Where the court¹:

- 579 (1) grants a decree of divorce, a decree of nullity of marriage or a decree of judicial separation²; or
- 580 (2) makes a dissolution, nullity or separation order in respect of a civil partnership³,

it may⁴ make an order:

- 581 (a) that a party to the marriage or civil partnership is to transfer to any child of the family⁵ or to such person as may be specified in the order for the benefit of such a child such property⁶ as may be so specified⁷;
- 582 (b) that a settlement of such property⁸ as may be so specified be made to the satisfaction of the court for the benefit of the children of the family or either or any of them⁹; or
- 583 (c) varying for the benefit of the children of the family¹⁰ or either or any of them any relevant settlement¹¹.

No transfer of property order¹² may be made in favour of a child who has attained the age of 18¹³ unless he is in full time education¹⁴ or there are special circumstances which justify the making of an order¹⁵.

Only rarely will the court settle property on children¹⁶; and there is no presumption in favour of a settlement on children merely because one party has the means to make such a settlement¹⁷. The court will not make a clean break order terminating a parent's responsibility to maintain children¹⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 24(1).

3 Civil Partnership Act 2004 Sch 5 para 6(1)(a).

4 Ie on granting the decree or making the order or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute): Matrimonial Causes Act 1973 s 24(1); Civil Partnership Act 2004 Sch 5 para 6(1). See also *Charalambous v Charalambous* [2004] EWCA Civ 1030, [2004] 2 FCR 721, [2004] 2 FLR 1093. As to the matters to which the court is to have regard in deciding how to exercise its powers to make orders for the benefit of children see PARAS 597-598; and as to the duration of orders in favour of children see PARA 495. As to the effect of a subsequent marriage or civil partnership on the courts' power to make or vary financial or property orders see PARA 452.

5 As to the meaning of 'child of the family' see PARA 477 note 3.

6 le property to which the first-mentioned party is entitled, either in possession or reversion: Matrimonial Causes Act 1973 s 24(1)(a); Civil Partnership Act 2004 Sch 5 para 7(1)(a), (3). As to the property that may be the subject of a property adjustment order under these provisions see PARAS 499 note 6, 500.

7 Matrimonial Causes Act 1973 s 24(1)(a); Civil Partnership Act 2004 Sch 5 para 7(1)(a). See further PARA 499 note 7.

8 le property to which the first-mentioned party is entitled, either in possession or reversion: Matrimonial Causes Act 1973 s 24(1)(b); Civil Partnership Act 2004 Sch 5 para 7(1)(b).

9 Matrimonial Causes Act 1973 s 24(1)(b); Civil Partnership Act 2004 Sch 5 para 7(1)(b). As to when a settlement of property order takes effect see PARA 507. As to the care needed in drafting orders see PARA 933.

10 The court may make an order under head (c) in the text notwithstanding that there are no children of the family: Matrimonial Causes Act 1973 s 24(2); Civil Partnership Act 2004 Sch 5 para 7(2). See also the Family Proceedings Rules 1991, SI 1991/1247, r 2.57; and PARA 510 note 5.

11 Matrimonial Causes Act 1973 s 24(1)(c) (s 24(1)(c), (d) amended by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 3); Civil Partnership Act 2004 Sch 5 para 7(1)(c). As to the relevant settlements for these purposes see PARA 510 note 6. As to the settlements with which the court can deal under these provisions see further PARA 511. As to when a variation of settlement order takes effect see PARA 516. As to the court's power to make orders attaching pension benefits see PARA 485 et seq; and as to the court's power to make pension-sharing orders see PARA 523 et seq.

12 le no order under the Matrimonial Causes Act 1973 s 24(1)(a) or the Civil Partnership Act 2004 Sch 5 para 7(1)(a) (see the text and notes 4-7).

13 Matrimonial Causes Act 1973 s 29(1); Civil Partnership Act 2004 Sch 5 paras 9, 49(1)(b).

14 le unless it appears to the court that the child is, or will be, or if an order were made without complying with the Matrimonial Causes Act 1973 s 29(1) or the Civil Partnership Act 2004 Sch 5 para 49(1)(b) (see the text and note 13) would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment: Matrimonial Causes Act 1973 s 29(3)(a); Civil Partnership Act 2004 Sch 5 para 49(5)(a). As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing* (*Downing intervening*) [1976] Fam 288, [1976] 3 All ER 474.

15 Matrimonial Causes Act 1973 s 29(3)(b); Civil Partnership Act 2004 Sch 5 para 49(5)(b). Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

16 *Chamberlain v Chamberlain* [1974] 1 All ER 33, [1973] 1 WLR 1557, CA; *Kiely v Kiely* [1988] 1 FLR 248, [1988] Fam Law 51, CA; *Lord Lilford v Glynn* [1979] 1 All ER 441, [1979] 1 WLR 78, CA.

17 *Lord Lilford v Glynn* [1979] 1 All ER 441, [1979] 1 WLR 78, CA.

18 See *Crozier v Crozier* [1994] Fam 114, [1996] 2 All ER 362.

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519. Matters to which the court is to have regard.

In deciding whether to exercise its power to make a property adjustment order¹ in respect of a child and, if so, in what manner, the court² is to have regard to certain matters³. The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable⁴.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁵.

1 As to the meaning of 'property adjustment order' see PARA 498.

2 As to the meaning of 'court' see PARA 346 note 2.

3 See PARAS 597-598; and as to the matters to which the court is to have regard generally see PARA 589.

4 See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.

5 See PARA 595.

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(iii) Orders for Sale of Property

520. Power to make orders.

Where the court¹ makes² a secured periodical payments order³, an order for the payment of a lump sum⁴ or a property adjustment order⁵ it may⁶ make a further order for the sale of such property⁷ as may be specified in the order (a 'sale of property order')⁸. Any such order may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality thereof, may include:

- 584 (1) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates⁹; and
- 585 (2) provision requiring any such property to be offered for sale to a person, or class of persons, specified in the order¹⁰.

Where a party to a marriage or civil partnership has a beneficial interest in any property, or in the proceeds of sale thereof, and some other person who is not a party to the marriage or civil partnership also has a beneficial interest in that property or in the proceeds of sale thereof¹¹, then, before deciding whether to make a sale of property order in relation to that property, it is the duty of the court to give that other person an opportunity to make representations with respect to the order¹².

1 As to the meaning of 'court' see PARA 346 note 2.

2 I.e. under the Matrimonial Causes Act 1973 s 23 or s 24 or the Civil Partnership Act 2004 Sch 5 paras 1-9 (see PARAS 467 et seq, 476 et seq, 498 et seq).

3 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

4 As to the meaning of 'order for the payment of a lump sum', and as to the making of such orders, see PARA 476.

5 As to the meaning of 'property adjustment order' see PARA 498.

6 I.e. on making the order in question or at any time thereafter: Matrimonial Causes Act 1973 s 24A(1) (s 24A added by the Matrimonial Homes and Property Act 1981 s 7); Civil Partnership Act 2004 Sch 5 para 10(1).

7 I.e. property in which or in the proceeds of sale of which either or both of the parties to the marriage or civil partnership has or have a beneficial interest, either in possession or reversion: Matrimonial Causes Act 1973 s 24A(1) (as added: see note 6); Civil Partnership Act 2004 Sch 5 para 11(1). For these purposes, property may include the shares in a company, but not its assets: see *Crittenden v Crittenden* [1991] FCR 70, [1990] 2 FLR 361, CA. The rights of the parties pursuant to an order for the sale of the family home and redistribution of the net proceeds are those existing at the time when the order takes effect (see PARA 521) and not at the time when the property is subsequently sold and the proceeds of sale divided: *Re Harper (a bankrupt)*, *Harper v O'Reilly* [1998] 3 FCR 475, sub nom *Harper v O'Reilly and Harper* [1997] 2 FLR 816. There is no 'beneficial interest' in assets held by a trustee in bankruptcy: see *Ram v Ram (No 2)* [2004] EWCA Civ 1684, [2004] 3 FCR 673, [2005] 2 FLR 75.

8 Matrimonial Causes Act 1973 s 24A(1) (as added: see note 6); Civil Partnership Act 2004 Sch 5 paras 10(1), (2), 11(1), (4). As to the time when a sale of property order takes effect see PARA 521; as to the matters to which the court is to have regard see PARA 522. As to the variation of sale of property orders see PARA 500. Quaere

whether the court has jurisdiction to make an order for sale in the absence of any of the types of order specified in the Matrimonial Causes Act 1973 s 24A(1) or the Civil Partnership Act 2004 Sch 5 para 10(1) (see the text and notes 1-5): see *R v Rushmoor Borough Council, ex p Barrett* [1989] QB 60, [1989] 2 All ER 268, CA. Orders for sale may also be made under the Married Women's Property 1882 s 17 and the Civil Partnership Act 2004 s 66 (see PARA 224 et seq) and the Trusts of Land and Appointment of Trustees Act 1996 s 14 (see **TRUSTS** vol 48 (2007 Reissue) PARA 1038).

9 Matrimonial Causes Act 1973 s 24A(2)(a) (as added: see note 6); Civil Partnership Act 2004 Sch 5 para 11(2), (3)(a). The court may not order the payment of unsecured debts from the net proceeds of sale of a property: *Burton v Burton* [1986] 2 FLR 419, [1986] Fam Law 330. Where a sale of property order contains a provision requiring the proceeds of the sale of the property to which the order relates to be used to secure periodical payments to a party to the marriage or civil partnership, the order ceases to have effect on the death or remarriage of, or on the formation of a subsequent marriage or civil partnership by, that person: Matrimonial Causes Act 1973 s 24A(5) (as added (see note 6); amended by the Civil Partnership Act 2004 Sch 27 para 42); Civil Partnership Act 2004 Sch 5 para 13. As to references to remarriage, to a subsequent marriage and to the formation of a subsequent civil partnership see PARA 452 note 1.

As to the application of the Matrimonial Causes Act 1973 s 24A(2), (5), (6) and the Civil Partnership Act 2004 Sch 5 paras 11, 13, 14 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

10 Matrimonial Causes Act 1973 s 24A(2)(b) (as added: see note 6); Civil Partnership Act 2004 Sch 5 para 11(3)(b). See note 9.

11 A trustee in bankruptcy may be such a person: see *Ram v Ram (No 2)* [2004] EWCA Civ 1684, [2004] 3 FCR 673, [2005] 2 FLR 75.

12 Matrimonial Causes Act 1973 s 24A(6) (as added (see note 6); further added by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 11); Civil Partnership Act 2004 Sch 5 para 14(1), (2). Any representations made by such other person are to be included among the circumstances to which the court is required to have regard (ie under the Matrimonial Causes Act 1973 s 25(1) or the Civil Partnership Act 2004 Sch 5 para 20: see PARA 589) in deciding how to exercise its powers: Matrimonial Causes Act 1973 s 24A(6) (as so added); Civil Partnership Act 2004 Sch 5 para 14(3). See note 9.

UPDATE

520 Power to make orders

NOTE 8--See also *Miller-Smith v Miller-Smith* [2009] EWCA Civ 1297, [2010] WTLR 519, [2009] All ER (D) 18 (Dec).

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521. Date order takes effect.

A sale of property order¹ made on or after the grant of a decree of divorce or nullity of marriage or on or after the making of a dissolution or nullity order in relation to a civil partnership does not take effect unless the decree has been made absolute or the order has been made final, as the case may be². The court³ may also direct that a sale of property order, whenever made, or such provision thereof as the court may specify, is not to take effect until the occurrence of an event specified by the court or the expiration of a period so specified⁴.

1 As to the making of sale of property orders see PARA 520.

2 Matrimonial Causes Act 1973 s 24A(3) (s 24A added by the Matrimonial Homes and Property Act 1981 s 7); Civil Partnership Act 2004 Sch 5 para 12(1).

3 As to the meaning of 'court' see PARA 346 note 2.

4 Matrimonial Causes Act 1973 s 24A(4) (as added: see note 2); Civil Partnership Act 2004 Sch 5 para 12(2). As to the application of the Matrimonial Causes Act 1973 s 24A(4) and the Civil Partnership Act 2004 Sch 5 para 12 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

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522. Matters to which the court is to have regard.

In deciding whether to exercise its power to make an order for the sale of property¹ and, if so, in what manner, the court² is to have regard to certain matters³. The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable⁴.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁵.

1 As to the making of sale of property orders see PARA 520.

2 As to the meaning of 'court' see PARA 346 note 2.

3 See the Matrimonial Causes Act 1973 s 25(1), (2); the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq. As to this requirement see generally *Rye v Rye* [2002] EWHC 956 (Fam), [2002] 2 FLR 981, [2002] All ER (D) 249 (May).

4 See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.

5 See PARA 595.

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(iv) Pension Sharing Orders and Pension Compensation Sharing Orders

523. Meanings of 'pension sharing order' and 'pension compensation sharing order'.

A 'pension sharing order' is an order which:

- 586 (1) provides that the shareable rights under a specified pension arrangement¹ of a party to a marriage or a civil partnership, or the shareable state scheme rights² of a party to a marriage or a civil partnership, are to be subject to pension sharing for the benefit of the other party to the marriage or a civil partnership³; and
- 587 (2) specifies the percentage value to be transferred⁴.

As from a day to be appointed⁵ it is provided that a 'pension compensation sharing order' is an order which:

- 588 (a) provides that the shareable rights to PPF compensation⁶ of a party to a marriage or a civil partnership that derive from rights under a specified⁷ pension scheme are to be subject to pension compensation sharing for the benefit of the other party⁸; and
- 589 (b) specifies the percentage value to be transferred⁹.

1 For these purposes, the reference to 'shareable rights under a pension arrangement' is to rights in relation to which pension sharing is available under the Welfare Reform and Pensions Act 1999 Pt IV Chapter I (ss 27-46) (see **SOCIAL SECURITY AND PENSIONS**) or under corresponding Northern Ireland legislation: Matrimonial Causes Act 1973 s 21A(2)(a) (s 21A added by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 2); Civil Partnership Act 2004 Sch 5 para 16(2). As to the meaning of 'pension arrangement' see PARA 485 note 1.

2 For these purposes, the reference to 'shareable state scheme rights' is to rights in relation to which pension sharing is available under the Welfare Reform and Pensions Act 1999 Pt IV Chapter II (ss 47-51) (see **SOCIAL SECURITY AND PENSIONS**) or under corresponding Northern Ireland legislation: Matrimonial Causes Act 1973 s 21A(2)(b) (as added: see note 1); Civil Partnership Act 2004 Sch 5 para 16(3).

3 Matrimonial Causes Act 1973 s 21A(1)(a) (as added: see note 1); Civil Partnership Act 2004 Sch 5 paras 15(2), 16(1)(a).

4 Matrimonial Causes Act 1973 s 21A(1)(b) (as added: see note 1); Civil Partnership Act 2004 Sch 5 para 16(1)(b).

5 The Matrimonial Causes Act 1973 ss 21B, 21C and the Civil Partnership Act 2004 Sch 5 paras 19A, 19B, 19F are added, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 1, 2, 14, 15. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

6 The reference to 'shareable rights to PPF compensation' is a reference to rights in relation to which pension compensation sharing is available under the Pensions Act 2008 Pt 3 Chapter 1 (ss 107-120: pension compensation on divorce etc) or under corresponding Northern Ireland legislation: Matrimonial Causes Act 1973 s 21B(2)(a) (prospectively added: see note 5); Civil Partnership Act 2004 Sch 5 para 19B(2) (as so prospectively added). 'PPF compensation' means compensation payable under the pension compensation provisions; and 'pension compensation provisions' means the Pensions Act 2004 Pt 2 Chapter 3 (ss 126-181) (pension

protection: see **SOCIAL SECURITY AND PENSIONS**) and any regulations or order made under it, the Pensions Act 2008 Pt 3 Chapter 1 and any regulations or order made under it, and any provision corresponding to those provisions in force in Northern Ireland: Matrimonial Causes Act 1973 s 21C (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 19F (as so prospectively added).

7 'Specified' means specified in the order: Matrimonial Causes Act 1973 s 21B(2)(c) (prospectively added: see note 5); Civil Partnership Act 2004 Sch 5 para 19B(3) (as so prospectively added).

8 Matrimonial Causes Act 1973 ss 21B(1)(a), (2)(b) (prospectively added: see note 5); Civil Partnership Act 2004 Sch 5 paras 19A(2), 19B(1)(a) (as so prospectively added).

9 Matrimonial Causes Act 1973 s 21B(1)(b) (prospectively added: see note 5); Civil Partnership Act 2004 Sch 5 para 19B(1)(b) (as so prospectively added).

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524. Making of pension sharing orders and pension compensation sharing orders.

The court¹ may make one or more pension sharing orders² on granting a decree of divorce or a decree of nullity of marriage, whether before or after the decree is made absolute, on making a dissolution or nullity order relating to a civil partnership, or at any time thereafter³. An order may not, however, be made in relation to:

- 590 (1) a pension arrangement⁴ which is the subject of a pension sharing order in relation to the marriage or civil partnership or has been the subject of pension sharing between the parties to the marriage or civil partnership⁵;
- 591 (2) shareable state scheme rights⁶ if such rights are the subject of a pension sharing order in relation to the marriage or civil partnership or such rights have been the subject of pension sharing between the parties to the marriage or civil partnership⁷; or
- 592 (3) the rights of a person under a pension arrangement if there is in force a pension requirement⁸ which relates to benefits or future benefits to which he is entitled under the pension arrangement⁹.

As from a day to be appointed¹⁰ the court may also, on application, make a pension compensation sharing order¹¹ on granting a decree of divorce or a decree of nullity of marriage, whether before or after the decree is made absolute, on making a dissolution or nullity order relating to a civil partnership, or at any time thereafter¹². A pension compensation sharing order may not, however, be made in relation to rights to PPF compensation¹³ that:

- 593 (a) are the subject of pension attachment¹⁴;
- 594 (b) derive from rights under a pension scheme that were the subject of pension sharing between the parties to the marriage or civil partnership¹⁵;
- 595 (c) are the subject of pension compensation attachment¹⁶; or
- 596 (d) are or have been the subject of pension compensation sharing between the parties to the marriage or civil partnership¹⁷.

In deciding whether to exercise its power to make a pension sharing order or a pension compensation sharing order and, if so, in what manner, the court¹⁸ is to have regard to certain matters¹⁹. The court must also consider whether it would be appropriate so to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree of divorce or nullity of marriage or the making of the dissolution or nullity order as the court considers just and reasonable²⁰.

Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case²¹.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to the meaning of 'pension sharing order' see PARA 523. No pension sharing order may be made if the proceedings in which the decree is granted were begun before 1 December 2000: see the Welfare Reform and Pensions Act 1999 s 85(3)(a); the Welfare Reform and Pensions Act 1999 (Commencement No 5) Order 2000, SI 2000/1116, art 2(e); and *S v S (rescission of decree nisi: pension sharing provision)* [2002] 1 FCR 193, [2002] 1 FLR 457; *H v H (rescission of decree nisi: pension sharing provision)* [2002] EWHC 767 (Fam), [2002] 2 FLR 116, [2002] All ER (D) 285 (May); *Rye v Rye* [2002] EWHC 956 (Fam), [2002] 2 FLR 981, [2002] All ER (D) 249 (May).

3 Matrimonial Causes Act 1973 s 24B(1) (s 24B added by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 4); Civil Partnership Act 2004 Sch 5 para 15(1). Thus, pension sharing orders are not available in proceedings for judicial or legal separation. As to the date on which a pension sharing order takes effect see PARA 525; as to the matters to which the court is to have regard see PARA 524. As to the procedure on an application for a pension sharing order see PARA 576 et seq; as to the court's duty to stay pension sharing orders see PARA 525; and as to the variation of pension sharing orders see PARA 529.

4 As to the meaning of 'pension arrangement' see PARA 485 note 1.

5 Matrimonial Causes Act 1973 s 24B(3) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 18(1). As to the application of the Matrimonial Causes Act 1973 s 24B(3)-(5) and the Civil Partnership Act 2004 Sch 5 para 18 to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

6 As to the meaning of 'shareable state scheme rights' see PARA 523 note 2.

7 Matrimonial Causes Act 1973 s 24B(4) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 18(2). See note 5.

8 Is a requirement imposed by the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 paras 24-29 (see PARA 485 et seq).

9 Matrimonial Causes Act 1973 s 24B(5) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 18(3). See note 5.

10 The Matrimonial Causes Act 1973 s 24E and the Civil Partnership Act 2004 Sch 5 paras 19A, 19D are added, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 1, 3, 14, 15. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

11 As to the meaning of 'pension compensation sharing order' see PARA 523.

12 Matrimonial Causes Act 1973 s 24E(1) (prospectively added: see note 10); Civil Partnership Act 2004 Sch 5 para 19A(1) (as so prospectively added).

13 As to the meaning of 'PPF compensation' see PARA 523 note 6.

14 Matrimonial Causes Act 1973 s 24E(3)(a) (prospectively added: see note 10); Civil Partnership Act 2004 Sch 5 para 19D(1)(a) (as so prospectively added). For these purposes rights to PPF compensation 'are the subject of pension attachment' if any of the following three conditions is met:

68 (1) that the rights derive from rights under a pension scheme in relation to which an order was made under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 imposing a requirement by virtue of the Matrimonial Causes Act 1973 s 25B(4) or the Civil Partnership Act 2004 Sch 5 para 25(2) (see PARA 485) and that order, as modified under the Matrimonial Causes Act 1973 s 25E(3) or the Civil Partnership Act 2004 Sch 5 para 31 (see PARA 485), remains in force (Matrimonial Causes Act 1973 s 24E(4), (5) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 19D(2), (3) (as so prospectively added));

69 (2) that the rights derive from rights under a pension scheme in relation to which an order was made under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 imposing a requirement by virtue of the Matrimonial Causes Act 1973 s 25B(7) or the Civil Partnership Act 2004 Sch 5 para 25(5) (see PARA 485), and that order either has been complied with or has not been complied with and, as modified under the Matrimonial Causes Act 1973 s 25E(3) or the Civil Partnership Act 2004 Sch 5 para 32 (see PARA 485), remains in force (Matrimonial Causes Act 1973 s 24E(6) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 19D(4) (as so prospectively added)); or

- 70 (3) that the rights derive from rights under a pension scheme in relation to which an order was made under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 imposing a requirement by virtue of the Matrimonial Causes Act 1973 s 25C or the Civil Partnership Act 2004 Sch 5 para 26 (see PARA 486), and remains in force (Matrimonial Causes Act 1973 s 24E(7) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 19D(5) (as so prospectively added)).
- 15 Matrimonial Causes Act 1973 s 24E(3)(b) (prospectively added: see note 10); Civil Partnership Act 2004 Sch 5 para 19D(1)(b) (as so prospectively added). For this purpose rights under a pension scheme 'were the subject of pension sharing between the parties to the marriage or civil partnership' if the rights were at any time the subject of a pension sharing order in relation to the marriage or civil partnership or a previous marriage or civil partnership between the same parties: Matrimonial Causes Act 1973 s 24E(8) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 19D(6) (as so prospectively added).
- 16 Matrimonial Causes Act 1973 s 24E(3)(c) (prospectively added: see note 10); Civil Partnership Act 2004 Sch 5 para 19D(1)(c) (as so prospectively added). For this purpose rights to PPF compensation 'are the subject of pension compensation attachment' if there is in force a requirement imposed by virtue of the Matrimonial Causes Act 1973 s 25F or the Civil Partnership Act 2004 Sch 5 para 34A (see PARA 526) relating to them: Matrimonial Causes Act 1973 s 24E(9) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 19D(7) (as so prospectively added).
- 17 Matrimonial Causes Act 1973 s 24E(3)(d) (prospectively added: see note 10); Civil Partnership Act 2004 Sch 5 para 19D(1)(d) (as so prospectively added). For this purpose rights to PPF compensation 'are or have been the subject of pension compensation sharing between the parties to the marriage or civil partnership' if they are or have ever been the subject of a pension compensation sharing order in relation to the marriage or civil partnership or a previous marriage or civil partnership between the same parties: Matrimonial Causes Act 1973 s 24E(10) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 19D(8) (as so prospectively added).
- 18 As to the meaning of 'court' see PARA 346 note 2.
- 19 See the Matrimonial Causes Act 1973 s 25(1), (2); the Civil Partnership Act 2004 Sch 5 paras 20, 21; and PARA 589 et seq. As to this requirement see generally *Rye v Rye* [2002] EWHC 956 (Fam), [2002] 2 FLR 981, [2002] All ER (D) 249 (May).
- 20 See the Matrimonial Causes Act 1973 s 25A; the Civil Partnership Act 2004 Sch 5 para 23; and PARA 592.
- 21 See PARA 595.

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525. Date orders take effect.

A pension sharing order¹ takes effect not earlier than seven days after the end of the period for filing notice of appeal against the order²; at the date at which this volume states the law no provision has been made for the taking effect of a pension compensation sharing order³. It is also provided that a pension sharing order and (as from a day to be appointed) a pension compensation sharing order is not to take effect unless the decree or order on or after which it is made⁴ has been made absolute or, as the case may be, final⁵.

¹ As to the meaning of 'pension sharing order' see PARA 523; as to the making of pension sharing orders see PARA 524.

² Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 9(1); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 9(1). The filing of a notice of appeal within the time allowed for doing so prevents the order taking effect before the appeal has been dealt with: Divorce etc (Pensions) Regulations 2000, SI 2000/1123, reg 9(2); Dissolution etc (Pensions) Regulations 2005, SI 2005/2920, reg 9(3). These provisions are made pursuant to the Matrimonial Causes Act 1973 s 24C (ss 24B, 24C added by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 4) and the Civil Partnership Act 2004 Sch 5 para 19(2), (3).

³ As to pension compensation sharing orders see PARAS 523, 524. As from a day to be appointed it is provided that no pension compensation sharing order may be made so as to take effect before the end of such period after the making of the order as may be prescribed by regulations made by the Lord Chancellor: Matrimonial Causes Act 1973 s 24F (ss 24E, 24F prospectively added by the Pensions Act 2008 Sch 6 paras 1, 3); Civil Partnership Act 2004 Sch 5 para 19E(2), (3) (Sch 5 para 19E prospectively added by the Pensions Act 2008 Sch 6 paras 14, 15). At the date at which this volume states the law no such day had been appointed and no such regulations had been made.

⁴ As to the decrees and orders on and after which pension sharing orders and pension compensation sharing orders may be made see PARA 524.

⁵ Matrimonial Causes Act 1973 ss 24B(2), 24E(2) (s 24B(2) as added (see note 2); s 24E(2) prospectively added (see note 3)); Civil Partnership Act 2004 Sch 5 paras 19(1), 19E(1) (Sch 5 para 19E prospectively added: see note 3).

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526. Attachment of pension compensation.

As from a day to be appointed¹ it is provided that where, having regard to any PPF compensation² to which a party to a marriage or civil partnership is or is likely to be entitled, the court determines to make an order³ for financial provision on divorce, dissolution, nullity or separation⁴, then:

- 597 (1) to the extent to which the order is made having regard to such compensation, it may require the Board of the Pension Protection Fund, if at any time any payment in respect of PPF compensation becomes due to the party with compensation rights⁵, to make a payment for the benefit of the other party⁶; and
- 598 (2) where the party with compensation rights has a right to commute any PPF compensation, the order may require that party to exercise it to any extent⁷.

These powers⁸ may not be exercised in relation to rights to PPF compensation that:

- 599 (a) derive from rights under a pension scheme that were at any time the subject of a pension sharing order⁹ in relation to the marriage or civil partnership or a previous marriage or civil partnership between the same parties¹⁰; or
- 600 (b) are or have ever been the subject of a pension compensation sharing order¹¹ in relation to the marriage or civil partnership or a previous marriage or civil partnership between the same parties¹².

1 The Matrimonial Causes Act 1973 ss 25F, 25G and the Civil Partnership Act 2004 Sch 5 paras 34A, 34B are added, and s 37(1) is amended, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 1, 7, 14, 17(1), (3)-(5). At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

2 As to the meaning of 'PPF compensation' see PARA 523 note 6.

3 I.e. an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5) (see PARA 458 et seq).

4 Matrimonial Causes Act 1973 s 25F(1) (prospectively added: see note 1); Civil Partnership Act 2004 Sch 5 para 34A(1) (as so prospectively added).

5 'Party with compensation rights' means the party to the marriage or civil partnership who is or is likely to be entitled to PPF compensation; and 'other party' (which is only defined in relation to marriage) means the other party to the marriage: Matrimonial Causes Act 1973 s 25G(5) (prospectively added: see note 1); Civil Partnership Act 2004 Sch 5 para 37(1) (definition as so prospectively added).

6 Matrimonial Causes Act 1973 s 25F(2) (prospectively added: see note 1); Civil Partnership Act 2004 Sch 5 para 34A(2) (as so prospectively added). The order must express the amount of any payment required to be made by virtue of this requirement as a percentage of the payment which becomes due to the party with compensation rights: Matrimonial Causes Act 1973 s 25F(3) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34A(3) (as so prospectively added). Any such payment by the Board of the Pension Protection Fund discharges so much of its liability to the party with compensation rights as corresponds to the amount of the payment and is treated for all purposes as a payment made by the party with compensation rights in or towards the discharge of that party's liability under the order: Matrimonial Causes Act 1973 s 25F(4) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34A(4) (as so prospectively added).

As from a day to be appointed (see note 1) the Lord Chancellor may by regulations:

- 71 (1) make provision, in relation to any provision of the Matrimonial Causes Act 1973 s 25F or the Civil Partnership Act 2004 Sch 5 para 34A which authorises the court making an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 to require the Board of the Pension Protection Fund to make a payment for the benefit of the other party, as to the person to whom, and the terms on which, the payment is to be made (Matrimonial Causes Act 1973 s 25G(1)(a) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34B(1) (a) (as so prospectively added));
- 72 (2) make provision, in relation to payment under a mistaken belief as to the continuation in force of a provision included by virtue of the Matrimonial Causes Act 1973 s 25F or the Civil Partnership Act 2004 Sch 5 para 34A in an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1, about the rights or liabilities of the payer, the payee or the person to whom the payment was due (Matrimonial Causes Act 1973 s 25G(1)(b) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34B(1)(b) (as so prospectively added));
- 73 (3) require notices to be given in respect of changes of circumstances relevant to orders under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 which include provision made by virtue of the Matrimonial Causes Act 1973 s 25F or the Civil Partnership Act 2004 Sch 5 para 34A (Matrimonial Causes Act 1973 s 25G(1)(c) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34B(1)(c) (as so prospectively added));
- 74 (4) make provision for the Board of the Pension Protection Fund to be discharged in prescribed circumstances from a requirement imposed by virtue of the Matrimonial Causes Act 1973 s 25F or the Civil Partnership Act 2004 Sch 5 para 34A (Matrimonial Causes Act 1973 s 25G(1)(d) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34B(1)(d) (as so prospectively added)); and
- 75 (5) make provision (which may include provision for calculation or verification in accordance with guidance from time to time prepared by a prescribed person and provision by reference to regulations under the Pensions Act 2008 s 112) about calculation and verification in relation to the valuation of PPF compensation for the purposes of the court's functions in connection with the exercise of any of its powers under these provisions (Matrimonial Causes Act 1973 s 25G(1) (e), (2) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34B(1)(e), (2) (as so prospectively added)).

At the date at which this volume states the law no such orders had been made.

7 Matrimonial Causes Act 1973 s 25F(5) (prospectively added: see note 1); Civil Partnership Act 2004 Sch 5 para 34A(5) (as so prospectively added). These provisions apply to any payment due in consequence of commutation in pursuance of the order as they apply to other payments in respect of PPF compensation (Matrimonial Causes Act 1973 s 25F(5) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34A(6) (as so prospectively added)), but the power conferred by the Matrimonial Causes Act 1973 s 25F(5) and the Civil Partnership Act 2004 Sch 5 para 34A(5) may not be exercised for the purpose of commuting compensation payable to the party with compensation rights to compensation payable to the other party (Matrimonial Causes Act 1973 s 25F(6) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 34A(7) (as so prospectively added)).

8 Ie the powers conferred by the Matrimonial Causes Act 1973 s 25F(2), (5) and the Civil Partnership Act 2004 Sch 5 para 34A(2), (5) (see the text and notes 1-7).

9 As to the meaning of 'pension sharing order' see PARA 523; as to the making of pension sharing orders see PARA 524.

10 Matrimonial Causes Act 1973 s 25F(7)(a) (prospectively added: see note 1); Civil Partnership Act 2004 Sch 5 para 34A(8)(a) (as so prospectively added).

11 As to the meaning of 'pension compensation sharing order' see PARA 523; as to the making of pension compensation sharing orders see PARA 524.

12 Matrimonial Causes Act 1973 s 25F(7)(b) (prospectively added: see note 1); Civil Partnership Act 2004 Sch 5 para 34A(8)(b) (as so prospectively added).

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527. Apportionment of charges.

If a pension sharing order¹ relates to rights under a pension arrangement², or (as from a day to be appointed³) if a pension compensation sharing order is made⁴, the court⁵ may include in the order provision about the apportionment between the parties of any charge⁶ in respect of pension sharing costs⁷.

1 As to the meaning of 'pension sharing order' see PARA 523; as to the making of pension sharing orders see PARA 524.

2 As to the meaning of 'pension arrangement' see PARA 485 note 1.

3 The Matrimonial Causes Act 1973 s 24G and the Civil Partnership Act 2004 Sch 5 para 19C are added, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 1, 3, 14, 15. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

4 As to the meaning of 'pension compensation sharing order' see PARA 523; as to the making of pension compensation sharing orders see PARA 524.

5 As to the meaning of 'court' see PARA 346 note 2.

6 In relation to a pension sharing order relating to rights under a pension arrangement, any charge under the Welfare Reform and Pensions Act 1999 s 41 (see **SOCIAL SECURITY AND PENSIONS**) or under corresponding Northern Ireland legislation (Matrimonial Causes Act 1973 s 24D (added by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 4); Civil Partnership Act 2004 Sch 5 para 17); and in relation to a pension compensation sharing order, any charge under the Pensions Act 2008 s 117 or under corresponding Northern Ireland legislation (Matrimonial Causes Act 1973 s 24G (prospectively added: see note 3); Civil Partnership Act 2004 Sch 5 para 19C (as so prospectively added)).

7 Matrimonial Causes Act 1973 ss 24D, 24G (as added and prospectively added: see notes 3, 6); Civil Partnership Act 2004 Sch 5 paras 17, 19C (Sch 5 para 19C prospectively added: see note 3). As to the application of the Matrimonial Causes Act 1973 ss 24D, 24G and the Civil Partnership Act 2004 Sch 5 paras 17, 19C to interim orders for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and to orders for financial provision and property adjustment under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531), as they apply to like orders under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) and the Civil Partnership Act 2004 Sch 5, see the Matrimonial and Family Proceedings Act 1984 s 21; the Civil Partnership Act 2004 Sch 7 para 14; and PARA 537.

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528. Appeals relating to pension sharing orders and pension compensation sharing orders which have taken effect.

Where an appeal against a pension sharing order¹ is begun on or after the day on which the order takes effect:

- 601 (1) if the pension sharing order relates to a person's rights under a pension arrangement², the appeal court may not set aside or vary the order if the person responsible for the pension arrangement³ has acted to his detriment in reliance on the taking effect of the order⁴;
- 602 (2) if the pension sharing order relates to a person's shareable state scheme rights⁵, the appeal court may not set aside or vary the order if the Secretary of State has acted to his detriment in reliance on the taking effect of the order⁶.

In determining for these purposes whether a person has acted to his detriment in reliance on the taking effect of the order, the appeal court may disregard any detriment which in its opinion is insignificant⁷.

Where these provisions apply, the appeal court may make such further orders, including one or more pension sharing orders, as it thinks fit for the purpose of putting the parties in the position it considers appropriate⁸.

As from a day to be appointed⁹ if, where an appeal against a pension compensation sharing order¹⁰ is begun on or after the day on which the order takes effect, the Board of the Pension Protection Fund has acted to its detriment in reliance on the taking effect of the order¹¹, the appeal court may not set aside or vary the order but may make such further orders (including a pension compensation sharing order) as it thinks fit for the purpose of putting the parties in the position it considers appropriate¹².

1 As to the meaning of 'pension sharing order' see PARA 523; as to the making of pension sharing orders see PARA 524.

2 As to the meaning of 'pension arrangement' see PARA 485 note 1.

3 As to the person responsible for the pension arrangement see the Matrimonial Causes Act 1973 s 25D(4); the Civil Partnership Act 2004 Sch 5 para 29(3); and PARA 485 note 6 (definition applied by the Matrimonial Causes Act 1973 s 40A(7) (s 40A added by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 10)) and the Civil Partnership Act 2004 Sch 5 para 79(7)).

4 Matrimonial Causes Act 1973 s 40A(1), (2) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 79(1), (2). The Matrimonial Causes Act 1973 s 24C and the Civil Partnership Act 2004 Sch 5 para 19 (when pension sharing orders take effect: see PARA 525) only apply to a pension sharing order under the Matrimonial Causes Act 1973 s 40A or the Civil Partnership Act 2004 Sch 5 para 79 (ie pursuant to the provisions described in this paragraph) if the decision of the appeal court can itself be the subject of an appeal: Matrimonial Causes Act 1973 s 40A(6) (as so added); Civil Partnership Act 2004 Sch 5 para 79(6).

5 As to the meaning of 'shareable state scheme rights' see PARA 523 note 2.

6 Matrimonial Causes Act 1973 s 40A(3) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 79(3).

7 Matrimonial Causes Act 1973 s 40A(4) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 79(4).

8 Matrimonial Causes Act 1973 s 40A(5) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 79(5).

9 The Matrimonial Causes Act 1973 s 40B and the Civil Partnership Act 2004 Sch 5 para 79A are added, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 1, 9, 14, 19. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

10 As to the meaning of 'pension compensation sharing order' see PARA 523; as to the making of pension compensation sharing orders see PARA 524.

11 In determining for these purposes whether the Board has acted to its detriment the appeal court may disregard any detriment which in the court's opinion is insignificant: Matrimonial Causes Act 1973 s 40B(3) (prospectively added: see note 9); Civil Partnership Act 2004 Sch 5 para 79A(3) (as so prospectively added).

12 Matrimonial Causes Act 1973 s 40B(1), (2) (prospectively added: see note 9); Civil Partnership Act 2004 Sch 5 para 79A(1), (2) (as so prospectively added). The Matrimonial Causes Act 1973 s 24F and the Civil Partnership Act 2004 Sch 5 para 19E (when pension sharing orders take effect: see PARA 525) only apply to a pension compensation sharing order under the Matrimonial Causes Act 1973 s 40B or the Civil Partnership Act 2004 Sch 5 para 79A (ie pursuant to the provisions described in the text and notes 9-11) if the decision of the appeal court can itself be the subject of an appeal: Matrimonial Causes Act 1973 s 40B(4) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 79A(4) (as so prospectively added).

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529. Variation of pension sharing orders and pension compensation sharing orders.

In relation to a pension sharing order or (as from a day to be appointed¹) a pension compensation sharing order, which is made at a time before a decree of divorce or nullity has been made absolute or an order for dissolution or nullity has been made final (the 'relevant order')², the general power to vary or discharge orders³ may be exercised:

- 603 (1) only on an application made before the relevant order has or, but for head (2) below, would have taken effect⁴; and
- 604 (2) only if, at the time when the application is made, the decree has not been made absolute or the order has not been made final⁵.

No pension sharing order may be made on an application for the variation of a periodical payments order⁶ or secured periodical payments order⁷ made following divorce, dissolution etc⁸.

1 The Civil Partnership Act 2004 Sch 5 para 50(1)(a) is amended, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 14, 18(1), (7), (a)-(c). At the date at which this volume states the law no day had been appointed for the coming into force of these provisions. Owing to the different drafting of the corresponding provisions of the Matrimonial Causes Act 1973 (ie s 31(4A)), no corresponding prospective amendments have been made to that Act.

2 As to the meanings of 'pension sharing order' and 'pension compensation sharing order' see PARA 523; and as to the variation of orders in the specific circumstances referred to in the text see the Matrimonial Causes Act 1973 s 31(2)(g); the Civil Partnership Act 2004 Sch 5 para 50(1)(i); and PARA 567.

3 The powers conferred by the Matrimonial Causes Act 1973 s 31 and the Civil Partnership Act 2004 Sch 5 Pt 11 (paras 50-62): see PARAS 567-568.

4 Matrimonial Causes Act 1973 s 31(4A)(a)(i) (s 31(4A)-(4C) added by the Welfare Reform and Pensions Act 1999 Sch 3 para 7(3)); Civil Partnership Act 2004 Sch 5 para 57(1)(a)(i) (prospectively amended: see note 1). An application made in accordance with this provision prevents the relevant order from taking effect before the application has been dealt with: Matrimonial Causes Act 1973 s 31(4A)(b) (as so added); Civil Partnership Act 2004 Sch 5 para 57(1)(b) (as so prospectively amended).

5 Matrimonial Causes Act 1973 s 31(4A)(a)(ii) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 57(1)(a)(ii).

6 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

7 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

8 See the Matrimonial Causes Act 1973 s 31(5); Civil Partnership Act 2004 Sch 5 para 58(2); and PARA 569.

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(v) Financial Relief and Property Adjustment following Overseas Divorce, Dissolution, Separation or Annulment

530. Applications for financial relief after overseas divorce etc.

Where:

- 605 (1) a marriage or civil partnership has been dissolved or annulled, or the parties to a marriage or civil partnership have been legally separated, by means of judicial or other proceedings in an overseas country¹; and
- 606 (2) the divorce, dissolution, annulment or legal separation is entitled to be recognised in England and Wales²,

either party may apply to the court³ for an order for financial relief⁴. Applications may be made retrospectively⁵, but a person is not entitled to make an application in relation to a marriage or civil partnership which has been dissolved or annulled in an overseas country if he or she has formed a subsequent marriage or civil partnership⁶.

Where a person applies for an order for financial relief under these provisions he or she may also apply⁷ for a transfer of tenancy order⁸, and the court may make such an order if the applicant is properly entitled⁹.

1 Matrimonial and Family Proceedings Act 1984 s 12(1)(a); Civil Partnership Act 2004 Sch 7 para 1(1)(a). For these purposes 'overseas country' means a country or territory outside the British Islands: Matrimonial and Family Proceedings Act 1984 s 27; Civil Partnership Act 2004 Sch 7 para 1(3). As to the meaning of 'British Islands' see **STATUTES** vol 44(1) (Reissue) PARA 1383.

2 Matrimonial and Family Proceedings Act 1984 s 12(1)(b); Civil Partnership Act 2004 Sch 7 para 1(1)(b). Thus these provisions do not apply to transnational divorces which do not fall within either the Matrimonial and Family Proceedings Act 1984 s 12 or the Civil Partnership Act 2004 Sch 7 para 1 and are not entitled to recognition in English law: see *Re Fatima* [1986] AC 527, sub nom *Fatima v Secretary of State for the Home Department* [1986] 2 All ER 32, HL; *Berkovits v Grinberg (A-G intervening)* [1995] Fam 142 at 157, 158, [1995] 2 All ER 681 at 694, 695. As to the recognition of foreign divorces, dissolutions, annulments etc see PARA 20; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 242-260.

3 In the manner prescribed by rules of court: Matrimonial and Family Proceedings Act 1984 s 12(1); Civil Partnership Act 2004 Sch 7 para 2(3). As to the meaning of 'court' see PARA 346 note 2. As to the applicable rules of court see PARA 941. The leave of the court is required for such an application: see PARA 938. If either party wishes an order to be made in his or her favour, that party must make an application of his or her own and cannot simply rely on the other party's application: see *Robin v Robin* (1983) 4 FLR 632, 13 Fam Law 147, CA.

4 Matrimonial and Family Proceedings Act 1984 s 12(1); Civil Partnership Act 2004 Sch 7 para 2(1). Specified provisions of the Matrimonial Causes Act 1973 Pt II and the Civil Partnership Act 2004 Sch 5 relating to financial relief and property adjustment in the event of divorce, dissolution, nullity etc are applied in relation to orders for financial provision and property adjustment under these provisions: see PARA 537. For these purposes an 'order for financial relief' is an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (orders for financial provision, property adjustment and pension sharing: see PARA 531) or an order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act

2004 Sch 7 para 13 (orders for transfers of tenancies of dwelling houses: see PARA 310): Matrimonial and Family Proceedings Act 1984 s 12(4); Civil Partnership Act 2004 Sch 7 para 2(2) (note that this definition is specifically disapplied by the Matrimonial and Family Proceedings Act 1984 s 12(4) for the purposes of s 19 (see PARA 535), s 23 (see PARA 586-587) and s 24 (see PARA 588); differences in the style of drafting of the Civil Partnership Act 2004 means that no similar disapplication is required in respect of the corresponding provisions of that Act (ie Sch 7 paras 12, 15-18)). In connection with the principles underpinning these provisions see *Hewitson v Hewitson* [1995] Fam 100, [1995] 1 All ER 472, CA (wife who had been granted a clean break final order by a court of competent jurisdiction in California not thereafter given leave to apply for relief, notwithstanding a temporary resumption of cohabitation with her former husband in England after the divorce); *N v N (overseas divorce: financial relief)* [1997] 1 FCR 573, sub nom *N v N (foreign divorce: financial relief)* [1997] 1 FLR 900 (husband had not made out a substantial ground).

On an application for financial relief under these provisions the court may direct that the children be separately represented on the application, either by a solicitor or by a solicitor and counsel, and may appoint the Official Solicitor or other fit person to be guardian ad litem of the children for the purpose of the application: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 2(2), (3) (Appendix 4 added by SI 2005/2922). Before a person other than the Official Solicitor is appointed guardian ad litem under this rule the solicitor acting for the children must file a certificate that the person proposed as guardian has no interest in the matter adverse to that of the children and that he is a proper person to be such guardian: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 2(4) (as so added).

5 See the Civil Partnership Act 2004 Sch 7 para 1(2), which provides that Sch 7 paras 1-16 apply even if the date of the dissolution, annulment or legal separation is earlier than 5 December 2005 (ie the date on which those provisions were brought substantively into force by the Civil Partnership Act 2004 (Commencement No 2) Order 2005, SI 2005/3175), and *Chebaro v Chebaro* [1987] Fam 127, [1987] 1 All ER 999, CA, in which it was held that on its true construction the Matrimonial and Family Proceedings Act 1984 s 12(1) has retrospective effect so that the court has power to grant relief notwithstanding the fact that an overseas divorce was obtained before 16 September 1985 (ie the date on which s 12 was brought into force by the Matrimonial and Family Proceedings Act 1984 (Commencement No 2) Order 1985, SI 1985/1316).

6 Matrimonial and Family Proceedings Act 1984 s 12(2) (s 12(2) amended, s 12(3) substituted, by the Civil Partnership Act 2004 Sch 27 para 90); Civil Partnership Act 2004 Sch 7 paras 2(2)(a), 3(1). References to the forming of a subsequent marriage or civil partnership include a reference to the forming of a marriage or civil partnership which is by law void or voidable: Matrimonial and Family Proceedings Act 1984 s 12(3) (as so substituted); Civil Partnership Act 2004 Sch 7 para 3(2).

7 Ie if he is entitled, either in his own right or jointly with the party, to occupy a dwelling-house in England or Wales by virtue of a tenancy which is a relevant tenancy within the meaning of the Family Law Act 1996 Sch 7 (transfer of certain tenancies on divorce, dissolution etc or on separation of cohabitants: see PARA 310 et seq). Applications must be made in the manner prescribed by rules of court: Matrimonial and Family Proceedings Act 1984 s 12(1); Civil Partnership Act 2004 Sch 7 para 2(3). As to the applicable rules of court see PARA 941. The leave of the court is required for such an application: see PARA 938. A person is not entitled to make an application in relation to a marriage or civil partnership which has been dissolved or annulled in an overseas country if he has formed a subsequent marriage or civil partnership: Matrimonial and Family Proceedings Act 1984 s 12(2) (as amended: see note 6); Civil Partnership Act 2004 Sch 7 para 3(1).

8 Ie any order which the court may make under the Family Law Act 1996 Sch 7 Pt 2 (order transferring tenancy or switching statutory tenants: see PARA 310 et seq).

9 Matrimonial and Family Proceedings Act 1984 s 22(1), (2) (s 22 substituted by the Family Law Act 1996 Sch 8 para 52); Civil Partnership Act 2004 Sch 7 paras 2(1), 13(1), (2). The applicant is properly entitled if: (1) in respect of a marriage, a divorce order, separation order or decree of nullity had been made or granted in England and Wales; or (2) in respect of a civil partnership, it had power to make a property adjustment order under the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9): Matrimonial and Family Proceedings Act 1984 s 22(2) (as so substituted); Civil Partnership Act 2004 Sch 7 para 13(2). The provisions of the Family Law Act 1996 Sch 7 para 10 (see PARA 314), Sch 7 para 11 (see PARA 315) and Sch 7 para 14(1) (see PARA 310-311) apply in relation to any order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act 2004 Sch 7 para 13 as they apply to an order under the Family Law Act 1996 Sch 7 Pt II (paras 6-9): Matrimonial and Family Proceedings Act 1984 s 22(3) (as so substituted); Civil Partnership Act 2004 Sch 7 para 13(3).

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531. Orders for financial provision and property adjustment.

If an application for an order for financial relief¹ is made in relation to a recognised overseas divorce, dissolution, separation or annulment², the court³ may⁴ make a financial provision order, a property adjustment order, a pension sharing order or (as from a day to be appointed⁵) a pension compensation sharing order⁶. If pursuant to these powers the court makes a secured periodical payments order⁷, an order for the payment of a lump sum⁸ or a property adjustment order⁹, then, on making that order or at any time thereafter, the court may¹⁰ make an order for the sale of property¹¹ which the court would otherwise¹² have power to make¹³.

1 As to the meaning of 'order for financial relief' see PARA 530 note 4.

2 As to the making of such applications see PARA 530.

3 As to the meaning of 'court' see PARA 346 note 2.

4 Ie subject to the Matrimonial and Family Proceedings Act 1984 s 20 or, as the case may be, the Civil Partnership Act 2004 Sch 7 para 11 (restriction on court's powers where jurisdiction depends on family home in England and Wales: see PARA 533).

5 The Matrimonial and Family Proceedings Act 1984 s 17(1)(c) is added, and the Civil Partnership Act 2004 Sch 7 para 9(2) is amended, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 10, 11, 20(1), (2). At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

6 Matrimonial and Family Proceedings Act 1984 s 17(1) (substituted by the Welfare Reform and Pensions Act 1999 Sch 12 paras 2, 3; prospectively amended (see note 5)); Civil Partnership Act 2004 Sch 7 para 9(1), (5). Thus:

76 (1) the court may make any one or more of the orders which it could make under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) (see PARA 450 et seq) if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation in respect of the marriage had been granted in England and Wales, that is to say any order such as is mentioned in s 23(1) (see PARA 458 et seq) or any order such as is mentioned in s 24(1) (see PARA 499 et seq) (Matrimonial and Family Proceedings Act 1984 s 17(1)(a) (as so substituted));

77 (2) if a marriage has been dissolved or annulled, the court may make one or more orders each of which would be a pension sharing order (within the meaning of the Matrimonial Causes Act 1973 Pt II: see PARA 523) in relation to the marriage (Matrimonial and Family Proceedings Act 1984 s 17(1)(b) (as so substituted));

78 (3) as from a day to be appointed (see note 5), if the marriage has been dissolved or annulled, the court may make an order which would be a pension compensation sharing order (within the meaning of the Matrimonial Causes Act 1973 Pt II: see PARA 523) in relation to the marriage (Matrimonial and Family Proceedings Act 1984 s 17(1)(c) (as so prospectively added));

79 (4) if a civil partnership has been dissolved or annulled, the court may make any one or more of the orders which it could make under the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5), Pt 2 (paras 6-9), Pt 4 (paras 15-19) or (as from a day to be appointed (see note 5)) Pt 4A (paras 19A-19F) (financial provision, property adjustment, pension sharing and pension compensation sharing: see PARAS 458 et seq, 499 et seq, 523 et seq) if a dissolution order or nullity order had

been made in respect of the civil partnership under of Pt 2 Chapter 2 (Sch 7 para 9(2) (as so prospectively amended)); and

- 80 (5) if civil partners have been legally separated, the court may make any one or more of the orders which it could make under Sch 5 Pt 1 or Pt 2 (financial provision and property adjustment: see PARAS 458 et seq, 499 et seq) if a separation order had been made in respect of the civil partners under Pt 2 Chapter 2 (Sch 7 para 9(3)).

As to the matters to which the court is to have regard in exercising its powers to make orders for financial provision and property adjustment see PARA 532. Specified provisions of the Matrimonial Causes Act 1973 Pt II and the Civil Partnership Act 2004 Sch 5 relating to financial relief and property adjustment in the event of divorce, dissolution, nullity etc are applied in relation to orders for financial provision and property adjustment under these provisions: see PARA 537.

7 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467. The Matrimonial and Family Proceedings Act 1984 defines 'secured periodical payments order' for these purposes as meaning such an order as is specified in the Matrimonial Causes Act 1973 s 23(1)(b) or (e) (see PARAS 467, 492): Matrimonial and Family Proceedings Act 1984 s 27. The Civil Partnership Act 2004 refers to a 'secured periodical payments order' as being any order which would be such an order if made under Sch 5: Sch 7 para 9(4)(a).

8 As to the meaning of 'order for the payment of a lump sum', and as to the making of such orders, see PARA 476.

9 As to the meaning of 'property adjustment order' see PARA 498. The Matrimonial and Family Proceedings Act 1984 defines 'property adjustment order' for these purposes as meaning such an order as is specified in the Matrimonial Causes Act 1973 s 24(1)(a), (b), (c) or (d) (see PARAS 499, 506, 510, 518): Matrimonial and Family Proceedings Act 1984 s 27. The Civil Partnership Act 2004 refers to a 'property adjustment order' as being any order which would be such an order if made under Sch 5: Sch 7 para 9(4)(c).

10 See note 4.

11 Ie any order mentioned in the Matrimonial Causes Act 1973 s 24A(1) or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14) (see PARA 520).

12 Ie if the order under the Matrimonial and Family Proceedings Act 1984 s 17(1) or the Civil Partnership Act 2004 Sch 7 para 9(2) or (3) (see the text and notes 1-6) had been made under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) or the Civil Partnership Act 2004 Sch 7.

13 Matrimonial and Family Proceedings Act 1984 s 17(2); Civil Partnership Act 2004 Sch 7 para 9(4).

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532. Matters to which the court is to have regard.

In deciding whether to make an order for financial provision or property adjustment in relation to a recognised overseas divorce, dissolution, separation or annulment¹ and, if so, in what manner, the court² must have regard to all the circumstances of the case, first consideration being given to the welfare of any child of the family³ who has not attained the age of 18⁴. As regards the exercise of those powers in relation to one of the parties to a marriage or civil partnership, the court must, in particular, have regard to the matters which it is required to take into account⁵ when making financial provision, property adjustment or pension sharing orders generally⁶; additional matters must be taken into account⁷ where the exercise of the court's powers involves a child of the family⁸. The court is also under a duty to consider the termination of financial obligations⁹.

When an order has been made by a court outside England and Wales for the making of payments or the transfer of property by a party to the marriage or civil partnership, the court, in considering in accordance with these provisions the financial resources of the other party to the marriage or civil partnership or a child of the family, must have regard to the extent to which that order has been complied with or is likely to be complied with¹⁰.

1 In deciding whether to exercise its powers under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9: see PARA 531. As to the making of applications in this regard see PARA 530.

2 As to the meaning of 'court' see PARA 346 note 2.

3 As to the meaning of 'child of the family' see PARA 477 note 3.

4 Matrimonial and Family Proceedings Act 1984 s 18(1), (2); Civil Partnership Act 2004 Sch 7 para 10(1), (2). The welfare of child is the first but not the paramount consideration: cf *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 All ER 336, CA (cited in PARA 589).

5 In the Matrimonial Causes Act 1973 s 25(2)(a)-(h) and the Civil Partnership Act 2004 Sch 5 para 21(2) (see PARA 590). These matters include, where applicable:

81 (1) so far as relating to the matters to which the court is required to have regard under the Matrimonial Causes Act 1973 s 25(2)(a) and the Civil Partnership Act 2004 Sch 5 para 21(2)(a) (regard to be had to financial resources generally), any benefits under a pension arrangement which either party to the marriage or civil partnership has or is likely to have and any PPF compensation to which either party is or is likely to be entitled, whether or not in the foreseeable future (Matrimonial and Family Proceedings Act 1984 s 18(3A)(a) (s 18(3A), (7) added by the Welfare Reform and Pensions Act 1999 s 22 and amended by the Pensions Act 2004 Sch 12 para 4); Civil Partnership Act 2004 Sch 7 para 10(4)); and

82 (2) so far as relating to the matters to which the court is required to have regard under the Matrimonial Causes Act 1973 s 25(2)(h) and the Civil Partnership Act 2004 Sch 5 para 21(2)(h) (regard to be had to benefits that cease to be acquirable), any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage or civil partnership, a party to the marriage or civil partnership will lose the chance of acquiring, and any PPF compensation which, by reason of the dissolution or annulment, a party to the marriage or civil partnership will lose the chance of acquiring entitlement to (Matrimonial and Family

Proceedings Act 1984 s 18(3A)(b) (as so added and amended); Civil Partnership Act 2004 Sch 7 para 10(5)).

As to the meaning of 'pension arrangement' see PARA 485 note 1 (definition applied by the Matrimonial and Family Proceedings Act 1984 s 18(7)(a) and the Civil Partnership Act 2004 Sch 7 para 10(9)(a)). Until a day to be appointed 'PPF compensation' means compensation payable under the Pensions Act 2004 Pt 2 Chapter 3 (ss 126-181) (pension protection: see **SOCIAL SECURITY AND PENSIONS**) or corresponding Northern Ireland legislation; as from that day it means compensation payable under the Pensions Act 2004 Pt 2 Chapter 3 and any regulations or order made under it, the Pensions Act 2008 Pt 3 Chapter 1 and any regulations or order made under it, and any provision corresponding to those provisions in force in Northern Ireland: Matrimonial and Family Proceedings Act 1984 s 18(7)(c) (as so added and amended; prospectively substituted by the Pensions Act 2008 s 120, Sch 6 paras 10, 12); Civil Partnership Act 2004 Sch 5 para 30(3), Sch 7 para 10(9)(c) (Sch 5 para 30(3) prospectively repealed, Sch 7 para 10(9)(c) prospectively amended, by the Pensions Act 2008 Sch 6 paras 14, 17, 20(3), Sch 11 Pt 4). At the date at which this volume states the law no day had been appointed for the coming into force of these amendments. References to 'benefits under a pension arrangement' include any benefits by way of pension, whether under a pension arrangement or not: Matrimonial and Family Proceedings Act 1984 s 18(7) (as so added); Civil Partnership Act 2004 Sch 7 para 10(9)(b).

6 Matrimonial and Family Proceedings Act 1984 s 18(3); Civil Partnership Act 2004 Sch 7 para 10(3)(a).

7 Ie the matters referred to in the Matrimonial Causes Act 1973 s 25(3)(a)-(e) and the Civil Partnership Act 2004 Sch 5 para 22(2) (see PARA 597) or, where the court's powers are being exercised against a party to the marriage or civil partnership in favour of a child of the family who is not the child of that party, the matters referred to in the Matrimonial Causes Act 1973 s 25(4)(a)-(c) and the Civil Partnership Act 2004 Sch 5 para 22(3) (see PARA 598).

8 Matrimonial and Family Proceedings Act 1984 s 18(4), (5); Civil Partnership Act 2004 Sch 7 para 10(6), (7).

9 Ie, the court is under duties corresponding with those imposed by the Matrimonial Causes Act 1973 s 25A(1), (2) and the Civil Partnership Act 2004 Sch 5 para 23(2), (3) (see PARA 592) where it decides to exercise under the Matrimonial Causes Act 1973 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531) any powers corresponding to those referred to in the Matrimonial Causes Act 1973 s 25A(1), (2) or the Civil Partnership Act 2004 Sch 5 para 23(2), (3): Matrimonial and Family Proceedings Act 1984 s 18(3); Civil Partnership Act 2004 Sch 7 para 10(3)(b).

10 Matrimonial and Family Proceedings Act 1984 s 18(6); Civil Partnership Act 2004 Sch 7 para 10(8).

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533. Restriction of powers of court where jurisdiction depends on family home in England and Wales.

Where the court¹ has jurisdiction to entertain an application for an order² for financial provision or property adjustment in relation to a recognised overseas divorce, dissolution, separation or annulment³ by reason only of the situation in England or Wales of a dwelling house⁴ which was a family home of the parties, the court may⁵ make any one or more of the following orders, but no other:

- 607 (1) an order that either party to the marriage or civil partnership is to pay to the other such lump sum as may be specified in the order⁶;
- 608 (2) an order that a party to the marriage or civil partnership is to pay to such person as may be so specified for the benefit of a child of the family⁷, or to such a child, such lump sum as may be so specified⁸;
- 609 (3) an order that a party to the marriage or civil partnership is to transfer to the other party, to any child of the family or to such person as may be so specified for the benefit of such a child, the interest of the first-mentioned party in the dwelling house, or such part of that interest as may be so specified⁹;
- 610 (4) an order that a settlement of the interest of a party to the marriage or civil partnership in the dwelling house, or such part of that interest as may be so specified, be made to the satisfaction of the court for the benefit of the other party to the marriage or civil partnership and of the children of the family or either or any of them¹⁰;
- 611 (5) an order varying for the benefit of the parties to the marriage or civil partnership and of the children of the family or either or any of them any relevant settlement¹¹ made on the parties to the marriage or the civil partnership, so far as that settlement relates to an interest in the dwelling house¹²;
- 612 (6) an order extinguishing or reducing the interest of either of the parties to the marriage or the civil partnership under a relevant settlement, so far as that interest is an interest in the dwelling house¹³; and
- 613 (7) an order for the sale of the interest of a party to the marriage or civil partnership¹⁴ in the dwelling house¹⁵.

Where, in the circumstances mentioned above, the court makes an order for the payment of a lump sum by a party to the marriage or civil partnership, the amount of the lump sum must not exceed, or where more than one such order is made the total amount of the lump sums must not exceed in aggregate, the following amount:

- 614 (a) if the interest of that party in the dwelling house is sold in pursuance of an order under head (7) above, the amount of the proceeds of sale of that interest¹⁶ after deducting therefrom any costs incurred in the sale thereof¹⁷; or
- 615 (b) if the interest of that party is not so sold, the amount which in the opinion of the court represents the value of that interest¹⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Ie an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9: see PARA 531. As to the making of applications in this regard see PARA 530. Specified provisions of the Matrimonial Causes Act 1973 Pt II and the Civil Partnership Act 2004 Sch 5 relating to financial relief and property adjustment in the event of divorce, dissolution, nullity etc are applied in relation to orders for financial provision and property adjustment under these provisions: see PARA 537.

3 As to the jurisdiction of the court in these matters see PARAS 939-940.

4 'Dwelling-house' includes any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling-house and occupied therewith: Matrimonial and Family Proceedings Act 1984 s 27; Civil Partnership Act 2004 Sch 7 para 19.

5 Ie under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9.

6 Matrimonial and Family Proceedings Act 1984 s 20(1)(a); Civil Partnership Act 2004 Sch 7 para 11(1), (2) (a).

7 As to the meaning of 'child of the family' see PARA 477 note 3.

8 Matrimonial and Family Proceedings Act 1984 s 20(1)(b); Civil Partnership Act 2004 Sch 7 para 11(2)(b).

9 Matrimonial and Family Proceedings Act 1984 s 20(1)(c); Civil Partnership Act 2004 Sch 7 para 11(2)(c).

10 Matrimonial and Family Proceedings Act 1984 s 20(1)(d); Civil Partnership Act 2004 Sch 7 para 11(2)(d).

Where, on an application for financial relief under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) or the Civil Partnership Act 2004 Sch 7 (see PARA 530 et seq) an application is made for an order for a variation of settlement the court must, unless it is satisfied that the proposed variation does not adversely affect the rights or interests of any children concerned, direct that the children be separately represented on the application, either by a solicitor or by a solicitor and counsel, and may appoint the Official Solicitor or other fit person to be guardian ad litem of the children for the purpose of the application: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 2(1), (2) (Appendix 4 added by SI 2005/2922). Before a person other than the Official Solicitor is appointed guardian ad litem under this rule the solicitor acting for the children must file a certificate that the person proposed as guardian has no interest in the matter adverse to that of the children and that he is a proper person to be such guardian: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 2(4) (as so added).

11 Ie any ante-nuptial or post-nuptial settlement, or any settlement made during the subsistence of the civil partnership or in anticipation of its formation, including such a settlement made by will or codicil: Matrimonial and Family Proceedings Act 1984 s 20(1)(e); Civil Partnership Act 2004 Sch 7 para 11(7).

12 Matrimonial and Family Proceedings Act 1984 s 20(1)(e); Civil Partnership Act 2004 Sch 7 para 11(2)(e).

13 Matrimonial and Family Proceedings Act 1984 s 20(1)(f); Civil Partnership Act 2004 Sch 7 para 11(2)(f).

14 For these purposes, where the interest of a party to the marriage or civil partnership in the dwelling house is held jointly or in common with any other person or persons, the reference to the interest of a party to the marriage or civil partnership is to be construed as including a reference to the interest of that other person, or the interest of those other persons, in the dwelling house: Matrimonial and Family Proceedings Act 1984 s 20(3)(a); Civil Partnership Act 2004 Sch 7 para 11(6)(a).

15 Matrimonial and Family Proceedings Act 1984 s 20(1)(g); Civil Partnership Act 2004 Sch 7 para 11(2)(g).

16 For these purposes, where the interest of a party to the marriage or civil partnership in the dwelling house is held jointly or in common with any other person or persons, the reference to the amount of the proceeds of a sale order under the Matrimonial and Family Proceedings Act 1984 s 20(1)(g) or Civil Partnership Act 2004 Sch 7 para 11(2)(g) is to be construed as a reference to that part of those proceeds which is attributable to the interest of that party to the marriage in the dwelling house: Matrimonial and Family Proceedings Act 1984 s 20(3)(b); Civil Partnership Act 2004 Sch 7 para 11(6)(b).

17 Matrimonial and Family Proceedings Act 1984 s 20(2)(a); Civil Partnership Act 2004 Sch 7 para 11(3), (4), (5)(a).

18 Matrimonial and Family Proceedings Act 1984 s 20(2)(b); Civil Partnership Act 2004 Sch 7 para 11(5)(b).

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534. Restriction on applications for financial relief from estate of deceased former spouse or civil partner.

On making an order for financial provision or property adjustment in relation to a recognised overseas divorce, dissolution, separation or annulment¹ the court² may³ order that the other party to the marriage or civil partnership⁴ will not on the death of the applicant be entitled to apply for an order for financial provision from the deceased's estate⁵. Where such an order⁶ has been made with respect to a party to a marriage or civil partnership which has been dissolved or annulled or a marriage or civil partnership the parties to which have been legally separated, then, on the death of the other party to that marriage or civil partnership (in the case of a marriage or civil partnership the parties to which have been legally separated, while the legal separation is in force), the court may not entertain an application⁷ for an order for financial provision from the deceased's estate made by the surviving party⁸.

1 I.e. an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9: see PARA 531. As to the making of applications in this regard see PARA 530. Specified provisions of the Matrimonial Causes Act 1973 Pt II and the Civil Partnership Act 2004 Sch 5 relating to financial relief and property adjustment in the event of divorce, dissolution, nullity etc are applied in relation to orders for financial provision and property adjustment under these provisions: see PARA 537.

2 For the purposes of the Inheritance (Provision for Family and Dependants) Act 1975 ss 15A(1), 15B(1) 'court' means the High Court or, where a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-44) (see PARA 732 et seq), a county court: Inheritance (Provision for Family and Dependants) Act 1975 ss 15A(1), 15B(2) (s 15A added by the Matrimonial and Family Proceedings Act 1984 s 25; Inheritance (Provision for Family and Dependants) Act 1975 s 15B added by the Civil Partnership Act 2004 Sch 4 para 22). This corresponds to the definition of 'court' for the purposes of matrimonial and civil partnership proceedings generally set out in PARA 346 note 2.

3 I.e. if the court considers it just to do so, and on the application of either of the parties to the marriage or civil partnership: Inheritance (Provision for Family and Dependants) Act 1975 ss 15A(1), 15B(1) (as added: see note 2).

4 I.e. the spouse or civil partner. For the purposes of the Inheritance (Provision for Family and Dependants) Act 1975, any reference to a spouse, wife, husband or civil partner is to be treated as including a reference to a person who in good faith entered into a void marriage or civil partnership with the deceased unless either the marriage or civil partnership of or between the deceased and that person was dissolved or annulled during the lifetime of the deceased and the dissolution or annulment is recognised by the law of England and Wales, or that person has during the lifetime of the deceased formed a subsequent marriage or civil partnership: s 25(4), (4A) (s 25(4) amended, s 25(4A), (5A) added, s 25(5) substituted, by the Civil Partnership Act 2004 Sch 4 para 27). Any reference to the formation of, or to a person who has formed, a subsequent marriage or civil partnership includes (as the case may be) a reference to the formation of, or to a person who has formed, a marriage or civil partnership which is by law void or voidable: Inheritance (Provision for Family and Dependants) Act 1975 s 25(5) (as so substituted). The formation of a marriage or civil partnership is treated for these purposes as the formation of a subsequent marriage or civil partnership, in relation to either of the spouses or civil partners, notwithstanding that the previous marriage or civil partnership of that spouse or civil partner was void or voidable: s 25(5A) (as so added). As to void and voidable marriages and civil partnerships see PARA 326 et seq.

5 Inheritance (Provision for Family and Dependants) Act 1975 ss 15A(1), 15B(1) (as added: see note 2). The 'order for financial provision from the deceased's estate' referred to in the text is an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2; as to which see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692.

6 le an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 15A(1) or s 15B(1) (see the text and notes 1-5).

7 le an application under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692).

8 Inheritance (Provision for Family and Dependants) Act 1975 ss 15A(2), (3), 15B(3), (4) (as added: see note 2).

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535. Consent orders for financial provision or property adjustment.

On an application for a consent order¹ for financial provision or property adjustment in relation to a recognised overseas divorce, dissolution, separation or annulment², including an application for a consent order varying or discharging such an order, the court³ may⁴, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed⁵ information furnished with the application⁶.

1 For these purposes, 'consent order', in relation to an application for an order, means an order in the terms applied for to which the respondent agrees: Matrimonial and Family Proceedings Act 1984 s 19(3); Civil Partnership Act 2004 Sch 7 para 12(5).

2 I.e. an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9: see PARA 531. As to the making of applications in this regard see PARA 530.

Where an application is made for a consent order there must be lodged with every application two copies of a draft of the order in the terms sought, one of which must be indorsed with a statement signed by the respondent to the application signifying his agreement, and a statement of information (which may be made in more than one document) which must include:

- 83 (1) the duration of the marriage or civil partnership, as the case may be, the age of each party and of any minor or dependent child of the family (Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 5(1)(b), (2)(a) (Appendix 4 added by SI 2005/2922));
- 84 (2) an estimate in summary form of the approximate amount or value of the capital resources and net income of each party and of any minor child of the family (Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 5(2)(b) (as so added));
- 85 (3) what arrangements are intended for the accommodation of each of the parties and any minor child of the family (Appendix 4 para 5(2)(c) (as so added));
- 86 (4) whether either party has subsequently married or formed a civil partnership or has any present intention to do so or to cohabit with another person (Appendix 4 para 5(2)(d) (as so added));
- 87 (5) where the order includes provision to be made under the Matrimonial and Family Proceedings Act 1984 s 17(1)(a) of a kind which could be made by an order under the Matrimonial Causes Act 1973 s 25B or s 25C, under the Matrimonial and Family Proceedings Act 1984 s 17(1)(b), or under the Civil Partnership Act 2004 Sch 7 para 9(2) of a kind which could be made by an order under Sch 5 para 15, 25 or 26 (orders relating to pension sharing: see PARA 523 et seq), a statement confirming that the person responsible for the pension arrangement in question has been served with the documents required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(11) (see PARA 927) and that no objection to such an order has been made by that person within 21 days from such service (Appendix 4 para 5(2)(e) (as so added));
- 88 (6) where the terms of the order provide for a transfer of property, a statement confirming that any mortgagee of that property has been served with notice of the application and that no objection to such a transfer has been made by the mortgagee within 14 days from such service (Appendix 4 para 5(2)(f) (as so added)); and
- 89 (7) any other especially significant matters (Appendix 4 para 5(2)(g) (as so added)).

Where an application is made for a consent order for interim periodical payments pending the determination of the application or for an order varying an order for periodical payments, the statement of information required by these provisions need include only the information in respect of net income mentioned in head (2) above: Appendix 4 para 5(3) (as so added). Where all or any of the parties attend the hearing of an application for financial relief the court may dispense with the lodging of a statement of information in accordance with heads (1)-(7) above and give directions for the information which would otherwise be required to be given in such a statement to be given in such a manner as it sees fit: Appendix 4 para 5(4) (as so added).

Specified provisions of the Matrimonial Causes Act 1973 Pt II and the Civil Partnership Act 2004 Sch 5 relating to financial relief and property adjustment in the event of divorce, dissolution, nullity etc are applied in relation to orders for financial provision and property adjustment under these provisions: see PARA 537.

3 As to the meaning of 'court' see PARA 346 note 2.

4 Ie notwithstanding the Matrimonial and Family Proceedings Act 1984 s 18 or the Civil Partnership Act 2004 Sch 7 para 10 (see PARA 532).

5 For these purposes 'prescribed' means prescribed by rules of court: Matrimonial and Family Proceedings Act 1984 s 19(3); Civil Partnership Act 2004 Sch 7 para 12(5). The information so prescribed is that set out in the Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1) (see PARA 714): r 3.18(3) (substituted by SI 2005/2922).

6 Matrimonial and Family Proceedings Act 1984 s 19(1), (2); Civil Partnership Act 2004 Sch 7 para 12(1)-(3). Cf the Matrimonial Causes Act 1973 s 33A (as added and amended); and PARA 713.

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536. Interim orders.

Where leave is granted¹ for the making of an application for an order for financial provision or property adjustment in relation to a recognised overseas divorce, dissolution, separation or annulment² and it appears to the court³ that the applicant or any child of the family⁴ is in immediate need of financial assistance, the court may make an interim order for maintenance⁵. An interim order may be made subject to such conditions as the court thinks fit⁶, but the court must not make an interim order if it appears to the court that it has jurisdiction to entertain the application for financial relief by reason only⁷ that either or both of the parties to the marriage or civil partnership had at the date of the application for leave a beneficial interest in possession in a dwelling house⁸ situated in England and Wales which was at some time during the marriage or civil partnership the family home of the parties⁹.

¹ See under the Matrimonial and Family Proceedings Act 1984 s 13 or the Civil Partnership Act 2004 Sch 7 para 4: see PARA 938.

² See an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9: see PARA 531. As to the making of applications in this regard see PARA 530. Specified provisions of the Matrimonial Causes Act 1973 Pt II and the Civil Partnership Act 2004 Sch 5 relating to financial relief and property adjustment in the event of divorce, dissolution, nullity etc are applied in relation to orders for financial provision and property adjustment under these provisions: see PARA 537.

³ As to the meaning of 'court' see PARA 346 note 2.

⁴ As to the meaning of 'child of the family' see PARA 477 note 3.

⁵ Matrimonial and Family Proceedings Act 1984 s 14(1); Civil Partnership Act 2004 Sch 7 para 5(2). An 'interim order for maintenance' is an order requiring the other party to the marriage or civil partnership to make to the applicant or to the child such periodical payments, and for such term, being a term beginning not earlier than the date of the grant of leave and ending with the date of the determination of the application for an order for financial relief, as the court thinks reasonable: Matrimonial and Family Proceedings Act 1984 s 14(1); Civil Partnership Act 2004 Sch 7 para 5(2), (3). As to the mode of application see PARA 941.

⁶ Matrimonial and Family Proceedings Act 1984 s 14(3); Civil Partnership Act 2004 Sch 7 para 5(5).

⁷ See by reason only of the Matrimonial and Family Proceedings Act 1984 s 15(1)(c) or the Civil Partnership Act 2004 Sch 7 para 7(4) (see PARA 939).

⁸ As to the meaning of 'dwelling house' see PARA 533 note 4.

⁹ Matrimonial and Family Proceedings Act 1984 s 14(2); Civil Partnership Act 2004 Sch 7 para 5(4).

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537. Supplementary provisions.

Where an order for financial provision or property adjustment in relation to a recognised overseas divorce, dissolution, separation or annulment¹, or an interim order for maintenance in anticipation of the making of such an order², is made, provision as to the following matters is also made³:

- 616 (1) provision as to lump sums⁴;
- 617 (2) provision as to orders for sale⁵;
- 618 (3) provisions about pension sharing and (as from a day to be appointed⁶) pension compensation sharing⁷;
- 619 (4) the power, by a financial provision order, to attach payments under a pension arrangement or (as from a day to be appointed⁸) pension compensation payments, or to require the exercise of a right of commutation under a pension arrangement or (as from a day to be appointed) of pension compensation, and the extension of lump sum powers in relation to death benefits under a pension arrangement⁹;
- 620 (5) orders relating to pensions where the Board of the Pension Protection Fund has assumed responsibility¹⁰;
- 621 (6) the duration of continuing financial provision orders in favour of a party to the marriage or civil partnership or in favour of children, and the age limit on making certain orders in favour of children¹¹;
- 622 (7) directions for the settlement of an instrument for securing payments or effecting property adjustment¹²;
- 623 (8) the variation, discharge etc of certain orders for financial relief¹³;
- 624 (9) arrears and repayments¹⁴;
- 625 (10) settlements etc made in compliance with a property adjustment order voidable on the bankruptcy of the settlor¹⁵;
- 626 (11) payments etc under an order made in favour of a person suffering from mental disorder¹⁶; and
- 627 (12) appeals relating to pension sharing orders or (as from a day to be appointed¹⁷) pension compensation sharing orders which have taken effect¹⁸.

Supplementary provision may also be made by regulations¹⁹.

1 Ie an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9: see PARA 531. As to the making of applications in this regard see PARA 530.

2 Ie an order under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5: see PARA 536.

3 Ie the provisions of the Matrimonial Causes Act 1973 Pt II and the Civil Partnership Act 2004 Sch 5 described in the text and notes 4-18 apply in relation to an order made under the Matrimonial and Family Proceedings Act 1984 s 14 or s 17 or the Civil Partnership Act 2004 Sch 7 para 5 or 9 as they apply in relation to a like order made under the Matrimonial Causes Act 1973 Pt II or the Civil Partnership Act 2004 Sch 5: Matrimonial and Family Proceedings Act 1984 s 21(1) (s 21(1) renumbered and amended, s 21(2)-(5) added, by the Welfare Reform and Pensions Act 1999 s 22(1), (4), (5), Sch 12 paras 2, 4(a)-(c), Sch 13 Pt II; Matrimonial and Family Proceedings Act 1984 s 21(1) amended by the Pensions Act 2004 Sch 12 para 4); Civil Partnership Act 2004 Sch 7 para 14(1). The provisions of the Matrimonial and Family Proceedings Act 1984 s 21(1), (2), (4)

are further amended, and the Civil Partnership Act 2004 Sch 7 para 14(1), (2), (4) are amended, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 10, 13, 14, 20. At the date at which this volume states the law no day had been appointed for the coming into force of those amendments.

4 See the Matrimonial Causes Act 1973 s 23(3); the Civil Partnership Act 2004 Sch 5 para 3(1)-(3), (7); and PARAS 476, 477, 492.

5 See the Matrimonial Causes Act 1973 s 24A(2), (4)-(6); the Civil Partnership Act 2004 Sch 5 paras 11(2)-(4), 12(2), 13, 14; and PARAS 520, 521.

6 See note 3.

7 See the Matrimonial Causes Act 1973 ss 24B(3)-(5), 24C, 24D, 24E(3)-(10), 24F, 24G; the Civil Partnership Act 2004 Sch 5 paras 17, 18, 19(2), (3), 19C, 19D, 19E(2), (3); and PARAS 523-525, 527.

8 See note 3.

9 See the Matrimonial Causes Act 1973 ss 25B(3)-(7B), 25C, 25F; the Civil Partnership Act 2004 Sch 5 paras 25, 26, 34A; and PARAS 485, 486. The specified provisions do not apply (ie as described in note 3) where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England or Wales of a dwelling house which was a family home of the parties: Matrimonial and Family Proceedings Act 1984 s 21(2) (as added and prospectively amended: see note 3); Civil Partnership Act 2004 Sch 7 para 14(2) (as so prospectively amended). The Matrimonial Causes Act 1973 s 25D(1) and the Civil Partnership Act 2004 Sch 5 para 27 (see PARA 487) apply in relation to an order made under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 by virtue of these provisions as they apply in relation to an order made under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5) (see PARA 458 et seq) by virtue of the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or 26: Matrimonial and Family Proceedings Act 1984 s 21(3) (as so added); Civil Partnership Act 2004 Sch 7 para 14(3).

10 See the Matrimonial Causes Act 1973 s 25E(2)-(10); the Civil Partnership Act 2004 Sch 5 paras 31-37; and PARA 485.

11 See the Matrimonial Causes Act 1973 ss 28(1), (2), 29; the Civil Partnership Act 2004 Sch 5 paras 47(1)-(4), (6), 49; and PARAS 460, 469, 495.

12 See the Matrimonial Causes Act 1973 s 30 (except s 30(b)); the Civil Partnership Act 2004 Sch 5 para 76; and PARAS 473, 504.

13 See the Matrimonial Causes Act 1973 s 31 (except s 31(2)(e), (4)); the Civil Partnership Act 2004 Sch 5 paras 50-54, 57-62 (except para 50(1)(g)); and PARAS 474, 515, 567-570.

14 See the Matrimonial Causes Act 1973 ss 32, 33, 38; the Civil Partnership Act 2004 Sch 5 paras 63-65; and PARAS 573-575, 679.

15 See the Matrimonial Causes Act 1973 s 39; the Civil Partnership Act 2004 Sch 5 para 77; and PARAS 505, 509.

16 See the Matrimonial Causes Act 1973 s 40; the Civil Partnership Act 2004 Sch 5 para 78; and PARA 455.

17 See note 3.

18 See the Matrimonial Causes Act 1973 ss 40A, 40B; the Civil Partnership Act 2004 Sch 5 paras 79, 79A; and PARA 528.

19 See the Matrimonial and Family Proceedings Act 1984 s 21(4), (5) (as added and prospectively amended: see note 3) and the Civil Partnership Act 2004 Sch 7 para 14(4), (5) (as so prospectively amended), which provide that the Lord Chancellor may by regulations make for the purposes of the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) and the Civil Partnership Act 2004 Sch 7 provision corresponding to any provision which may be made by him under the Matrimonial Causes Act 1973 s 25D(2)-(2B) or the Civil Partnership Act 2004 Sch 5 para 28(1)-(3) (see PARA 487) or (as from a day to be appointed) under the Matrimonial Causes Act 1973 s 25G(1)-(3) or the Civil Partnership Act 2004 Sch 5 paras 34B-36 (see PARAS 485, 526, 567). In exercise of the power so conferred the Secretary of State made the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, and the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920: see PARA 487 et seq.

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(vi) Financial Relief following Death of Former Spouse or Civil Partner

538. Effect of death of parties.

The right to apply for secured periodical payments after a decree absolute or dissolution order is not a cause of action which survives¹ against a deceased respondent's estate². Further, the survival of both parties to a marriage (or, presumably, a civil partnership) is a prerequisite to the commencement of proceedings for the variation of a settlement³; but an order for secured periodical payments made for a wife, civil partner or child in proceedings for divorce, dissolution, nullity or judicial or legal separation, or for maintenance on proof of failure to provide reasonable maintenance, may be varied, after the death of the person liable to make payments, where application is made within six months from the date when representation is first taken out, either at the instance of that person's personal representatives or against them⁴. If the amount received by the person entitled to payments since the death exceeds that which is reasonable, in the changed circumstances resulting from the death, for him or her to have received, an order for the repayment of the excess may be made⁵. In the absence of an order directing security for periodical payments, the court has no jurisdiction to order a person's personal representatives to make payments for his children after his death⁶.

¹ The provisions of the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814) do not apply: see the cases cited in notes 2, 3.

² *Dipple v Dipple* [1942] P 65, [1942] 1 All ER 234; *Sugden v Sugden* [1957] P 120, [1957] 1 All ER 300, CA (order for maintenance of children payable 'until further order'; wife claimed from husband's executrix arrears accrued after death of husband and sought declaration that executrix was liable to continue payment; it was held that, on a true construction of the order, the obligation ended on the death of the husband). Unless the death is strictly proved, the decree will be made absolute (or, presumably, in the case of a civil partnership the order will be made final): *Dering v Dering and Blakely* (1868) LR 1 P & D 531.

³ *D'Este v D'Este* [1973] Fam 55 at 61, sub nom *D(J) v D(S)* [1973] 1 All ER 349 at 354.

⁴ See the Matrimonial Causes Act 1973 s 31(6)-(9); the Civil Partnership Act 2004 Sch 5 paras 53, 54, 59-62; and PARAS 474, 550, 567-569.

⁵ See the Matrimonial Causes Act 1973 s 33; the Civil Partnership Act 2004 Sch 5 para 64; and PARA 573.

⁶ *Sugden v Sugden* [1957] P 120 at 135, [1957] 1 All ER 300 at 302, CA per Denning LJ and at 137, 304 per Hodson LJ; *Hinde v Hinde* [1953] 1 All ER 171, [1953] 1 WLR 175, CA.

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539. Making payments from deceased's estate.

If the court is satisfied that the disposition of a deceased's estate effected by his will, or by the law relating to intestacy, or the combination of the two, is not such as to make reasonable financial provision for that person's spouse or civil partner, or former spouse or civil partner, or for a child of the family, it may, on the application of or on behalf of the affected party, make one or more of a number of orders for the purpose of making good the insufficiency¹. Such orders may require the making of periodical or lump sum payments out of the deceased's estate², the transfer or settlement of property comprised in the estate³, or the variation of settlements entered into by the deceased in anticipation or during the subsistence of the marriage or civil partnership⁴. Financial relief may be granted pursuant to these provisions where a party to a marriage or civil partnership dies while proceedings for financial relief following divorce, dissolution, nullity or judicial or legal separation are pending⁵, and may also be granted as part of an application for the variation of a secured periodical payments order or a maintenance agreement⁶.

1 See the Inheritance (Provision for Family and Dependents) Act 1975 ss 1, 2; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692.

2 See the Inheritance (Provision for Family and Dependents) Act 1975 s 2(1)(a), (b); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 691.

3 See the Inheritance (Provision for Family and Dependents) Act 1975 s 2(1)(c)-(e); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 691.

4 See the Inheritance (Provision for Family and Dependents) Act 1975 s 2(1)(f), (g); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 691.

5 See the Inheritance (Provision for Family and Dependents) Act 1975 ss 14, 14A; and PARA 540. The right to apply for relief in these circumstances may, however, be restricted: see ss 15, 15ZA; and PARA 882.

6 See the Inheritance (Provision for Family and Dependents) Act 1975 ss 18, 18A; and PARA 541.

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540. Application for financial provision or property adjustment order where financial relief not previously granted.

Where:

- 628 (1) a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, or a dissolution order, nullity order, separation order or presumption of death order has been made in relation to a civil partnership¹;
- 629 (2) one of the parties to the marriage or civil partnership² dies within 12 months from the date on which the order was made³; and
- 630 (3) either an application for a financial provision order⁴ or a property adjustment order⁵ has not been made by the other party or such an application has been made but the proceedings on the application have not been determined at the time of the death of the deceased⁶,

then if an application for an order making good an inadequacy in the financial provision made for the surviving party following the death of the deceased⁷ is made by the surviving party, the court⁸ has power⁹, if it thinks it just to do so, to treat the surviving party as if the decree of divorce or nullity of marriage had not been made absolute, the decree of judicial separation had not been granted, or the dissolution, nullity, separation or presumption of death order had not been made, as the case may be¹⁰.

1 Inheritance (Provision for Family and Dependants) Act 1975 ss 14(1), 14A(1)(a) (s 14A added by the Civil Partnership Act 2004 Sch 4 para 20). Note that these provisions do not apply in relation to a decree of judicial separation or a separation order unless at the date of the death of the deceased the decree or order was in force and the separation was continuing: Inheritance (Provision for Family and Dependants) Act 1975 ss 14(2), 14A(3) (as so added).

2 As to the parties to a marriage or civil partnership for these purposes see PARA 534 note 4.

3 Inheritance (Provision for Family and Dependants) Act 1975 ss 14(1), 14A(1)(b) (as added: see note 1).

4 I.e. under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5) (see PARA 458 et seq).

5 I.e. under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9) (see PARA 499 et seq).

6 Inheritance (Provision for Family and Dependants) Act 1975 ss 14(1), 14A(1)(c) (as added: see note 1).

7 I.e. an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2: see PARA 539; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692. For the power of the court to order that the surviving party is not to be entitled to apply for an order under s 2 see ss 15, 15ZA; and PARA 882. As to overseas divorces, dissolutions etc see ss 15A, 15B; and PARA 534.

8 As to the meaning of 'court' see PARA 534 note 2.

9 le notwithstanding anything in the Inheritance (Provision for Family and Dependants) Act 1975 s 1 or s 3 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 665 et seq, 671 et seq).

10 Inheritance (Provision for Family and Dependants) Act 1975 ss 14(1), 14A(2) (as added: see note 1).

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541. Application for variation to be accompanied by order for financial provision.

Where:

- 631 (1) a person against whom a secured periodical payments order was made¹ has died and an application is made² for the variation or discharge of that order or for the revival of the operation of any suspended provision of the order³; or
- 632 (2) a party to a maintenance agreement⁴ has died and an application is made⁵ for the alteration⁶ of the agreement⁷,

the court⁸ has power⁹ to direct that the application¹⁰ be deemed to have been accompanied by an application for an order¹¹ making good an inadequacy in the financial provision made for the surviving party following the death of the deceased¹².

1 Ie under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 (see PARA 467 et seq).

2 Ie under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 (see PARA 474).

3 Inheritance (Provision for Family and Dependants) Act 1975 ss 18(1)(a), 18A(1)(a) (s 18A added by the Civil Partnership Act 2004 Sch 4 para 25).

4 Ie a maintenance agreement (within the meaning of the Matrimonial Causes Act 1973 s 34 or the Civil Partnership Act 2004 Sch 5 Pt 13 (paras 66-73) (see PARA 697)) which provides for the continuation of payments under the agreement after the death of one of the parties: Inheritance (Provision for Family and Dependants) Act 1975 ss 18(1)(b), 18A(1)(b) (as added: see note 3).

5 Ie under the Matrimonial Causes Act 1973 s 36(1) or the Civil Partnership Act 2004 Sch 5 para 73 (see PARA 701).

6 Ie under the Matrimonial Causes Act 1973 s 35 or the Civil Partnership Act 2004 Sch 5 para 69 (see PARA 700 et seq).

7 Inheritance (Provision for Family and Dependants) Act 1975 ss 18(1)(b), 18A(1)(b) (as added: see note 3).

8 As to the meaning of 'court' see PARA 534 note 2.

9 Ie unless an order made under the Inheritance (Provision for Family and Dependants) Act 1975 s 15(1) or s 15ZA(1) (see PARA 882) is in force with respect to a spouse or civil partner, in which case the court may not give the direction referred to in the text with respect to any application made under the Matrimonial Causes Act 1973 s 31(6) or s 36(1) or the Civil Partnership Act 2004 Sch 5 para 60 or Sch 5 para 73 (see PARAS 474, 701) by that spouse or civil partner on the death of the other spouse or civil partner: Inheritance (Provision for Family and Dependants) Act 1975 ss 18(3), 18A(3) (as added: see note 3).

10 Ie the application under the Matrimonial Causes Act 1973 s 31(6) or s 36(1) or under the Civil Partnership Act 2004 Sch 5 para 60 or Sch 5 para 73.

11 Ie an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2: see PARA 539; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692. For the power of the court to order that the surviving party is not to be entitled to apply for an order under s 2 see ss 15, 15ZA; and PARA 882. As to overseas divorces, dissolutions etc see ss 15A, 15B; and PARA 534.

12 Inheritance (Provision for Family and Dependants) Act 1975 ss 18(1), 18A(1) (as added: see note 3). Where the court gives such a direction it also has power, in the proceedings on the application under the Matrimonial Causes Act 1973 s 31(6) or s 36(1) or the Civil Partnership Act 2004 Sch 5 para 60 or Sch 5 para 73, to make any order which the court would have had power to make under the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 if the application under the Matrimonial Causes Act 1973 s 31(6) or s 36(1) or the Civil Partnership Act 2004 Sch 5 para 60 or Sch 5 para 73 had been made jointly with an application for an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2: ss 18(2), 18A(2) (as so added). The court also has power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under the Inheritance (Provision for Family and Dependants) Act 1975 in the case of an application for an order under s 2: ss 18(2), 18A(2) (as so added)

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(2) FINANCIAL PROVISION DURING SUBSISTENCE OF MARRIAGE OR CIVIL PARTNERSHIP

(i) Powers of the High Court

542. Failure to provide reasonable maintenance.

Either party to a marriage or a subsisting civil partnership may apply to the court¹ for an order on the ground that the other party:

- 633 (1) has failed to provide reasonable maintenance for the applicant²; or
- 634 (2) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family³.

The court must not, however, entertain such an application unless:

- 635 (a) the applicant or the respondent is domiciled⁴ in England and Wales on the date of the application⁵;
- 636 (b) the applicant has been habitually resident⁶ there throughout the period of one year ending with that date⁷; or
- 637 (c) the respondent is resident there on that date⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 27(1)(a) (s 27(1) substituted by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(1)); Civil Partnership Act 2004 Sch 5 para 39(1)(a). Maintenance which was initially reasonable may subsequently become unreasonable due to changes in circumstances: see eg *Dowell v Dowell* [1952] 2 All ER 141, DC. As to the matters to which the court is to have regard see PARA 589; as to the orders which may be made see PARA 543 et seq; as to the procedure on such an application see PARA 886 et seq.

Formerly (ie under the Matrimonial Causes Act 1973 s 27(1) as originally enacted), either party to a marriage could apply to the court for an order for financial provision where the other party had wilfully neglected to maintain his or her spouse or any child of the family. Application might be so made on the ground that the husband had wilfully neglected: (1) to provide reasonable maintenance for the applicant; or (2) to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family: see s 27(1)(a) (as originally enacted). Where the wife was the respondent, the application might be made on the ground that she had wilfully neglected to provide, or to make a proper contribution towards, reasonable maintenance: (a) for the applicant in a case where, by reason of the impairment of the applicant's earning capacity through age, illness or disability of mind or body, and having regard to any resources of the applicant and the respondent respectively which were, or should properly be made, available for the purpose, it was reasonable in all the circumstances to expect the respondent so to provide or contribute; or (b) for any child of the family: see s 27(1)(b) (as originally enacted). For cases decided under s 27(1) (as originally enacted) see *Brannan v Brannan* [1973] Fam 120, [1973] 1 All ER 38, DC (wilfulness did not connote any malice or wickedness; the misconduct, if it was appropriate to use that word, consisted only in the failure to pay to the wife sums which, in the opinion of the court, were in all the circumstances sufficient for her reasonable maintenance and support; the wilfulness amounted to nothing more than this, that the husband knew what he was doing and intended to do what he was doing; the fact that the husband had a good defence to desertion did not necessarily or inevitably mean that he had an answer to wilful neglect to maintain); *Le Roy-Lewis v Le Roy-Lewis* [1955] P 1, [1954] 3 All ER 57; *Ridley v Ridley* [1953] P 150, [1953] 1 All ER 798; *Scott v Scott* [1951] P 245, [1951] 1 All ER 216; *Caras v*

Caras [1955] 1 All ER 624n, [1955] 1 WLR 254; *Jones v Jones* [1959] P 38, [1958] 3 All ER 410, DC; *Lilley v Lilley* [1960] P 158 at 169, [1959] 3 All ER 283, CA.

As to the duty to maintain at common law (now largely superseded by statute) see PARA 216.

3 Matrimonial Causes Act 1973 s 27(1)(b) (as substituted: see note 2); Civil Partnership Act 2004 Sch 5 para 39(1)(b). As to the meaning of 'child of the family' see PARA 477 note 3.

4 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

5 Matrimonial Causes Act 1973 s 27(2)(a) (s 27(2) amended by the Domicile and Matrimonial Proceedings Act 1973 s 6(1)); Civil Partnership Act 2004 Sch 5 para 39(2)(a).

6 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59 et seq.

7 Matrimonial Causes Act 1973 s 27(2)(b) (as amended: see note 5); Civil Partnership Act 2004 Sch 5 para 39(2)(b).

8 Matrimonial Causes Act 1973 s 27(2)(c) (as amended: see note 5); Civil Partnership Act 2004 Sch 5 para 39(2)(c).

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543. Orders which may be made.

Where, on an application on the ground that the other party to the marriage or civil partnership has failed to provide reasonable maintenance for the applicant¹, the applicant satisfies the court² of any ground of complaint³, the court may make any one or more of the following orders:

- 638 (1) an order that the respondent is to make to the applicant such periodical payments, for such term, as may be specified in the order (a 'periodical payments order')⁴;
- 639 (2) an order that the respondent is to secure to the applicant, to the satisfaction of the court, such periodical payments, for such term, as may be so specified (a 'secured periodical payments order')⁵;
- 640 (3) an order that the respondent is to pay to the applicant such lump sum as may be so specified (an 'order for the payment of a lump sum')⁶;
- 641 (4) an order that the respondent is to make to such person as may be specified in the order for the benefit of the child to whom the application relates, or to that child, such periodical payments, for such term, as may be so specified (also a 'periodical payments order')⁷;
- 642 (5) an order that the respondent is to secure to such person as may be so specified for the benefit of that child, or to that child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified (also a 'secured periodical payments order')⁸;
- 643 (6) an order that the respondent is to pay to such person as may be so specified for the benefit of that child, or to that child, such lump sum as may be so specified (also an 'order for the payment of a lump sum')⁹.

No such order may be made in favour of a child who has attained the age of 18¹⁰ unless he is in full time education¹¹ or there are special circumstances which justify the making of an order¹².

1 Ie under the Matrimonial Causes Act 1973 s 27(1), (2) or the Civil Partnership Act 2004 Sch 5 para 39(1), (2): see PARA 542.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Ie any ground mentioned in the Matrimonial Causes Act 1973 s 27(1), (2) or the Civil Partnership Act 2004 Sch 5 para 39(1), (2): see PARA 542.

4 Matrimonial Causes Act 1973 ss 21(1)(a), 27(6)(a) (s 27(6) amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(3)); Civil Partnership Act 2004 Sch 5 paras 39(4), 41(1)(a), (2), 80(1)(a). As to the duration of periodical payments orders and secured periodical payments orders see PARA 546; as to the property that may be the subject of a secured periodical payments order see PARA 547. See also PARA 548 (deed to secure payments), PARA 549 (unfair pressure on payer) and PARA 550 (death of person paying).

5 Matrimonial Causes Act 1973 ss 21(1)(b), 27(6)(b) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 paras 41(1)(b), 80(1)(b). As to secured periodical payments orders in this context see further note 4.

6 Matrimonial Causes Act 1973 ss 21(1)(c), 27(6)(c) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 paras 41(1)(c), 80(1)(c). An order for the payment of a lump sum may (ie without prejudice to the Matrimonial Causes Act 1973 s 27(6)(c) or (f) or the Civil Partnership Act 2004 Sch 5 para 41(1)(c) or (f)) be

made for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the applicant or any child of the family to whom the application relates before the making of the application to be met; may provide for the payment of that sum by instalments of such amount as may be specified in the order; and may require the payment of the instalments to be secured to the satisfaction of the court: Matrimonial Causes Act 1973 s 27(7); Civil Partnership Act 2004 Sch 5 para 42. In connection with the payment of a lump sum see also PARA 478 (adjournment of proceedings) and PARA 483 (Duxbury calculations). As to the meaning of 'child of the family' see PARA 477 note 3.

7 Matrimonial Causes Act 1973 ss 21(1)(a), 27(6)(d) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 paras 41(1)(d), 80(1)(a). As to the meaning (for the purposes of the Matrimonial Causes Act 1973) of 'child' see PARA 477 note 3. As to periodical payments orders in this context see further note 4.

8 Matrimonial Causes Act 1973 ss 21(1)(b), 27(6)(e) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 paras 41(1)(e), 80(1)(b). As to secured periodical payments orders in this context see further note 4.

9 Matrimonial Causes Act 1973 ss 21(1)(c), 27(6)(f) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 paras 41(1)(f), 80(1)(c). As to a lump sum order so made see further note 6.

10 Matrimonial Causes Act 1973 ss 27(6), 29(1) (s 27(6) as amended: see note 4); Civil Partnership Act 2004 Sch 5 paras 45, 49(1)(c).

11 Ie unless it appears to the court that the child is, or will be, or if an order were made without complying with the Matrimonial Causes Act 1973 s 29(1) or the Civil Partnership Act 2004 Sch 5 para 49(1)(a) (see the text and note 10) would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment: Matrimonial Causes Act 1973 s 29(3)(a); Civil Partnership Act 2004 Sch 5 para 49(5)(a). As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing* (*Downing intervening*) [1976] Fam 288, [1976] 3 All ER 474.

12 Matrimonial Causes Act 1973 s 29(3)(b); Civil Partnership Act 2004 Sch 5 para 49(5)(b). Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

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544. Matters to which the court is to have regard.

In deciding whether to exercise its power to make an order for the provision of maintenance to a party to a marriage or a subsisting civil partnership¹, and, if so, in what manner, the court² is to have regard to certain matters³. Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case⁴.

1 le under the Matrimonial Causes Act 1973 s 27(1), (2) or the Civil Partnership Act 2004 Sch 5 para 39(1), (2): see PARA 542.

2 As to the meaning of 'court' see PARA 346 note 2.

3 See the Matrimonial Causes Act 1973 s 27(3), (3A), (3B); the Civil Partnership Act 2004 Sch 5 paras 43, 44; and PARAS 589-590, 597-598.

4 See PARA 595.

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545. Interim orders.

Where, on an application on the ground that the other party to the marriage or civil partnership has failed to provide reasonable maintenance for the applicant¹, it appears to the court² that the applicant or any child of the family³ to whom the application relates is in immediate need of financial assistance, but it is not yet possible to determine what order, if any, should be made on the application, the court may make an interim order for maintenance, that is to say, an order requiring the respondent to make to the applicant until the determination of the application such periodical payments as the court thinks reasonable⁴.

1 le under the Matrimonial Causes Act 1973 s 27(1), (2) or the Civil Partnership Act 2004 Sch 5 para 39(1), (2): see PARA 542.

2 As to the meaning of 'court' see PARA 346 note 2.

3 As to the meaning of 'child of the family' see PARA 477 note 3.

4 Matrimonial Causes Act 1973 s 27(5); Civil Partnership Act 2004 Sch 5 paras 39(3), 40.

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546. Duration of continuing periodical payments orders and secured periodical payments orders.

The term to be specified in a periodical payments order or a secured periodical payments order¹ in favour of a party to a marriage or civil partnership is to be such term as the court² thinks fit, except that the term must not begin before the date of the making of an application for the order and must be so defined as not to extend beyond the death of either of the parties³.

The term to be specified in a periodical payments or secured periodical payments order in favour of a child⁴ must not extend beyond the date of the child's eighteenth birthday⁵, unless he is in full time education⁶ or there are special circumstances which justify the making of an order⁷. The term may begin with the date of the making of an application for the order in question or any later date⁸, subject to the proviso that a term beginning on such date must not extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age⁹ unless the court considers that in the circumstances of the case the welfare of the child requires that it should extend to a later date¹⁰. Alternatively, where a maintenance calculation¹¹ (the 'current calculation') is in force with respect to a child¹² and an application is made¹³ for a periodical payments or secured periodical payments order in favour of that child¹⁴ before the end of the period of six months beginning with the making of the current calculation¹⁵, the term to be specified in any such order made on that application may be expressed to begin on, or at any time after, whichever is the later of the date six months before the application is made¹⁶ and the date on which the current calculation took effect or, where successive maintenance calculations have been continuously in force with respect to a child, on which the first of those calculations took effect¹⁷. If a maintenance calculation ceases to have effect¹⁸ and an application is made, before the end of the period of six months beginning with the date on which the calculation so ceased¹⁹, for a periodical payments or secured periodical payments order in favour of a child with respect to whom that maintenance calculation was in force immediately before it ceased to have effect, the term to be specified in any such order made on that application may begin with the date on which that maintenance calculation ceased to have effect or any later date²⁰.

1 As to the meanings of 'periodical payments order' and 'secured periodical payments order', and as to the making of a such orders, see PARA 543.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Matrimonial Causes Act 1973 s 28(1)(a) (s 28(1) amended by the Matrimonial and Family Proceedings Act 1984 s 5(1); and by the Civil Partnership Act 2004 Sch 27 para 43(1), (2)); Civil Partnership Act 2004 Sch 5 para 47(1), (2)(a), (3)(a).

Where a periodical payments order in favour of a party to a marriage or civil partnership is made otherwise than on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order relating to a civil partnership (see PARA 542 et seq), and the marriage or civil partnership in question is subsequently dissolved or annulled but the order continues in force, the order ceases to have effect, notwithstanding anything in it, on the remarriage, or the formation of a subsequent civil partnership or marriage, by that party, except in relation to any arrears due under it on the date of the remarriage, marriage or formation of the civil partnership: Matrimonial Causes Act 1973 s 28(2) (amended by the Civil Partnership Act 2004 Sch 27 para 43(3)); Civil Partnership Act 2004 Sch 5 para 47(6). As to references to remarriage, to a subsequent marriage and to the formation of a subsequent civil partnership see PARA 452 note 1.

- 4 As to the meaning (for the purposes of the Matrimonial Causes Act 1973) of 'child' see PARA 477 note 3.
- 5 Matrimonial Causes Act 1973 s 29(2)(b); Civil Partnership Act 2004 Sch 5 para 49(3)(b).
- 6 Ie unless it appears to the court that the child is, or will be, or if an order were made without complying with the Matrimonial Causes Act 1973 s 29(2)(b) or the Civil Partnership Act 2004 Sch 5 para 49(3)(b) (see the text and note 5) would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment: Matrimonial Causes Act 1973 s 29(3)(a); Civil Partnership Act 2004 Sch 5 para 49(5)(a). As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing (Downing intervening)* [1976] Fam 288, [1976] 3 All ER 474.
- 7 Matrimonial Causes Act 1973 s 29(3)(b); Civil Partnership Act 2004 Sch 5 para 49(5)(b). Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.
- 8 Matrimonial Causes Act 1973 s 29(2); Civil Partnership Act 2004 Sch 5 para 49(2)(a).
- 9 As to compulsory school age see the Education Act 1996 s 8; and **EDUCATION** vol 15(1) (2006 Reissue) PARA 15.
- 10 Matrimonial Causes Act 1973 s 29(2)(a) (amended by the Matrimonial and Family Proceedings Act 1984 s 5(4); and the Education Act 1996 Sch 37 para 136); Civil Partnership Act 2004 Sch 5 para 49(3)(a), (4).
- 11 For these purposes 'maintenance calculation' has the same meaning as it has in the Child Support Act 1991 by virtue of s 54 as read with any regulations in force thereunder (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 554); Matrimonial Causes Act 1973 s 52(1) (definition added by SI 1993/623; and amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 3); Civil Partnership Act 2004 Sch 5 para 49(11).
- 12 Matrimonial Causes Act 1973 s 29(5)(a) (s 29(5)-(8) added by SI 1993/623; amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 3); Civil Partnership Act 2004 Sch 5 para 49(7)(a).
- 13 Ie under the Matrimonial Causes Act 1973 Pt II (ss 25-40A) or the Civil Partnership Act 2004 Sch 5 (see PARA 450 et seq).
- 14 Ie in accordance with the Child Support Act 1991 s 8 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 556, 560).
- 15 Matrimonial Causes Act 1973 s 29(5)(b) (as added and amended: see note 12); Civil Partnership Act 2004 Sch 5 para 49(7)(b).
- 16 Matrimonial Causes Act 1973 s 29(2), (6)(a) (as added and amended: see note 12); Civil Partnership Act 2004 Sch 5 para 49(2)(b), (8)(a).
- 17 Matrimonial Causes Act 1973 s 29(6)(b) (as added and amended: see note 12); Civil Partnership Act 2004 Sch 5 para 49(8)(b).
- 18 Ie by or under any provision of the Child Support Act 1991.
- 19 Matrimonial Causes Act 1973 s 29(8) (as added and amended: see note 12); Civil Partnership Act 2004 Sch 5 para 49(10).
- 20 Matrimonial Causes Act 1973 s 29(7) (as added and amended: see note 12); Civil Partnership Act 2004 Sch 5 para 49(9).

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547. Property that may be the subject of a secured periodical payments order.

When the court intends to make a secured periodical payments order¹ it will usually indicate that intention to the parties and invite them to agree on the asset which is to provide the security. The appropriate security will usually be stocks, shares or real property. It will usually be unduly onerous to order that the whole of one party's capital assets should provide the security². If the parties cannot agree which property is to provide the security, the court will do so. It is, however, wrong to delegate that task to conveyancing counsel³, although, once the intentions of the court are determined, it may direct that conveyancing counsel draft any necessary documents in order to put that intention into effect⁴. The court will rarely require reversionary interests to provide the necessary security⁵.

1 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 543.

2 *Barker v Barker* [1952] P 184, [1952] 1 All ER 1128, CA.

3 *Barker v Barker* [1952] P 184, [1952] 1 All ER 1128, CA.

4 See PARA 548.

5 *Allison v Allison* [1927] P 308.

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548. Deed to secure payments.

Where the court¹ decides to make a financial provision order requiring any payments to be secured², it may direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties³. The court may order the lodgment of documents for the purpose of settling the deed⁴. Where a person refuses or neglects to execute a deed securing payments as ordered by the court, the court may order that execution be effected by such person as it nominates for that purpose, and a deed so executed operates as if executed by the party originally directed to execute it⁵. The court has power to order the rectification of a deed⁶ and to vary it⁷.

1 As to the meaning of 'court' see PARA 346 note 2.

2 See PARA 543.

3 Matrimonial Causes Act 1973 s 30(a); Civil Partnership Act 2004 Sch 5 para 76(1)(a), (2).

4 *Bartlett v Bartlett* (1918) 34 TLR 518.

5 See the Supreme Court Act 1981 s 39; the County Courts Act 1984 s 38; and PARA 641. See also *Howarth v Howarth* (1886) 11 PD 68 at 95, CA; cf *De Ricci v De Ricci* [1891] P 378 (application arising out of a compromise, which had become a rule of court).

6 *Burroughes v Abbott* [1922] 1 Ch 86; cf *Philipson v Philipson* (1933) 148 LT 455. Except for fraud, such a deed is irrevocable: *Bradley v Bradley* (1882) 7 PD 237.

7 See the Matrimonial Causes Act 1973 s 31(3); the Civil Partnership Act 2004 Sch 5 para 45(3); and PARA 567.

UPDATE

548 Deed to secure payments

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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549. Unfair pressure on payer.

The making of an order for an amount or amounts larger than the circumstances of the parties warrant, so as to bring pressure on the payer to do something he not unreasonably refuses to do, is wrong in principle¹; it has been held that where the trustees of a settlement had a discretion to make payments to a husband from trust funds and, in the exercise of that discretion, did not make such payments, the court could not order the husband to pay maintenance to the wife amounting to most of his income in order to bring pressure to bear on the trustees to exercise their discretion in a way they did not wish to exercise it². The court may, however, make orders that encourage trustees to enhance the means of the maintaining party, so long as no improper pressure is brought to bear on the trustees³.

1 *Wakeford v Wakeford* [1953] 2 All ER 827, [1953] 1 WLR 1222, DC.

2 *Howard v Howard* [1945] P 1, [1945] 1 All ER 91, CA; *B v B (financial provision)* (1982) 3 FLR 298, 12 Fam Law 92, CA. See also *Browne v Browne* [1989] 1 FLR 291, [1989] Fam Law 147, CA (court wrong to exert pressure on a discretionary trustee; court must look at reality of situation).

3 *Thomas v Thomas* [1996] 2 FCR 544, [1995] 2 FLR 668, CA.

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550. Death of person paying.

Any periodical payments order in favour of a child¹ ceases to have effect, notwithstanding anything in the order, on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of the death². Where a secured periodical payments order is made³, the party in favour of whom the order is made has an enforceable claim which is maintainable after the death of the other party against that party's estate, whether or not the effect of the order is to create a charge on property of that other party, and the order may be enforced against his or her personal representatives; the court may order the personal representatives to execute the necessary deed⁴.

The right to apply for an order for secured periodical payments is, however, not a cause of action which survives⁵ against a person's estate⁶. It has been held that an application by a personal representative of the party against whom an order was made to extinguish or diminish periodical payments payable under the order stands on the same footing⁷.

Where the person liable to make payments under a secured periodical payments order has died, an application relating to that order may be made by the person entitled to payments under the order or by the personal representatives of the deceased person, but, except with the permission of the court, no such application may be made after the end of the period of six months from the date on which representation in regard to the estate of that person is first taken out⁸.

The personal representatives of a deceased person against whom a secured periodical payments order was made are not liable for having distributed any part of the estate of the deceased after the expiration of the period of six months on the ground that they ought to have taken into account the possibility that the court might permit such an application to be made after that period by the person entitled to payments under the order; but any power to recover any part of the estate so distributed arising by virtue of the making of an order to vary, discharge, suspend or revive is not thereby prejudiced⁹.

1 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 543. As to the meaning (for the purposes of the Matrimonial Causes Act 1973) of 'child' see PARA 477 note 3.

2 Matrimonial Causes Act 1973 s 29(4); Civil Partnership Act 2004 Sch 5 para 49(6).

3 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order in this context, see PARA 543.

4 *Hyde v Hyde* [1948] P 198, [1948] 1 All ER 362; *Mosey v Mosey and Barker* [1956] P 26, [1955] 2 All ER 391.

5 As to the survival of causes of action after death generally see the Law Reform (Miscellaneous Provisions) Act 1934 s 1; PARAS 684-686; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814.

6 *Dipple v Dipple* [1942] P 65, [1942] 1 All ER 234.

7 *Mosey v Mosey and Barker* [1956] P 26, [1955] 2 All ER 391.

8 Matrimonial Causes Act 1973 s 31(6) (amended by the Matrimonial Homes and Property Act 1981 s 8(2)(b)); Civil Partnership Act 2004 Sch 5 para 60(1)-(3). As to the matters to which the court is to have regard in

exercising its powers see the Matrimonial Causes Act 1973 s 31(7); the Civil Partnership Act 2004 Sch 5 para 59; and PARA 568. In considering for these purposes the question when representation was first taken out, a grant limited to settled land or to trust property must be left out of account, and a grant limited to real estate or to personal estate must be left out of account, unless a grant limited to the remainder of the estate has previously been made or is made at the same time: Matrimonial Causes Act 1973 s 31(9); Civil Partnership Act 2004 Sch 5 para 60(6).

Where a person against whom a secured periodical payments order was so made has died and an application is made under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 for the variation or discharge of that order or for the revival of the operation of any provision thereof which has been suspended, the court has power to direct that the application made under either of those provisions is to be deemed to have been accompanied by an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692): ss 18(1)(a), 18A(1)(a) (s 18A added by the Civil Partnership Act 2004 Sch 4 para 25). Where the court gives such a direction, it has power, in the proceedings on the application under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 to make any order which the court would have had power to make under the provisions of the Inheritance (Provision for Family and Dependents) Act 1975 if the application made under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 had been made jointly with an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2; and the court has power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under the Inheritance (Provision for Family and Dependents) Act 1975 in the case of an application under s 2: ss 18(2), 18A(2) (s 18A(2) as so added). Where an order made under s 15(1) or s 15ZA(1) (see PARA 882) is in force with respect to a party to a marriage or civil partnership, the court may not give a direction under s 18(1) or s 18A(1) with respect to any application under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60 by that party on the death of the other party: Inheritance (Provision for Family and Dependents) Act 1975 ss 18(3), 18A(3) (s 18A(3) as so added).

Where an application for an order under s 2 is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order, then, in the proceedings on that application, the court has power, if an application is duly made by that person or by the personal representative of the deceased, to vary or discharge that order or to revive the operation of any provision thereof which has been suspended: see s 16; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 695.

9 Matrimonial Causes Act 1973 s 31(8); Civil Partnership Act 2004 Sch 5 para 60(4), (5).

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551. Child support.

Where a child has an absent or non-resident parent, each of those parents is responsible for maintaining him and is to be taken to have met this by making periodical payments of maintenance with respect to the child of such amount, and at such intervals, as may be determined in accordance with the provisions of the Child Support Act 1991¹.

Where a maintenance calculation requires the making of periodical payments², it is the duty of the non-resident parent with respect to whom the calculation was made to make those payments³. The court may make an order under which one party is to make periodical payments to the other, such payments to be reduced pro tanto by any sums payable as child support maintenance pursuant to the Child Support Act 1991 (a 'Segal order'); however, in order to preserve the legitimacy of such an order it is crucial that the order contains a substantial ingredient of spousal support⁴.

1 See the Child Support Act 1991 ss 1(1), (2), 3(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 555.

2 As to periodical payments and secured periodical payments orders see PARA 543.

3 See the Child Support Act 1991 s 1(3); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 555.

4 *Dorney-Kingdom v Dorney-Kingdom* [2000] 3 FCR 20, [2000] 2 FLR 855, CA.

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552. Alienation and bankruptcy.

Secured periodical payments¹ are alienable and chargeable, unless the deed securing them provides against alienation². Periodical payments³ under an order of the court in matrimonial or civil partnership proceedings cannot be assigned nor can they be released or taken in execution⁴. Even though the right to arrears of periodical payments may be assignable⁵, the court is unlikely to enforce arrears in favour of an assignee⁶. Neither arrears of such periodical payments nor future payments constitute a debt or liability for purposes of insolvency⁷, and a debt provable in the bankruptcy is, therefore, not created⁸. A spouse or civil partner remains liable under a periodical payments order⁹ notwithstanding his or her bankruptcy and subsequent discharge¹⁰.

A deed of assignment of rights under a lump sum order¹¹ is valid as a contract for valuable consideration to assign a future chose in action, the essence of a lump sum order being that it carries all the incidents of outright ownership¹². A lump sum order is a debt provable in the bankruptcy of the person against whom the order has been made¹³.

1 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 543.

2 *Harrison v Harrison* (1888) 13 PD 180, CA; *Maclurcan v Maclurcan* (1897) 77 LT 474, CA (wife, after accepting sum for releasing husband, applied to court to set aside the deed of arrangement); *Hyde v Hyde* [1948] P 198, [1948] 1 All ER 362; *Mosey v Mosey and Barker* [1956] P 26 at 41, [1955] 2 All ER 391 at 394.

3 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 543.

4 *Re Robinson* (1884) 27 ChD 160, CA; *Watkins v Watkins* [1896] P 222, CA; *Campbell v Campbell* [1922] P 187. Cf the Matrimonial Causes Act 1973 s 39; the Civil Partnership Act 2004 Sch 5 para 77; and PARAS 505, 509. For an agreement between a wife and her solicitors assigning to the latter her rights in any financial provision and property adjustment orders which she might obtain in the proceedings, excluding periodical payments, in order to meet the solicitor's bill see *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116 (cited in PARA 484 note 1).

5 *Watkins v Watkins* [1896] P 222 at 228, CA per Lindley LJ.

6 *Re Robinson* (1884) 27 ChD 160, CA.

7 Ie within the meaning of the Insolvency Rules 1986, SI 1986/1925, r 12.3(2): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491.

8 *Re Rice, ex p Rice* (1864) 10 LT 103; cf *Victor v Victor* [1912] 1 KB 247, CA; *McQuiban v McQuiban* [1913] P 208 (payments under separation deeds provable).

9 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

10 *Linton v Linton* (1885) 15 QBD 239, CA; *Re Hawkins, ex p Hawkins* [1894] 1 QB 25; *Kerr v Kerr* [1897] 2 QB 439; *James v James* [1964] P 303, [1963] 2 All ER 465, DC. As to arrears under a separation deed see, however, *Victor v Victor* [1912] 1 KB 247, CA; *McQuiban v McQuiban* [1913] P 208. As to the respective rights of a bankrupt and her trustee in bankruptcy, where maintenance is payable under a deed, see *Re Tennant's Application* [1956] 2 All ER 753, [1956] 1 WLR 874, CA; as to the respective rights of sequestrators and a trustee in bankruptcy, where it is sought to enforce arrears of maintenance under an order see *Coles v Coles* [1957] P 68, [1956] 3 All ER 542; and as to the effect of a husband's undertakings in an order regarding the

matrimonial home when a bankruptcy order was made against him see *Re Solomon (a bankrupt), ex p Trustee of Property of Bankrupt v Solomon* [1967] Ch 573, sub nom *Re A Debtor, ex p Trustee v Solomon* [1966] 3 All ER 255.

11 As to the making of a lump sum order see PARA 543.

12 *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116 (rights assigned in favour of solicitors in consideration of the provision of legal services; agreement not champertous or otherwise contrary to public policy).

13 *Curtis v Curtis* [1969] 2 All ER 207, [1969] 1 WLR 422, CA.

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(ii) Powers of Magistrates' Courts

553. Orders for financial provision.

Either party to a marriage or civil partnership may apply to a magistrates' court¹ for an order for financial provision² on the ground that the other party:

- 644 (1) has failed to provide reasonable maintenance for the applicant³;
- 645 (2) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family⁴;
- 646 (3) has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent⁵; or
- 647 (4) has deserted the applicant⁶.

Where, on an application for an order for financial provision the applicant satisfies the court of any ground of application, the court may⁷ make any one or more of the following orders:

- 648 (a) an order that the respondent is to make to the applicant such periodical payments, and for such term, as may be specified in the order⁸;
- 649 (b) an order that the respondent is to pay to the applicant such lump sum as may be so specified⁹;
- 650 (c) an order that the respondent is to make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified¹⁰;
- 651 (d) an order that the respondent is to pay to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such lump sum as may be so specified¹¹.

If there is a child of the family who is under the age of 18, the court must not dismiss or make a final order on the application until it has decided whether to exercise any of its powers under the Children Act 1989¹² with respect to the child¹³.

1 As to the mode of application and procedure see PARAS 469, 894.

2 I.e. an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 paras 2, 3: see the text and notes 7-11.

3 Domestic Proceedings and Magistrates' Courts Act 1978 s 1(a) (s 1 amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 21); Civil Partnership Act 2004 Sch 6 para 1(1)(a). As to the duty to maintain at common law (now largely superseded by statute) see PARA 216.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 1(b) (as amended: see note 3); Civil Partnership Act 2004 Sch 6 para 1(1)(b). For these purposes 'child of the family', in relation to the parties to a marriage or civil partnership, means: (1) a child of both of those parties; and (2) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family: Domestic Proceedings and Magistrates' Courts Act 1978 s 88(1) (amended by the Children Act 1989 Sch 13 para 43); Civil Partnership Act 2004 Sch 6 para 48. 'Child', in relation to one or both of the parties to a marriage, includes a child whose father and mother were not married

to each other at the time of his birth: Domestic Proceedings and Magistrates' Courts Act 1978 s 88(1) (as so amended). The Domestic Proceedings and Magistrates' Courts Act 1978 also provides that 'local authority' means the council of a county (other than a metropolitan county), of a metropolitan district or of a London borough, or the Common Council of the City of London: s 88(1). As to the counties in England and the counties and county boroughs in Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 51 et seq.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 1(c) (as amended: see note 3); Civil Partnership Act 2004 Sch 6 para 1(1)(c). Where a person applies under these provisions for an order for financial provision under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 paras 2, 3 (see the text and notes 7-11), the magistrates, in deciding whether to make an order, should apply the same test as that applied by the court on a petition for divorce or dissolution under the Matrimonial Causes Act 1973 s 1(2)(b) or the Civil Partnership Act 2004 s 44(5)(a) (see PARA 347), namely whether any right-thinking person would conclude that the respondent has behaved in such a way that the applicant could not reasonably be expected to live with the respondent, taking into account the whole of the circumstances and the characters and personalities of the parties: *Bergin v Bergin* [1983] 1 All ER 905, [1983] 1 WLR 279, applying *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47, [1974] 2 All ER 766 and *O'Neill v O'Neill* [1975] 3 All ER 289, [1975] 1 WLR 1118, CA. As to the court's powers where the parties are living apart by agreement see PARA 556.

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 1(d) (as amended: see note 3); Civil Partnership Act 2004 Sch 6 para 1(1)(d). For these purposes, 'desertion' is constituted by similar acts and intentions as those required to found a petition on the basis of desertion under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004 (see PARA 363 et seq) but it is not necessary that the desertion should have continued for any specified period (see PARA 363), although the desertion in respect of which relief is sought must have commenced by the date when the application is made and must still be subsisting when the complaint is adjudicated on (*Williams v Williams* [1904] P 145, DC; *Irvin v Irvin* [1968] 1 All ER 271, [1968] 1 WLR 464, DC (resumption of cohabitation before the date of adjudication put an end to the wife's cause of complaint and she was not entitled to an order)).

7 The subject to the provisions of the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or, as the case may be, the Civil Partnership Act 2004 Sch 6: see PARA 553 et seq. As to the matters to which the court is to have regard in exercising its powers see PARA 568; and as to the making of interim orders see PARA 563. An order of limited duration may be made: *Khan v Khan* [1980] 1 All ER 497, [1980] 1 WLR 355, DC, approving dictum of Sir George Baker P in *Chesworth v Chesworth* (1973) 4 Fam Law 22, DC.

8 Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a); Civil Partnership Act 2004 Sch 6 paras 1(2), 2(1)(a), (4).

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(b); Civil Partnership Act 2004 Sch 6 para 2(1)(b). Without prejudice to the generality of the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(b), (d) or the Civil Partnership Act 2004 Sch 6 para 2(1)(b), (d), an order for the payment of a lump sum may be made for the purpose of enabling any liability or expenses reasonably incurred in maintaining the applicant, or any child of the family to whom the application relates, before the making of the order to be met: Domestic Proceedings and Magistrates' Courts Act 1978 s 2(2); Civil Partnership Act 2004 Sch 6 para 3. The amount of any lump sum required to be paid by an order under these provisions is not to exceed £1,000 or such larger amount as the Lord Chancellor may from time to time fix: Domestic Proceedings and Magistrates' Courts Act 1978 s 2(3) (amended by SI 1992/709; the Constitutional Reform Act 2005 Sch 4 para 96(1), (2), Sch 18); Civil Partnership Act 2004 Sch 6 para 2(2), (3); Magistrates' Courts (Increase of Lump Sums) Order 1988, SI 1988/1069, art 2. Lump sum payments may total more than this limit if they benefit the whole family and not one person only: *Burridge v Burridge* [1983] Fam 9, [1983] 3 All ER 80.

Since magistrates are expressly empowered to make a lump sum order against a respondent to enable the applicant to meet any liabilities or expenses reasonably incurred in maintaining the applicant or a child of the family, the exercise of that power is not limited either by implication or public policy to cases where the respondent has capital resources. Accordingly, provided that the magistrates have regard to the respondent's capacity to pay a lump sum out of income or potential income, they may make a lump sum order against the respondent despite the respondent's lack of capital resources: *Burridge v Burridge* [1983] Fam 9, [1983] 3 All ER 80.

10 Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(c); Civil Partnership Act 2004 Sch 6 para 2(1)(c).

11 Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(d); Civil Partnership Act 2004 Sch 6 para 2(1)(d). As to the making of lump sum orders see further note 9.

12 As to the Children Act 1989 see **CHILDREN AND YOUNG PERSONS**.

13 Domestic Proceedings and Magistrates' Courts Act 1978 s 8 (substituted by the Children Act 1989 Sch 13 para 36); Civil Partnership Act 2004 Sch 6 para 45.

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554. Orders for payments which have been agreed by the parties.

Either party to a marriage or a civil partnership may apply to a magistrates' court for an order on the ground that either the party making the application or the other party has agreed to make such financial provision¹ as may be specified in the application²; and the court on such an application may³, if:

652 (1) it is satisfied that the applicant or the respondent, as the case may be, has agreed to make that provision⁴; and

653 (2) it has no reason to think that it would be contrary to the interests of justice to exercise its powers under these provisions⁵,

order that the applicant or the respondent, as the case may be, is to make the financial provision specified in the application⁶.

A party to a marriage or civil partnership who has applied for an order for financial provision⁷ is not precluded at any time before the determination of that application from applying for an order for agreed payments⁸; but, if an order for agreed payments is made on the application of either party and either of them has also made an application for an order for financial provision, the application made for the order for financial provision is to be treated as if it had been withdrawn⁹.

1 For these purposes, 'financial provision' means one or more of:

90 (1) the making of periodical payments by one party to the other (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(a) (s 6 substituted by the Matrimonial and Family Proceedings Act 1984 s 10); Civil Partnership Act 2004 Sch 6 para 10(1)(a));

91 (2) the payment of a lump sum by one party to the other (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(b) (as so substituted); Civil Partnership Act 2004 Sch 6 para 10(1)(b));

92 (3) the making of periodical payments by one party to a child of the family or to the other party for the benefit of such a child (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(c) (as so substituted); Civil Partnership Act 2004 Sch 6 para 10(1)(c)); and

93 (4) the payment by one party of a lump sum to a child of the family or to the other party for the benefit of such a child (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(d) (as so substituted); Civil Partnership Act 2004 Sch 6 para 10(1)(d)),

and any reference to the financial provision specified in an application made under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1) or the Civil Partnership Act 2004 Sch 6 para 9 or specified by the court under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(5) or the Civil Partnership Act 2004 Sch 6 para 13 (see PARA 555) is a reference to either:

94 (a) the type of provision specified in the application or by the court, as the case may be (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2) (as so substituted); Civil Partnership Act 2004 Sch 6 para 10(2)(a));

95 (b) the amount so specified as the amount of any payment to be made thereunder (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2) (as so substituted); Civil Partnership Act 2004 Sch 6 para 10(2)(b)); and

96 (c) in the case of periodical payments, to the term so specified as the term for which the payments are to be made (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2) (as so substituted); Civil Partnership Act 2004 Sch 6 para 10(2)(c)).

As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4. For the powers of magistrates' courts to make orders for financial provision see PARA 553.

2 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1) (as substituted: see note 1); Civil Partnership Act 2004 Sch 6 para 9(1).

3 Is subject to the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(3) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 12: see PARA 555.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1)(a) (as substituted: see note 1); Civil Partnership Act 2004 Sch 6 para 9(2)(a), (3).

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1)(b) (as substituted: see note 1); Civil Partnership Act 2004 Sch 6 para 9(2)(b).

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1) (as substituted: see note 1); Civil Partnership Act 2004 Sch 6 para 9(2). See *R v Chester Justices, ex p Holland* [1984] FLR 725, [1984] Fam Law 184 (order drawn up in terms other than those agreed by the parties); distinguished in *R v Brighton Magistrates' Court, ex p Budd* [1986] 1 FLR 426, [1986] Fam Law 134. As to the mode of application and procedure see PARAS 469, 894.

7 Is an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8): see PARA 553.

8 Is an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14).

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(4) (as substituted: see note 1); Civil Partnership Act 2004 Sch 6 para 14.

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555. Sufficiency of agreed payments.

Where the financial provision¹ specified in an application for an order for agreed payments² includes or consists of provision in respect of a child of the family³, the court must not make such an order unless it considers that the provision which the applicant or the respondent, as the case may be, has agreed to make in respect of that child provides for, or makes a proper contribution towards, the financial needs of the child⁴.

Where, on an application for an order for agreed payments, the court decides:

- 654 (1) that it would be contrary to the interests of justice to make an order for the making of the financial provision specified in the application⁵; or
- 655 (2) that any financial provision which the applicant or the respondent, as the case may be, has agreed to make in respect of a child of the family does not provide for, or make a proper contribution towards, the financial needs of that child⁶,

but is of the opinion:

- 656 (a) that it would not be contrary to the interests of justice to make an order for the making of some other financial provision specified by the court⁷; and
- 657 (b) that, in so far as that other financial provision contains any provision for a child of the family, it provides for, or makes a proper contribution towards, the financial needs of that child⁸,

then, if both the parties agree, the court may order that the applicant or the respondent, as the case may be, is to make that other financial provision⁹.

Where the respondent is not present or represented by counsel or solicitor at the hearing of an application for an order under these provisions, the court must not make an order unless there is produced to the court such evidence¹⁰ of:

- 658 (i) the consent of the respondent to the making of the order¹¹;
- 659 (ii) the financial resources of the respondent¹²; and
- 660 (iii) in a case where the financial provision specified in the application includes or consists of provision in respect of a child of the family to be made by the applicant to the respondent for the benefit of the child or to the child, the financial resources of the child¹³.

If there is a child of the family who is under the age of 18, the court must not dismiss or make a final order on the application until it has decided whether to exercise any of its powers under the Children Act 1989¹⁴ with respect to the child¹⁵.

1 As to the meaning of 'financial provision' see PARA 554 note 1.

2 le an application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1) or the Civil Partnership Act 2004 Sch 6 para 9: see PARA 554.

3 As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(3) (s 6 substituted by the Matrimonial and Family Proceedings Act 1984 s 10); Civil Partnership Act 2004 Sch 6 para 12. As to the making of interim orders see PARA 563. As to the duration of orders see PARA 560.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(5)(a) (as substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 13(1)(a).

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(5)(b) (as substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 13(1)(b).

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(5)(i) (as substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 13(2)(a).

8 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(5)(ii) (as substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 13(2)(b).

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(5) (as substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 13(2).

10 le such evidence as may be prescribed by rules of court: Domestic Proceedings and Magistrates' Courts Act 1978 s 6(9) (as substituted (see note 4); amended by the Courts Act 2003 Sch 8 para 191); Civil Partnership Act 2004 Sch 6 para 11(1), (2). For the prescribed form of evidence see the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 17 (amended by SI 2005/2930).

11 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(9)(a) (as substituted and amended: see notes 4, 10); Civil Partnership Act 2004 Sch 6 para 11(2)(a).

12 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(9)(b) (as substituted and amended: see notes 4, 10); Civil Partnership Act 2004 Sch 6 para 11(2)(b).

13 Domestic Proceedings and Magistrates' Courts Act 1978 s 6(9)(c) (as substituted and amended: see notes 4, 10); Civil Partnership Act 2004 Sch 6 para 11(2)(c).

14 As to the Children Act 1989 see **CHILDREN AND YOUNG PERSONS**.

15 Domestic Proceedings and Magistrates' Courts Act 1978 s 8 (substituted by the Children Act 1989 Sch 13 para 36); Civil Partnership Act 2004 Sch 6 para 45.

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556. Orders for periodical payments where parties are living apart by agreement.

Where the parties to a marriage or a civil partnership have been living apart for a continuous period exceeding three months, neither party having deserted the other, and one of the parties has been making periodical payments for the benefit of the other party or of a child of the family¹, that other party may apply to a magistrates' court for an order² for periodical payments³.

Where on an application for such an order the court is satisfied that the respondent has made the payments specified in the application it may⁴ make one or both of the following orders:

- 661 (1) an order that the respondent is to make to the applicant such periodical payments, and for such term, as may be specified in the order⁵;
- 662 (2) an order that the respondent is to make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified⁶.

In the exercise of its powers under these provisions, the court may not require:

- 663 (a) the respondent to make payments which exceed in aggregate during any period of three months the aggregate amount paid by him for the benefit of the applicant or a child of the family during the period of three months immediately preceding the date of the making of the application⁷;
- 664 (b) the respondent to make payments to or for the benefit of any person which exceed in amount the payments which the court considers that it would have required the respondent to make to or for the benefit of that person on an application⁸ for financial provision⁹;
- 665 (c) payments to be made to or for the benefit of a child of the family who is not a child of the respondent unless the court considers that it would have made an order in favour of that child on an application for financial provision¹⁰.

Where, on an application for an order for periodical payments, the court considers that the orders which it has the power to make:

- 666 (i) would not provide reasonable maintenance for the applicant¹¹; or
- 667 (ii) if the application relates to a child of the family, would not provide or make a proper contribution towards reasonable maintenance for that child¹²,

the court must refuse to make an order under these above provisions, although it may treat the application as if it were an application for an order¹³ for financial provision¹⁴.

If there is a child of the family who is under the age of 18, the court must not dismiss or make a final order on the application until it has decided whether to exercise any of its powers under the Children Act 1989¹⁵ with respect to the child¹⁶.

- 1 As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.
- 2 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (paras 15-19): see the text and notes 4-16.
- 3 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(1); Civil Partnership Act 2004 Sch 6 para 15(1). Any such application must specify the aggregate amount of the payments so made during the period of three months immediately preceding the date of the making of the application: Domestic Proceedings and Magistrates' Courts Act 1978 s 7(1); Civil Partnership Act 2004 Sch 6 para 15(2). As to the matters to which the court must have regard in considering the making of such an order see PARA 589.
- 4 Ie subject to the provisions of the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or, as the case may be, the Civil Partnership Act 2004 Sch 6: see PARA 553 et seq.
- 5 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(a); Civil Partnership Act 2004 Sch 6 paras 15(3), (4), 16(1)(a), (2). As to the duration of orders see PARA 560. As to the making of interim orders see PARA 563.
- 6 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(b); Civil Partnership Act 2004 Sch 6 para 16(1)(b). As to the duration of orders see PARA 561.
- 7 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(3)(a); Civil Partnership Act 2004 Sch 6 para 17(a).
- 8 Ie an application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 1: see PARA 553.
- 9 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(3)(b); Civil Partnership Act 2004 Sch 6 para 17(b).
- 10 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(3)(c); Civil Partnership Act 2004 Sch 6 para 17(c).
- 11 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(4)(a); Civil Partnership Act 2004 Sch 6 para 18(1)(a).
- 12 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(4)(b); Civil Partnership Act 2004 Sch 6 para 18(1)(b).
- 13 Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or, as the case may be, the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8): see PARA 553.
- 14 Domestic Proceedings and Magistrates' Courts Act 1978 s 7(4); Civil Partnership Act 2004 Sch 6 para 18(2). Where the court decides so to proceed it must indicate orally which of the grounds for financial provision (ie which of the grounds in the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a), (b) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 2(1)(a), (b) (see PARA 553) it considers applicable and a memorandum of the decision and the grounds therefor must be entered in the court's register: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 18(1), (1A) (r 18(1A) added by SI 2005/2930). If the respondent is not then present or represented in court, or the respondent or his representative does not then agree to the continuance of the hearing, the court must adjourn the hearing and the designated officer for the court must serve notice of the decision and the grounds therefor on the respondent in the appropriate form: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 18(2), Sch 1 (amended by SI 2005/617).
- 15 As to the Children Act 1989 see **CHILDREN AND YOUNG PERSONS**.
- 16 Domestic Proceedings and Magistrates' Courts Act 1978 s 8 (substituted by the Children Act 1989 Sch 13 para 36); Civil Partnership Act 2004 Sch 6 para 45.

UPDATE

556 Orders for periodical payments where parties are living apart by agreement

NOTE 14--SI 1991/1991 Sch 1 further amended: SI 2009/2025.

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557. Orders for the benefit of children.

A magistrates' court may make orders for the benefit of children where a party to a marriage or civil partnership has made:

- 668 (1) an application for financial provision¹;
- 669 (2) an application for agreed payments²; or
- 670 (3) an application for an order for periodical payments where the parties are living apart by agreement³.

The orders for the benefit of children which may be made on an application for an order for financial provision are:

- 671 (a) an order that the respondent is to make to the applicant for the benefit of a child of the family⁴ to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified⁵; and
- 672 (b) an order that the respondent is to pay to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such lump sum as may be so specified⁶.

The orders for the benefit of children which may be made on an application for agreed payments are:

- 673 (i) orders for the making of periodical payments by one party to a child of the family or to the other party for the benefit of such a child⁷; and
- 674 (ii) orders for the payment by one party of a lump sum to a child of the family or to the other party for the benefit of such a child⁸.

On an application for an order for periodical payments where the parties are living apart by agreement the court may order that the respondent is to make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified⁹.

¹ I.e. under the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 or the Civil Partnership Act 2004 Sch 6 para 1: see PARA 553.

² I.e. under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1) or the Civil Partnership Act 2004 Sch 6 para 9(1): see PARA 554.

³ I.e. under the Domestic Proceedings and Magistrates' Courts Act 1978 s 7(1) or the Civil Partnership Act 2004 Sch 6 para 15(1): see PARA 556.

⁴ As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

⁵ See the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(c); the Civil Partnership Act 2004 Sch 6 para 2(1)(c); and PARA 553.

6 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(d); the Civil Partnership Act 2004 Sch 6 para 2(1)(d); and PARA 553.

7 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(c); the Civil Partnership Act 2004 Sch 6 para 10(1)(c); and PARA 554.

8 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(d); the Civil Partnership Act 2004 Sch 6 para 10(1)(d); and PARA 554.

9 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(b); the Civil Partnership Act 2004 Sch 6 para 16(1)(b); and PARA 556.

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558. Age limit on making orders for the benefit of children.

No order for the benefit of a child¹ may be made in favour of a person who has attained the age of 18² unless it appears to the court:

- 675 (1) that the child is, or will be, or if such an order were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation³, whether or not he is also, or will also be, in gainful employment⁴; or
- 676 (2) that there are special circumstances which justify the making of the order⁵.

1 As to the orders for the benefit of children which may be made see PARAS 492, 518, 557.

2 Domestic Proceedings and Magistrates' Courts Act 1978 ss 5(1), 6(7), 7(7); Civil Partnership Act 2004 Sch 6 paras 27(1), 28(2).

3 As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing (Downing intervening)* [1976] Fam 288, [1976] 3 All ER 474.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(3)(a)(i); Civil Partnership Act 2004 Sch 6 para 27(5)(a).

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(3)(a)(ii); Civil Partnership Act 2004 Sch 6 para 27(5)(b). Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

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559. Matters to which the court is to have regard.

In deciding whether to exercise its power to make an order for the provision of maintenance to a party to a marriage or a subsisting civil partnership¹, and, if so, in what manner, a magistrates' court is to have regard to certain matters². Although there is no statutory period of limitation that applies to proceedings for financial relief, delay may be one of the factors to which the court will have regard when considering all the circumstances of the case³.

1 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt 1 (ss 1-35) or the Civil Partnership Act 2004 Sch 6: see PARA 553 et seq.

2 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 3; the Civil Partnership Act 2004 Sch 6 paras 4-6, 19; and PARA 589.

3 See PARA 595.

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560. Duration of periodical payment orders.

The term to be specified in any order that the respondent is to make to the applicant such periodical payments, and for such term, as may be specified in the order¹ (other than orders made for the benefit of children²) must be such term as the court thinks fit, except that the term must not begin earlier than the date of the making of the application for the order and must not extend beyond the death of either of the parties to the marriage or civil partnership³. Where such an order is made⁴ and the marriage or civil partnership affected by the order is subsequently dissolved or annulled but the order continues in force, the order ceases to have effect, regardless of anything in it, on the remarriage of, or the entering into of a subsequent marriage or civil partnership⁵ by, the party in whose favour it was made, except in relation to any arrears due under the order on the date of the remarriage or the entering into of the subsequent marriage or civil partnership⁶.

1 Is an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 para 2(1)(a) (orders for financial provision for support of respondent: see PARA 553), an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(a) or the Civil Partnership Act 2004 Sch 6 para 10(1)(a) (orders for the making of agreed payments: see PARA 554) or the Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(a) or the Civil Partnership Act 2004 Sch 6 para 16(1)(a) (orders where parties are living apart by agreement: see PARA 556).

2 As to the duration of orders made for the benefit of children see PARA 561.

3 Domestic Proceedings and Magistrates' Courts Act 1978 ss 4(1), 6(6), 7(6) (s 6 substituted by the Matrimonial and Family Proceedings Act 1984 s 10); Civil Partnership Act 2004 Sch 6 paras 26(1), 28(1). Where the order is for agreed financial provision between the parties (ie is an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(a) or the Civil Partnership Act 2004 Sch 6 para 10(1)(a)) and, by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(4) or the Civil Partnership Act 2004 Sch 6 para 14 (see PARA 554) an application for an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or, as the case may be, the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8) (see PARA 553) is treated as if it had been withdrawn, then the term which may be specified as the term for which the payments are to be made may begin with the date of the making of the application for the order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or, as the case may be, the Civil Partnership Act 2004 Sch 6 Pt 1 or any later date: Domestic Proceedings and Magistrates' Courts Act 1978 s 6(8) (as so substituted); Civil Partnership Act 2004 Sch 6 para 28(3).

4 See note 1.

5 References in the Domestic Proceedings and Magistrates' Courts Act 1978 to 'remarriage' include references to a marriage which is by law void or voidable: s 88(3). Note that this provision has not been amended to take account of the possibility that a person may also enter into a subsequent civil partnership, and that the Civil Partnership Act 2004 Sch 6 does not provide that references therein to a subsequent marriage or civil partnership include references to a subsequent marriage or civil partnership which is void or voidable: it is submitted, however (particularly in the light of the corresponding provision made in respect of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 Sch 5: see PARA 452 note 1) that such meaning may be inferred. As to void and voidable marriages and civil partnerships see PARA 326 et seq.

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 4(2) (amended by the Civil Partnership Act 2004 Sch 27 para 57); Civil Partnership Act 2004 Sch 6 para 26(2).

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561. Duration of orders for the benefit of children.

The term to be specified in an order for periodical payments made in favour of a child¹ must not extend beyond the date of the child's eighteenth birthday², unless he is in full time education³ or there are special circumstances which justify the making of an order⁴. The term may begin with the date of the making of an application for the order in question or any later date⁵, subject to the proviso that a term beginning on such date must not extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age⁶ unless the court considers that in the circumstances of the case the welfare of the child requires that it should extend to a later date⁷. Alternatively, where a maintenance calculation⁸ (the 'current calculation') is in force with respect to a child⁹ and an application is made¹⁰ for a periodical payments order in favour of that child¹¹ before the end of the period of six months beginning with the making of the current calculation¹², the term to be specified in any such order made on that application may be expressed to begin on, or at any time after, whichever is the later of the date six months before the application is made¹³ and the date on which the current calculation took effect or, where successive maintenance calculations have been continuously in force with respect to a child, on which the first of those calculations took effect¹⁴. If a maintenance calculation ceases to have effect¹⁵ and an application is made, before the end of the period of six months beginning with the date on which the calculation so ceased¹⁶, for a periodical payments order in favour of a child with respect to whom that maintenance calculation was in force immediately before it ceased to have effect, the term to be specified in any such order made on that application may begin with the date on which that maintenance calculation ceased to have effect or any later date¹⁷.

1 Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(c) or the Civil Partnership Act 2004 Sch 6 para 2(1)(c) (orders for financial provision for support of respondent: see PARA 553), an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(c) or the Civil Partnership Act 2004 Sch 6 para 10(1)(c) (orders for the making of agreed payments: see PARA 554) or the Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(b) or the Civil Partnership Act 2004 Sch 6 para 16(1)(b) (orders where parties are living apart by agreement: see PARA 556).

2 Domestic Proceedings and Magistrates' Courts Act 1978 ss 5(2)(b), 6(7), 7(7); Civil Partnership Act 2004 Sch 6 paras 27(3)(b), 28(2).

3 Ie unless it appears to the court that the child is, or will be, or if a periodical payments order (see note 1) would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment: Domestic Proceedings and Magistrates' Courts Act 1978 s 5(3)(b)(i); Civil Partnership Act 2004 Sch 6 para 27(5)(a). As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing (Downing intervening)* [1976] Fam 288, [1976] 3 All ER 474.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(3)(b)(ii); Civil Partnership Act 2004 Sch 6 para 27(5)(b). Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(2); Civil Partnership Act 2004 Sch 6 para 27(2) (a). Where the order is for agreed financial provision between the parties (ie is an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(a) or the Civil Partnership Act 2004 Sch 6 para 10(1)(a)) and, by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(4) or the Civil Partnership Act 2004 Sch 6 para 14 (see PARA 554) an application for an order under the Domestic Proceedings and Magistrates'

Courts Act 1978 s 2 or, as the case may be, the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8) (see PARA 553) is treated as if it had been withdrawn, then the term which may be specified as the term for which the payments are to be made may begin with the date of the making of the application for the order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or, as the case may be, the Civil Partnership Act 2004 Sch 6 Pt 1 or any later date: Domestic Proceedings and Magistrates' Courts Act 1978 s 6(8) (as so substituted); Civil Partnership Act 2004 Sch 6 para 28(3).

6 As to compulsory school age see the Education Act 1996 s 8; and **EDUCATION** vol 15(1) (2006 Reissue) PARA 15.

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(2)(a) (amended by the Matrimonial and Family Proceedings Act 1984 s 9; and the Education Act 1996 Sch 37 para 138); Civil Partnership Act 2004 Sch 6 para 27(3)(a), (4).

8 For these purposes 'maintenance calculation' has the same meaning as it has in the Child Support Act 1991 by virtue of s 54 as read with any regulations in force thereunder (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 554); Domestic Proceedings and Magistrates' Courts Act 1978 s 88(1) (definition added by SI 1993/623; and amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 4); Civil Partnership Act 2004 Sch 6 para 27(11).

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(5)(a) (s 5(5)-(8) added by SI 1993/623; amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 4); Civil Partnership Act 2004 Sch 6 para 27(7)(a).

10 Ie an application for such an order as is mentioned in note 1.

11 Ie in accordance with the Child Support Act 1991 s 8 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 556, 560).

12 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(5)(a) (as added and amended: see note 9); Civil Partnership Act 2004 Sch 6 para 27(7)(b).

13 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(2), (6)(a) (as added and amended: see note 9); Civil Partnership Act 2004 Sch 6 para 27(2)(b), (8)(a).

14 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(6)(b) (as added and amended: see note 9); Civil Partnership Act 2004 Sch 6 para 27(8)(b).

15 Ie by or under any provision of the Child Support Act 1991.

16 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(8) (as added and amended: see note 9); Civil Partnership Act 2004 Sch 6 para 27(10).

17 Domestic Proceedings and Magistrates' Courts Act 1978 s 5(7) (as added and amended: see note 9); Civil Partnership Act 2004 Sch 6 para 27(9).

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562. Death of person paying.

Any periodical payments order in favour of a child¹ ceases to have effect, notwithstanding anything in the order, on the death of the person liable to make payments under the order².

¹ ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(c) or the Civil Partnership Act 2004 Sch 6 para 2(1)(c) (orders for financial provision for support of respondent: see PARA 553), an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(c) or the Civil Partnership Act 2004 Sch 6 para 10(1)(c) (orders for the making of agreed payments: see PARA 554) or the Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(b) or the Civil Partnership Act 2004 Sch 6 para 16(1)(b) (orders where parties are living apart by agreement: see PARA 556).

² Matrimonial Causes Act 1973 ss 5(4), 6(7), 7(7); Civil Partnership Act 2004 Sch 6 paras 27(6), 28(2).

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563. Power to make interim order.

Where an application is made for an order for financial provision¹, for a payment which has been agreed by the parties² or for periodical payments where the parties are living apart by agreement³ the magistrates' court may⁴ make an order (an 'interim maintenance order') which requires the respondent⁵ to make to the applicant or to any child of the family⁶ who is under the age of 18, or to the applicant for the benefit of such a child, such periodical payments as the court thinks reasonable⁷. The High Court may also make an interim maintenance order on ordering the application to be reheard by a magistrates' court, either after the refusal of an order⁸ or on an appeal⁹ in relation to such an order¹⁰.

Not more than one interim maintenance order may be made with respect to any application for an order for financial provision¹¹, although this does not prejudice the powers of a court under these provisions to make an interim order on any further such application¹².

¹ Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 para 2: see PARA 553.

² Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 para 10: see PARAS 554, 555.

³ Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 para 16: see PARA 556.

⁴ Ie at any time before making a final order on, or dismissing, the application or on refusing to make an order on the application by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 s 27 or the Civil Partnership Act 2004 Sch 6 para 8 (see PARA 565): Domestic Proceedings and Magistrates' Courts Act 1978 s 19(1)(a); Civil Partnership Act 2004 Sch 6 para 20(1), (2).

⁵ Where an application is made for an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 para 10 (see PARAS 554-555) by the party to the marriage or civil partnership who has agreed to make the financial provision specified in the application, this provision applies as if the reference to the respondent were a reference to the applicant and the references to the applicant were references to the respondent; and the Domestic Proceedings and Magistrates' Courts Act 1978 s 19(3) and the Civil Partnership Act 2004 Sch 6 paras 22, 23 (see note 7) apply accordingly: Domestic Proceedings and Magistrates' Courts Act 1978 s 19(3A) (added by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 24; amended by the Children Act 1989 Sch 13 para 37); Civil Partnership Act 2004 Sch 6 paras 21(2), 23(2).

⁶ As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

⁷ Domestic Proceedings and Magistrates' Courts Act 1978 s 19(1)(a)(i) (s 19(1) amended by the Children Act 1989 Sch 15); Civil Partnership Act 2004 Sch 6 para 21(1)(a). An interim maintenance order may provide for payments to be made from such date as the court may specify: Domestic Proceedings and Magistrates' Courts Act 1978 s 19(3) (amended by SI 1993/623); Civil Partnership Act 2004 Sch 6 para 22(1). However, subject to the Domestic Proceedings and Magistrates' Courts Act 1978 s 5(5), (6) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 27(7), (8) (see PARA 561), the date must not be earlier than the date of the making of the application for an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 para 2 (see PARA 553), the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 para 10 (see PARAS 554-555) or the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 para 16 (see PARA 556); and, where such an order made by the High Court on an appeal under the Domestic Proceedings and Magistrates' Courts Act 1978 s 29 or the Civil Partnership Act 2004 Sch 6 para 46 (see PARAS 566, 898, 900-901) provides for payments to be made from a date earlier than the date of the making of the order, the interim order may

provide that payments made by the respondent under an order made by a magistrates' court are to be treated, to such extent and in such manner as may be provided by the interim order, as having been paid on account of any payment provided for by the interim order: Domestic Proceedings and Magistrates' Courts Act 1978 s 19(3) (as so amended); Civil Partnership Act 2004 Sch 6 paras 22(1), (2), 23(1). As to the 'respondent' see note 5.

8 le under the Domestic Proceedings and Magistrates' Courts Act 1978 s 27 or the Civil Partnership Act 2004 Sch 6 para 8: see PARA 565.

9 le under the Domestic Proceedings and Magistrates' Courts Act 1978 s 29 or the Civil Partnership Act 2004 Sch 6 para 46: see PARAS 566, 898, 900-901. No appeal lies from the making of or refusal to make, the variation of or refusal to vary, or the revocation of or refusal to revoke, an interim maintenance order: Domestic Proceedings and Magistrates' Courts Act 1978 s 19(8); Civil Partnership Act 2004 Sch 6 para 25(2).

10 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(1)(b) (as amended: see note 7); Civil Partnership Act 2004 Sch 6 para 20(3). An interim order made by the High Court on ordering that an application be reheard by a magistrates' court is to be treated for the purposes of its enforcement and for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 (see PARA 576 et seq), or the Civil Partnership Act 2004 Sch 6 paras 30-42 (see PARA 576 et seq) as if it were an order of that magistrates' court and not of the High Court: Domestic Proceedings and Magistrates' Courts Act 1978 s 19(9); Civil Partnership Act 2004 Sch 6 para 25(1).

11 See note 1.

12 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(7) (amended by the Children Act 1989 Sch 15); Civil Partnership Act 2004 Sch 6 para 20(4), (5).

UPDATE

563 Power to make interim order

NOTE 7--1978 Act s 19(1), (3) amended: SI 2009/871.

NOTE 10--1978 Act s 19(9) amended: SI 2009/871.

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564. Duration of interim orders.

An interim order made¹ on an application for an order for financial provision², for a payment which has been agreed by the parties³ or for periodical payments where the parties are living apart by agreement⁴ ceases to have effect on whichever of the following dates occurs first:

- 677 (1) the date, if any, specified for the purpose in the interim order⁵;
- 678 (2) the date of the expiration of the period of three months beginning with the date of the making of the interim order⁶; and
- 679 (3) the date on which a magistrates' court either makes a final order on or dismisses the application⁷.

Where, however, an interim order so made would otherwise⁸ cease to have effect by virtue of head (1) or head (2) above, the magistrates' court which made the order or, in the case of an interim order made by the High Court, the magistrates' court by which the application for the original order⁹ is to be reheard, has power by order to provide that the interim order is to continue in force for a further period¹⁰; and any order so continued in force ceases to have effect on whichever of the following dates occurs first:

- 680 (a) the date, if any, specified for the purpose in the order continuing it¹¹;
- 681 (b) the date of the expiration of the period of three months beginning with the date of the making of the order continuing it or, if more than one order has been made with respect to the application, beginning with the date of the making of the first of those orders¹²; and
- 682 (c) the date on which the court either makes a final order on, or dismisses, the application¹³.

1 As to the making of interim orders see PARA 563.

2 I.e. an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 para 2: see PARA 553.

3 I.e. an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 para 10: see PARAS 554-555.

4 I.e. an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 para 16: see PARA 556.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(5)(a); Civil Partnership Act 2004 Sch 6 para 24(1)(a).

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(5)(b); Civil Partnership Act 2004 Sch 6 para 24(1)(b).

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(5)(b); Civil Partnership Act 2004 Sch 6 para 24(1)(b).

8 I.e. but for the Domestic Proceedings and Magistrates' Courts Act 1978 s 19(6) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 24(2).

9 I.e. any of the orders referred to in the text and notes 2-4.

10 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(6); Civil Partnership Act 2004 Sch 6 para 24(2).

11 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(6)(a); Civil Partnership Act 2004 Sch 6 para 24(3)(a).

12 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(6)(b); Civil Partnership Act 2004 Sch 6 para 24(3)(b).

13 Domestic Proceedings and Magistrates' Courts Act 1978 s 19(6)(b); Civil Partnership Act 2004 Sch 6 para 24(3)(b).

UPDATE

564 Duration of interim orders

TEXT AND NOTES 8-13--1978 Act s 19(6) amended: SI 2009/871.

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565. Refusal of order in case more suitable for High Court.

Where, on hearing an application for an order for financial provision¹, a magistrates' court is of the opinion that any of the matters in question between the parties would be more conveniently dealt with by the High Court, the magistrates' court must refuse to make any order on the application, and no appeal lies from that refusal; but, if in any proceedings in the High Court relating to or comprising the same subject matter as that application the High Court so orders, the application must be reheard and determined by a magistrates' court acting for the same local justice area as the first-mentioned court².

¹ ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 paras 2, 3: see PARA 553.

² Domestic Proceedings and Magistrates' Courts Act 1978 s 27 (amended by the Courts Act 2003 Sch 8 para 193); Civil Partnership Act 2004 Sch 6 para 8. See further *Perks v Perks* [1946] P 1, [1945] 2 All ER 580, CA (the High Court must have a concurrent jurisdiction, the question being which is the more convenient forum); *Smyth v Smyth* [1956] P 427, [1956] 2 All ER 476, DC (no concurrent jurisdiction); *Davies v Davies* [1957] P 357, [1957] 2 All ER 444, DC (no concurrent jurisdiction). Once the magistrates' court has assumed jurisdiction to adjudicate on the principal issue before it, it cannot thereafter refer to the High Court the question of what consequential order should be made: *Davies v Davies*. See also *B v B* (1975) 119 Sol Jo 610, CA (desirability of transferring cases to the High Court which had much better facilities for dealing with them); *Goodall (formerly Jolly) v Jolly* [1984] FLR 143, sub nom *Goodall v Jolley* [1984] Fam Law 23 (application to vary registered maintenance order).

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566. Effect of divorce or dissolution on magistrates' order.

A magistrates' order is not discharged by a decree absolute of divorce¹; presumably this would also apply to a final order for the dissolution of a civil partnership. Where, however, a decree is pronounced in the High Court or a county court on findings which are inconsistent with the basis on which such an order was previously made and on which the right to be supported by the other party subsisted, justices to whom an application for the revocation of the order is made² are bound to accede to the application³.

Irrespective of whether the marriage or civil partnership in question has been dissolved, where, after the making by a magistrates' court of an order for financial provision⁴, proceedings between, and relating to the marriage or civil partnership of, the parties to the proceedings in which that order was made have been commenced in the High Court or a county court, then, except in the case of an order for the payment of a lump sum, the court in which the proceedings or any application made therein are or is pending may, if it thinks fit, direct that the order made by a magistrates' court is to cease to have effect on such date as may be specified in the direction⁵.

1 *Bragg v Bragg* [1925] P 20; and see *Wood v Wood* (1949) 93 Sol Jo 200, DC; *Kirk v Kirk* [1947] 2 All ER 118, DC; *Wood v Wood* [1957] P 254 at 267, [1957] 2 All ER 14, CA. The order continues to operate subject to the discretion of the magistrates to vary or discharge it in the circumstances of the case: see *Bowen v Bowen* [1958] 1 All ER 770 at 774, [1958] 1 WLR 508 at 512, 513, DC (it is common and convenient in a divorce case to allow a maintenance order to stand whether or not it also includes an order for the custody and maintenance of children); *Bragg v Bragg*; *Mezger v Mezger* [1937] P 19, [1936] 3 All ER 130 (divorce granted to husband by foreign court; order continued by magistrates because divorce granted on grounds not recognised in England and because wife in need of money; held that magistrates had not exercised their discretion properly); *Abson v Abson* [1952] P 55, [1952] 1 All ER 370, DC; *Prest v Prest* [1950] P 63 at 67, 69, [1949] 2 All ER 790 at 793, 794, DC (and see the correction of this case in *Pilcher v Pilcher* [1955] P 318 at 332, [1955] 2 All ER 644 at 652, DC); *Grainger v Grainger* [1954] 2 All ER 665, [1954] 1 WLR 1270, DC; *Moore v Napier (formerly Moore)* [1953] 2 All ER 1401, DC; *Sternberg v Sternberg* [1963] 3 All ER 319, [1963] 1 WLR 1036, DC. As to the propriety of taking into account the grounds and consequences of a foreign decree see *Wood v Wood* [1957] P 254 at 289, 295, 296, 298, [1957] 2 All ER 14 at 27, 31-32, 33, CA.

2 *Ie* under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or (presumably) the Civil Partnership Act 2004 Sch 6 paras 30-34: see PARAS 576-580.

3 *Sternberg v Sternberg* [1963] 3 All ER 319, [1963] 1 WLR 1036, DC.

4 *Ie* an order under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or the Civil Partnership Act 2004 Sch 6: see PARA 553 *et seq*.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 28(1); Civil Partnership Act 2004 Sch 6 para 46(a). Nothing in these provisions is to be taken as prejudicing the effect of any order made by the High Court or a county court so far as it implicitly supersedes or revokes an order or part of an order made by a magistrates' court: Domestic Proceedings and Magistrates' Courts Act 1978 s 28(3). Where the designated officer of the court receives notice of any direction made by the High Court or a county court under these provisions by virtue of which an order made by the court under the Domestic Proceedings and Magistrates' Courts Act 1978 or the Civil Partnership Act 2004 ceases to have effect, particulars thereof must be entered in the court's register: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 23(1) (amended by SI 2005/617).

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(3) VARIATION, DISCHARGE AND SUSPENSION OF ORDERS

(i) Orders of the High Court

567. Orders that may be varied, discharged or suspended.

Where the court¹ has made:

- 683 (1) any order for maintenance pending suit or the outcome of proceedings² and any interim order for maintenance³;
- 684 (2) any periodical payments order⁴;
- 685 (3) any secured periodical payments order⁵;
- 686 (4) any order making provision for payment of a lump sum by instalments⁶;
- 687 (5) any deferred order for a lump sum⁷ which includes provision in respect of pension rights⁸ or (as from a day to be appointed⁹) provision¹⁰ in respect of pension compensation rights¹¹;
- 688 (6) any order for a settlement of property¹² or for a variation of settlement¹³, being an order made on or after the grant of a decree of judicial separation or a separation order¹⁴;
- 689 (7) any order for the sale of property¹⁵; or
- 690 (8) a pension sharing order or (as from a day to be appointed¹⁶) a pension compensation sharing order which is made at a time before the decree of divorce or nullity has been made absolute or the order for dissolution or nullity has been made final¹⁷,

it has power¹⁸ to vary or discharge the order or any instrument executed in pursuance of the order, or to suspend any provision of such order or instrument temporarily and to revive the operation of any provision so suspended¹⁹.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to maintenance pending suit and the outcome of proceedings see PARA 456.

3 Matrimonial Causes Act 1973 s 31(1), (2)(a); Civil Partnership Act 2004 Sch 5 para 50(1)(c), (d). As to interim orders see PARA 545. Where the court has made an order for maintenance pending suit or the outcome of proceedings or an interim order for maintenance it has power (subject to the provisions of the Matrimonial Causes Act 1973 ss 28(1A), 31(3)-(14) or, as applicable, the Civil Partnership Act 2004 Sch 5 paras 47(5), 52-62 (see PARAS 460, 469, 515 et seq)) to remit the payment of any arrears due under the order or of any part thereof: Matrimonial Causes Act 1973 s 31(2A) (added by the Administration of Justice Act 1982 s 5); Civil Partnership Act 2004 Sch 5 para 52.

4 Matrimonial Causes Act 1973 s 31(2)(b); Civil Partnership Act 2004 Sch 5 para 50(1)(a). As to the making of periodical payments orders see PARAS 450, 458 et seq (financial relief on divorce, dissolution, nullity, separation and presumption of death), 542 et seq (financial provision during subsistence of marriage or civil partnership). Where the court has made an order for periodical payments it has power (subject to the provisions of the Matrimonial Causes Act 1973 ss 28(1A), 31(3)-(14) or, as applicable, the Civil Partnership Act 2004 Sch 5 paras 47(5), 52-62 (see PARAS 460, 469, 515 et seq) to remit the payment of any arrears due under the order or of any part thereof: Matrimonial Causes Act 1973 s 31(2A) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 52.

Where in exercise of these powers the court decides to vary or discharge a periodical payments order it also has power (subject to the Matrimonial Causes Act 1973 s 28(1), (2) or, as the case may be, the Civil Partnership Act 2004 Sch 5 para 47(1), (6) (see PARAS 460, 546)) to direct that the variation or discharge is not to take effect until the expiration of such period as may be specified in the order: Matrimonial Causes Act 1973 s 31(10) (added by the Matrimonial and Family Proceedings Act 1984 s 6(1), (4)); Civil Partnership Act 2004 Sch 5 para 61.

There is no power to vary an order for periodical payments once the order has been dismissed: *Minton v Minton* [1979] AC 593, [1979] 1 All ER 79, HL. See also *L v L* [1962] P 101 at 108, [1961] 3 All ER 834, CA.

5 Matrimonial Causes Act 1973 s 31(2)(c); Civil Partnership Act 2004 Sch 5 para 50(1)(b). As to the making of secured periodical payments orders see PARAS 450, 467 et seq (financial relief on divorce, dissolution, nullity, separation and presumption of death), 542 et seq (financial provision during subsistence of marriage or civil partnership). Where the court has made an order for secured periodical payments it has power (subject to the provisions of the Matrimonial Causes Act 1973 ss 28(1A), 31(3)-(14) or, as applicable, the Civil Partnership Act 2004 Sch 5 paras 47(5), 52-62 (see PARAS 460, 469, 515 et seq)) to remit the payment of any arrears due under the order or of any part thereof: Matrimonial Causes Act 1973 s 31(2A) (as added: see note 3); Civil Partnership Act 2004 Sch 5 para 52.

Where in exercise of these powers the court decides to vary or discharge a secured periodical payments order it also has power (subject to the Matrimonial Causes Act 1973 s 28(1), (2) or, as the case may be, the Civil Partnership Act 2004 Sch 5 para 47(1), (6) (see PARAS 460, 546)) to direct that the variation or discharge is not to take effect until the expiration of such period as may be specified in the order: Matrimonial Causes Act 1973 s 31(10) (added by the Matrimonial and Family Proceedings Act 1984 s 6(1), (4)); Civil Partnership Act 2004 Sch 5 para 61.

6 Matrimonial Causes Act 1973 s 31(2)(d); Civil Partnership Act 2004 Sch 5 para 50(1)(e). As to orders making provision for the payment of a lump sum by instalments see the Matrimonial Causes Act 1973 ss 23(3)(c), s 27(7)(b); the Civil Partnership Act 2004 Sch 5 paras 3(3), 42(2); and PARAS 476 (financial relief on divorce, dissolution, nullity, separation and presumption of death), 543 (financial provision during subsistence of marriage or civil partnership). In rare cases the court may discharge the payer's liability to meet the outstanding instalments: see *Tilley v Tilley* (1979) 10 Fam Law 89, CA; *Penrose v Penrose* [1994] 2 FCR 1167, [1994] 2 FLR 621, CA.

7 Ie any order made by virtue of the Matrimonial Causes Act 1973 s 23(1)(c) or the Civil Partnership Act 2004 Sch 5 para 2(1)(c): see PARA 476.

8 Ie provision made by virtue of the Matrimonial Causes Act 1973 s 25B(4) or s 25C or the Civil Partnership Act 2004 Sch 5 para 25(2) or Sch 5 para 26: see PARAS 485, 486.

9 The Matrimonial Causes Act 1973 s 31(2)(dd), (g), (4B), (4C) and the Civil Partnership Act 2004 Sch 5 paras 50(1)(f), (i), 57(2), (3) are amended, as from a day to be appointed, by the Pensions Act 2008 ss 120, 148, Sch 6 paras 1, 8(1)-(5), 14, 18(1)-(3), (7)(d), (e), Sch 11 Pt 4. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

10 Ie provision made by virtue of the Matrimonial Causes Act 1973 s 25F(2) or the Civil Partnership Act 2004 Sch 5 para 34A(2): see PARA 526.

11 Matrimonial Causes Act 1973 s 31(2)(dd) (added by the Pensions Act 1995 s 166(3)(a); prospectively amended (see note 9)); Civil Partnership Act 2004 Sch 5 para 50(1)(f) (prospectively amended: see note 9). Where the court has made a deferred order for the payment of a lump sum which includes provision made by virtue of the Matrimonial Causes Act 1973 s 25C or the Civil Partnership Act 2004 Sch 5 para 26 in respect of pension rights, these provisions cease to apply to the order on the death of either of the parties to the marriage or civil partnership: Matrimonial Causes Act 1973 s 31(2B) (added by the Pensions Act 1995 s 166(3)(b)); Civil Partnership Act 2004 Sch 5 para 50(2).

These provisions are modified in connection with pension payments for which responsibility has been assumed by the Board of the Pension Protection Fund: see the Matrimonial Causes Act 1973 s 25E(2)-(10) (added by the Pensions Act 2004 Sch 12 para 3; Matrimonial Causes Act 1973 s 25E(9) prospectively amended by the Pensions Act 2008 ss 120, 148, Sch 6 paras 1, 6, Sch 11 Pt 4); the Civil Partnership Act 2004 Sch 5 paras 31-37; the Divorce etc (Pension Protection Fund) Regulations 2006, SI 2006/1932; the Dissolution etc (Pension Protection Fund) Regulations 2006, SI 2006/1934.

12 Ie any order under the Matrimonial Causes Act 1973 s 24(1)(b) or the Civil Partnership Act 2004 Sch 5 para 7(1)(b): see PARA 506.

13 Ie any order under the Matrimonial Causes Act 1973 s 24(1)(c) or (d) or the Civil Partnership Act 2004 Sch 5 para 7(1)(c) or (d): see PARA 510.

14 Matrimonial Causes Act 1973 s 31(2)(e); Civil Partnership Act 2004 Sch 5 para 50(1)(g).

15 Matrimonial Causes Act 1973 s 31(2)(f) (added by the Matrimonial Homes and Property Act 1981 s 8(2)(a)); Civil Partnership Act 2004 Sch 5 para 50(1)(h). As to the making of orders for the sale of property see PARA 520 et seq.

16 See note 9.

17 Matrimonial Causes Act 1973 s 31(2)(g) (added by the Welfare Reform and Pensions Act 1999 Sch 3 para 7(1), (2); prospectively amended (see note 9)); Civil Partnership Act 2004 Sch 5 para 50(1)(i) (prospectively amended: see note 9). As to the making of pension sharing orders and pension compensation sharing orders see PARA 523 et seq. No variation of a pension sharing order or (as from a day to be appointed) a pension compensation sharing order may be made so as to take effect before the decree is made absolute or the order has been made final: Matrimonial Causes Act 1973 s 31(4B) (s 31(4B), (4C), (15) added by the Welfare Reform and Pensions Act 1999 Sch 3 para 7(3), (7); Matrimonial Causes Act 1973 s 31(4B), (4C) prospectively amended (see note 9)); Civil Partnership Act 2004 Sch 5 para 57(2) (prospectively amended: see note 9). The variation of a pension sharing order or (as from a day to be appointed) a pension compensation sharing order prevents the order taking effect before the end of such period after the making of the variation as may be prescribed by regulations made by the Lord Chancellor: Matrimonial Causes Act 1973 s 31(4C), (15) (as so added and prospectively amended); Civil Partnership Act 2004 Sch 5 para 57(3), (4) (Sch 5 para 57(3) as so prospectively amended).

18 le subject to the provisions of the Matrimonial Causes Act 1973 ss 28(1A), 31(3)-(14) or, as applicable, the Civil Partnership Act 2004 Sch 5 paras 47(5), 52-62 (see PARAS 460, 469, 515 et seq).

19 Matrimonial Causes Act 1973 s 31(1), (3) (s 31(1) amended by the Matrimonial and Family Proceedings Act 1984 s 6(1), (2)); Civil Partnership Act 2004 Sch 5 paras 50(3), 51. The court may refuse to consider an application for variation, discharge, suspension or revival where the applicant is in contempt of court: *Baker v Baker (No 2)* [1997] 2 FCR 249, [1997] 1 FLR 148, CA (husband conceded that he was in contempt of court by reason of his non-payment of a lump sum); and see *Hadkinson v Hadkinson* [1952] P 285, [1952] 2 All ER 567, CA; *Mubarak v Mubarak* [2004] EWHC 1158 (Fam), [2005] Fam Law 355; *Laing v Laing* [2005] EWHC 3152 (Fam), [2007] 2 FLR 199, [2007] Fam Law 580.

UPDATE

567 Orders that may be varied, discharged or suspended

NOTE 4--See *McFarlane v McFarlane* [2009] EWHC 891 (Fam), [2009] Fam Law 1020, [2009] All ER (D) 223 (Jun).

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568. Matters to which the court is to have regard.

In exercising its powers to vary or discharge orders for financial relief¹, the court² must have regard to all the circumstances of the case³, first consideration being given to the welfare, while a minor, of any child of the family⁴ who has not attained the age of 18⁵. In the case of a periodical payments order⁶ or secured periodical payments⁷ order made on or after the grant of a decree of divorce or nullity of marriage or the making of a dissolution or nullity order, the court must consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as will in the opinion of the court be sufficient, in the light of any proposed exercise by the court, where the marriage or civil partnership has been dissolved, of its powers to make supplemental provision⁸, to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments⁹. In a case where the party against whom the order was made has died, the circumstances of the case must also include the changed circumstances resulting from his or her death¹⁰.

In considering an application for the variation, discharge or suspension of such an order, the court must look at the matter afresh and make an order which is reasonable in the current circumstances¹¹; and that principle applies where a party is seeking to extend the term of an order for periodical payments¹². On such an application the court will take into account all the factors that would be taken into account¹³ on an initial application for relief¹⁴.

1 As to these powers see PARA 567.

2 As to the meaning of 'court' see PARA 346 note 2.

3 The circumstances of the case must include any change in any of the matters to which the court was required to have regard when making the order to which the application relates: Matrimonial Causes Act 1973 s 31(7) (substituted by the Matrimonial and Family Proceedings Act 1984 s 6(1), (3)); Civil Partnership Act 2004 Sch 5 para 59(2). Thus the requirement of fairness emphasised in *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL is paramount, and factors likely to be relevant are:

- 97 (1) the reasons for the original orders;
- 98 (2) the reasons for any order varying the original order;
- 99 (3) the effect of past orders for financial provision upon the pattern of the parties' lives;
- 100 (4) the fact that there was no power to vary any orders for payment of lump sums; and
- 101 (5) the private and public interests in finality of orders relating to the division of capital assets on termination of marriage or civil partnership.

However, although fairness is the court's overarching objective, the respondent should not be treated as an insurer against all hazards nor, when fairness was the measure, should he be necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility: see *North v North* [2007] EWCA Civ 760, [2007] 2 FCR 601, [2008] 1 FLR 158. See also *Cornick v Cornick (No 3)* [2001] 2 FLR 1240 (in which it was held that the original direct or indirect contributions made by one party should not be left out of account merely because the majority of the assets of the other party had been acquired once the marriage was over, as contributions made during the marriage might have founded subsequent success); *Williams v Lindley* [2005] EWCA Civ 103, [2005] 1 FCR 269, [2005] 2 FLR 710 (wife's remarriage a supervening event potentially

justifying variation); *S v S (ancillary relief: consent order)* [2002] EWHC 223 (Fam), [2003] Fam 1, [2002] 1 FLR 992 (subsequent change in the law may constitute a supervening event which invalidates the basis of a consent order); *B v B (ancillary relief consent order: appeal out of time)* [2007] EWHC 2472 (Fam), [2008] 1 FLR 1279 (increase in property value arising from refurbishment and rising property market a foreseeable event).

4 As to the meaning of 'child of the family' see PARA 477 note 3.

5 Matrimonial Causes Act 1973 s 31(7) (as substituted: see note 3); Civil Partnership Act 2004 Sch 5 para 59(1). See *MB v KB* [2007] EWHC 789 (Fam), [2007] 2 FLR 586 (evolving needs of child).

6 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

7 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

8 Ie under the Matrimonial Causes Act 1973 s 31(7B) or, as the case may be, the Civil Partnership Act 2004 Sch 5 para 53: see PARA 569.

9 Matrimonial Causes Act 1973 s 31(7)(a) (as substituted (see note 3); amended by the Family Law Act 1996 Sch 8 para 16(6)(b)); Civil Partnership Act 2004 Sch 5 para 59(3)-(5).

10 Matrimonial Causes Act 1973 s 31(7)(b) (as substituted: see note 3); Civil Partnership Act 2004 Sch 5 para 59(6).

11 See *Lewis v Lewis* [1977] 3 All ER 992, [1977] 1 WLR 409, CA; *Garner v Garner* [1992] 1 FCR 529 at 537, 538, [1992] 1 FLR 573 at 581, 582, CA per Cazalet J ('Almost invariably an application to vary an early periodical payments order will be brought on the basis that there has been some change in the circumstances since the original order was made; otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If an order is not appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a material change in the circumstances. However, because of the impact of continuing inflation, because children grow older and cost more to support and because, for example, the cost of living in its increase may hit one party harder than another, it will usually follow that, if time has passed, there will inevitably have been some changes in the circumstances, and in particular in the financial circumstances, of the parties concerned. Following *Lewis v Lewis*, by which decision this court is bound, a court on the hearing of an application to vary is fully entitled to look at all the relevant circumstances . . . On occasions the court may be slow to accede to an application to vary a consent order; not least because the party's solicitors might otherwise be deterred from either seeking to negotiate such a provision or to achieve finality. Another factor which may influence a court will be the time that has passed since the original order was made. If an application consequent on an order is brought very soon after the order was made, the court, in normal circumstances, is likely to attach more weight to the earlier order than if it had been made some years previously. Likewise, the court would expect to pay full regard to any special terms agreed between the parties at the time the original order was made -- as, for example, when endorsements on briefs or contemporaneous correspondence show that an agreed order has, for some particular reason, been set at an artificially low figure. Shortly stated, the court must decide what weight it should attach to the original order and all the surrounding circumstances. However, once an application to vary is before it, the court is fully entitled to make an order considering all the circumstances afresh, paying such regard to the old order as may be thought appropriate'); *VB v JP* [2008] EWHC 112 (Fam), [2008] 2 FCR 682, [2008] 1 FLR 742 (substantial increase in one party's income and other party's expenditure on children).

12 See *Flavell v Flavell* [1997] 1 FCR 332, [1997] 1 FLR 253, CA.

13 Ie under the Matrimonial Causes Act 1973 s 25 or the Civil Partnership Act 2004 Sch 5 paras 20, 21: see PARA 589 et seq.

14 See *Garner v Garner* [1992] 1 FCR 529, [1992] 1 FLR 573, CA.

UPDATE

568 Matters to which the court is to have regard

NOTE 3--See also *Myerson v Myerson* [2009] EWCA Civ 282, [2010] 1 WLR 114, [2009] All ER (D) 05 (Apr) (fall in value of husband's assets due to global economic situation did not render order unfair and unworkable).

NOTE 11--See also *Walkden v Walkden* [2009] EWCA Civ 627, [2009] 3 FCR 25 (mistake as to value of shareholding not grounds for varying order); *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791, [2009] 3 FCR 650 (significant increase in husband's earnings grounds for varying order).

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569. Court's powers on discharge or variation of periodical payments orders and secured periodical payments orders.

Where, after the dissolution of a marriage or a civil partnership the court¹:

- 691 (1) discharges a periodical payments order² or a secured periodical payments order³ made in favour of a party to the marriage or civil partnership⁴; or
- 692 (2) varies such an order so that payments under the order are required to be made only for such further period as is determined by the court⁵,

the court has power, in addition to any power it otherwise has, to make supplemental provision consisting of any of:

- 693 (a) an order for the payment of a lump sum in favour of a party to the marriage or civil partnership⁶;
- 694 (b) one or more property adjustment orders⁷ in favour of a party to the marriage or civil partnership⁸;
- 695 (c) one or more pension sharing orders⁹;
- 696 (d) (as from a day to be appointed¹⁰) a pension compensation sharing order¹¹; or
- 697 (e) a direction that the party in whose favour the original order discharged or varied was made is not entitled to make any further application for a periodical payments or secured periodical payments order or an extension of the period to which the original order is limited by any variation made by the court¹².

No property adjustment order, pension sharing order or (as from a day to be appointed¹³) pension compensation sharing order may be made on an application for the variation of a periodical payments or secured periodical payments order made, whether in favour of a party to a marriage or civil partnership or in favour of a child of the family¹⁴, following divorce, dissolution etc¹⁵, and no order for the payment of a lump sum may be made on an application for the variation of a periodical payments or secured periodical payments order in favour of a party to a marriage or civil partnership following divorce, dissolution etc¹⁶ or¹⁷ on account of failure to maintain¹⁸.

1 As to the meaning of 'court' see PARA 346 note 2. As to the matters to which the court is to have regard in exercising its powers under these provisions see PARA 568.

2 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

3 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

4 Matrimonial Causes Act 1973 s 31(7A)(a) (s 31(7A)-(7F) added by the Family Law Act 1996 Sch 8 para 16(7)); Civil Partnership Act 2004 Sch 5 para 53(1)(a).

5 Matrimonial Causes Act 1973 s 31(7A)(b) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 53(1)(b).

6 Matrimonial Causes Act 1973 s 31(7B)(a) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 53(2)(a), (3). An order for the payment of a lump sum made pursuant to this provision may provide for the payment of that sum by instalments of such amount as may be specified in the order and require the payment of the instalments to be secured to the satisfaction of the court: Matrimonial Causes Act 1973 s 31(7C) (as so added); Civil Partnership Act 2004 Sch 5 para 54(1). See also *Harris v Harris* [2001] 1 FCR 68, CA.

Where the court makes an order for the payment of a lump sum under these provisions and directs that payment of that sum or any part of it is to be deferred or that that sum or any part of it is to be paid by instalments, the court may order that the amount deferred or the instalments is or are to carry interest at such rate as may be specified by the order from such date, not earlier than the date of the order (ie the date on which the court orders payment of a lump sum and not to any subsequent date: *L v L (lump sum: interest)* [1995] 1 FCR 60, [1994] 2 FLR 324), as may be so specified, until the date when payment of it is due: Matrimonial Causes Act 1973 ss 23(6), 31(7D) (s 23(6) added by the Administration of Justice Act 1982 s 16; Matrimonial Causes Act 1973 s 31(7D) as so added; amended by SI 1998/2572); Civil Partnership Act 2004 Sch 5 paras 3(5)-(7), 54(2). It is not appropriate for interest to be payable where the recipient is receiving benefits worth more than the interest which would be payable: see *H v H (lump sum: interest payable)* [2005] EWHC 1513 (Fam), [2006] 1 FLR 327.

7 As to property adjustment orders see PARA 498 et seq.

8 Matrimonial Causes Act 1973 s 31(7B)(b) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 53(2)(b). If under this provision the court makes more than one property adjustment order in favour of the same party to the marriage or civil partnership, each of those orders must fall within a different head specified in the Matrimonial Causes Act 1973 s 21(2) and the Civil Partnership Act 2004 Sch 5 para 7 (see PARA 498): Matrimonial Causes Act 1973 s 31(7E) (as so added); Civil Partnership Act 2004 Sch 5 para 54(3). The Matrimonial Causes Act 1973 ss 24A, 30 and the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14) and Sch 5 para 76 (see PARAS 520-521, 473, 548) apply where the court makes a property adjustment order under this provision as they apply where it makes any other property adjustment order: Matrimonial Causes Act 1973 s 31(7F) (as so added; amended by SI 1998/2572); Civil Partnership Act 2004 Sch 5 para 54(4).

9 Matrimonial Causes Act 1973 s 31(7B)(ba) (as added (see note 4); further added by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 7(1), (5)); Civil Partnership Act 2004 Sch 5 para 53(2)(c). As to the meaning of 'pension sharing order' see PARA 523; and as to the making of pension sharing orders see PARA 524. The Matrimonial Causes Act 1973 s 24B(3)-(5) and the Civil Partnership Act 2004 Sch 5 para 18 (see PARA 524) apply in relation to a pension sharing order made under these provisions as they apply in relation to any other pension sharing order: Matrimonial Causes Act 1973 s 31(7G) (added by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 7(1), (6)); Civil Partnership Act 2004 Sch 5 para 54(5).

10 The Matrimonial Causes Act 1973 s 31(7B)(bb), (7H) and the Civil Partnership Act 2004 Sch 5 paras 53(2)(ca), 54(6) are added, and the Matrimonial Causes Act 1973 s 31(5) and the Civil Partnership Act 2004 Sch 5 para 58(2) are amended, as from a day to be appointed, by the Pensions Act 2008 s 120, Sch 6 paras 1, 8(1), (6)-(8), 14, 18(1), (4), (5), (8). At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

11 Matrimonial Causes Act 1973 s 31(7B)(bb) (prospectively added: see note 10); Civil Partnership Act 2004 Sch 5 para 53(2)(ca) (as so prospectively added). As to the meaning of 'pension compensation sharing order' see PARA 523; and as to the making of pension compensation sharing orders see PARA 524. The Matrimonial Causes Act 1973 s 24E(3)-(10) and the Civil Partnership Act 2004 Sch 5 para 19D (see PARA 524) apply in relation to a pension compensation sharing order made under these provisions as they apply in relation to any other pension compensation sharing order: Matrimonial Causes Act 1973 s 31(7H) (as so prospectively added); Civil Partnership Act 2004 Sch 5 para 54(6) (as so prospectively added).

12 Matrimonial Causes Act 1973 s 31(7B)(c) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 53(2)(d). On dismissing an entitlement to future periodical payments the court's function is not to open capital claims but to substitute for the periodical payments order such other order or orders as would both fairly compensate the payee and at the same time complete the clean break, and in surveying what substitute order or orders should be made, first consideration should be given to the option of carving out of the payer's pension funds a pension for the payee equivalent to the discharged periodical payments order: see *Pearce v Pearce* [2003] EWCA Civ 1054, [2004] 1 WLR 68, [2003] 3 FCR 178.

13 See note 10.

14 As to the meaning of 'child of the family' see PARA 477 note 3.

15 Ie under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5) (see PARA 450 et seq).

16 See note 15.

17 le under the Matrimonial Causes Act 1973 s 23 or s 27 or the Civil Partnership Act 2004 Sch 5 Pt 1 or Sch 5 Pt 9 (paras 39-45) (see PARA 542 et seq).

18 Matrimonial Causes Act 1973 s 31(5) (amended by the Family Law Act 1996 Sch 8 para 16(5)(a); the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 7(1), (4)(a)-(c); prospectively amended (see note 10)); Civil Partnership Act 2004 Sch 5 para 58(2), (3) (prospectively amended: see note 10). This is subject to the Matrimonial Causes Act 1973 s 31(7A)-(7G) and the Civil Partnership Act 2004 Sch 5 paras 53, 54 (see the text and notes 1-10) and is without prejudice to any power exercisable by virtue of the Matrimonial Causes Act 1973 s 31(2)(d), (dd), (e) or (g) or the Civil Partnership Act 2004 Sch 5 paras 50(1)(e), (f), (g) or (i) (see PARA 567) or otherwise than by virtue of the Matrimonial Causes Act 1973 s 31 or the Civil Partnership Act 2004 Sch 5 Pt 11 (paras 50-62): Matrimonial Causes Act 1973 s 31(5) (as so amended and prospectively amended); Civil Partnership Act 2004 Sch 5 para 58(1). Where an attempt was made to avoid the prohibition on the payment of a lump sum by making an original rather than a variation application, the court was constrained by considerations of policy not to exercise its jurisdiction to grant a lump sum payment, even though there was merit in the applicant's case: see *Powys v Powys* [1971] P 340, [1971] 3 All ER 116; cf *Williams v Williams* [1971] P 271, [1971] 2 All ER 764 (no order made on earlier application for financial provision).

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570. Variation of periodical payments orders and secured periodical payments orders in respect of a child.

Where:

- 698 (1) a periodical payments order¹ or secured periodical payments order² in favour of more than one child³ (the 'order') is in force⁴;
- 699 (2) the order requires payments specified in it to be made to or for the benefit of more than one child without apportioning those payments between them⁵;
- 700 (3) a maintenance calculation⁶ (the 'calculation') is made with respect to one or more, but not all, of the children with respect to whom those payments are to be made⁷; and
- 701 (4) an application is made⁸, before the end of the period of six months beginning with the date on which the calculation was made, for the variation or discharge of the order⁹,

the court¹⁰ may¹¹, in exercise of its powers to vary or discharge the order¹², direct that the variation or discharge is to take effect from the date on which the calculation took effect or any later date¹³.

Where:

- 702 (a) an order for the purposes of the relationship between maintenance calculations and court orders relating to child support¹⁴ (the 'child order') is affected¹⁵ by a maintenance calculation¹⁶;
- 703 (b) on the date on which the child order became so affected there was in force a periodical payments or secured periodical payments order (the 'spousal or civil partner's order') in favour of a party to a marriage or civil partnership having the care of the child in whose favour the child order was made¹⁷; and
- 704 (c) an application is made, before the end of the period of six months beginning with the date on which the maintenance calculation was made, for the spousal or civil partner's order to be varied or discharged¹⁸,

the court may¹⁹, in exercise of its powers to vary or discharge the spousal or civil partner's order, direct that the variation or discharge is to take effect from the date on which the child order became so affected or any later date²⁰.

1 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

2 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

3 As to the meaning of 'child' see PARA 477 note 3.

4 Matrimonial Causes Act 1973 s 31(11)(a) (s 31(11)-(14) added by SI 1993/623); Civil Partnership Act 2004 Sch 5 para 62(1)(a).

5 Matrimonial Causes Act 1973 s 31(11)(b) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 62(1)(b).

6 For these purposes 'maintenance calculation' has the same meaning as it has in the Child Support Act 1991 by virtue of s 54 as read with any regulations in force thereunder (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 554); Matrimonial Causes Act 1973 s 52(1) (definition added by SI 1993/623; and amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 3); Civil Partnership Act 2004 Sch 5 para 62(5).

7 Matrimonial Causes Act 1973 s 31(11)(c) (as added (see note 4); s 31(11), (12) further amended by the Child Support, Pensions and Social Security Act 2000 s 26, Sch 3 para 3(1), (3)(a), (b)); Civil Partnership Act 2004 Sch 5 para 62(1)(c).

8 An application for the variation of a periodical payments order or secured periodical payments order made in favour of a child may, if the child has attained the age of 16, be made by the child himself: Matrimonial Causes Act 1973 s 27(6A) (added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(4)); Civil Partnership Act 2004 Sch 5 para 55(1).

9 Matrimonial Causes Act 1973 s 31(11)(d) (as added and amended: see notes 4, 7); Civil Partnership Act 2004 Sch 5 para 62(1)(d).

10 As to the meaning of 'court' see PARA 346 note 2. As to the matters to which the court is to have regard in exercising its powers under these provisions see PARA 568.

11 Ie without prejudice to any other power of the court to direct that the variation of discharge of an order under the Matrimonial Causes Act 1973 s 31 or the Civil Partnership Act 2004 Sch 5 Pt 11 (paras 50-62) is to take effect from a date earlier than that on which the order for variation or discharge was made: Matrimonial Causes Act 1973 s 31(14) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 62(4).

12 As to these powers see PARAS 567, 569.

13 Matrimonial Causes Act 1973 s 31(11) (as added and amended: see notes 4, 7); Civil Partnership Act 2004 Sch 5 para 62(1).

14 Ie an order of a kind prescribed by the Child Support Act 1991 s 10(1): see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 555.

15 For these purposes an order is 'affected' if it ceases to have effect or is modified by or under the Child Support Act 1991 s 10 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 555); Matrimonial Causes Act 1973 s 31(13) (as added: see note 4); Civil Partnership Act 2004 Sch 5 para 62(3).

16 Matrimonial Causes Act 1973 s 31(12)(a) (as added and amended: see notes 4, 7); Civil Partnership Act 2004 Sch 5 para 62(2)(a).

17 Matrimonial Causes Act 1973 s 31(12)(b) (as added and amended: see notes 4, 7); Civil Partnership Act 2004 Sch 5 para 62(2)(b).

18 Matrimonial Causes Act 1973 s 31(12)(c) (as added and amended: see notes 4, 7); Civil Partnership Act 2004 Sch 5 para 62(2)(c).

19 See note 11.

20 Matrimonial Causes Act 1973 s 31(12) (as added and amended: see notes 4, 7); Civil Partnership Act 2004 Sch 5 para 62(2).

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571. Revival of periodical payments orders in respect of a child.

Where a periodical payments order made in favour of a child¹ on an application on the ground that the other party to the marriage or civil partnership has failed to provide reasonable maintenance for the applicant² ceases to have effect:

- 705 (1) on the date on which the child attains the age of 16³; or
- 706 (2) at any time after that date but before or on the date on which he attains the age of 18⁴,

then if, on an application made to the court⁵ for an order under these provisions, it appears to the court that:

- 707 (a) the child is, will be or, if an order were made under these provisions, would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation⁶, whether or not he also is, will be or would be in gainful employment⁷; or
- 708 (b) there are special circumstances⁸ which justify the making of such an order⁹,

the court has power by order to revive the first-mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to exercise its powers of variation and discharge¹⁰ in relation to any order so revived¹¹.

1 As to the meaning of 'child' see PARA 477 note 3.

2 Ie under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 Pt 9 (paras 39-45) (see PARA 542 et seq).

3 Matrimonial Causes Act 1973 s 27(6B) (added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(4); substituted by the Family Law Reform Act 1987 Sch 2 para 52); Civil Partnership Act 2004 Sch 5 para 55(2)(a).

4 Matrimonial Causes Act 1973 s 27(6B) (as added and substituted: see note 3); Civil Partnership Act 2004 Sch 5 para 55(2)(b).

5 As to the meaning of 'court' see PARA 346 note 2.

6 As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing (Downing intervening)* [1976] Fam 288, [1976] 3 All ER 474.

7 Matrimonial Causes Act 1973 s 27(6B)(a) (as added and substituted: see note 3); Civil Partnership Act 2004 Sch 5 para 55(3)(a).

8 Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

9 Matrimonial Causes Act 1973 s 27(6B)(b) (as added and substituted: see note 3); Civil Partnership Act 2004 Sch 5 para 55(3)(b).

10 le its powers under the Matrimonial Causes Act 1973 s 31 or, as the case may be, the Civil Partnership Act 2004 Sch 5 para 51: see *PARA 567*.

11 Matrimonial Causes Act 1973 s 27(6B) (as added and substituted: see note 3); Civil Partnership Act 2004 Sch 5 para 55(3)-(5).

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572. Variation or discharge of secured periodical payments orders following death of former spouse or civil partner.

Where an application for an order for financial provision from the estate of a deceased spouse or civil partner is made¹ to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order², then, in the proceedings on that application, the court has power, if an application under these provisions is made by that person or by the personal representative of the deceased, to vary or discharge that periodical payments order or any instrument executed in pursuance of it, or to revive the operation of any provision of such an order or instrument which has been suspended³. In exercising these powers the court must have regard to all the circumstances of the case⁴ and to any change (whether resulting from the death of the deceased or otherwise) in any of the matters to which the court was required to have regard when making the secured periodical payments order⁵.

1 Ie an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2; as to which see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692.

2 Ie an order made under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004 Sch 5: see PARA 467 et seq.

3 Inheritance (Provision for Family and Dependents) Act 1975 s 16(1), (3) (s 16(1) amended by the Civil Partnership Act 2004 Sch 4 para 23). The reference in the text to a provision of a periodical payments order having been suspended is a reference to the suspension of such an order under the Matrimonial Causes Act 1973 s 31 or the Civil Partnership Act 2004 Pt 11 (paras 50-62): see PARA 567 et seq.

4 Ie including any order which the court proposes to make under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692) or s 5 (interim orders: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 703).

5 Inheritance (Provision for Family and Dependents) Act 1975 s 16(2). As to the matters to which the court is required to have regard when making a secured periodical payments order see PARA 471.

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573. Orders for repayment in changed circumstances.

Where, on an application¹ made in relation to:

- 709 (1) any order for maintenance pending suit or the outcome of proceedings²;
- 710 (2) any interim order for maintenance³;
- 711 (3) any periodical payments order⁴; or
- 712 (4) any secured periodical payments order⁵,

it appears to the court that by reason of:

- 713 (a) a change in the circumstances of the person entitled to, or liable to make, payments under the order since the order was made⁶; or
- 714 (b) the changed circumstances resulting from the death of the person so liable⁷,

the amount received by the person entitled to payments under the order in respect of a period after those circumstances changed or after the death of the person liable to make payments under the order, as the case may be, exceeds the amount which the person so liable or his or her personal representatives should have been required to pay, the court may order the respondent to the application to pay to the applicant such sum, not exceeding the amount of the excess, as the court thinks just⁸.

1 An application under these provisions may be made in proceedings in the High Court or a county court for the variation or discharge of one of the orders specified in the text or for leave to enforce, or the enforcement of, the payment of arrears under that order; however, when not made in such proceedings, the application must be made to a county court: Matrimonial Causes Act 1973 s 33(4); Civil Partnership Act 2004 Sch 5 para 64(7). Accordingly, references in these provisions to the 'court' are references to the High Court or a county court, as the circumstances require (Matrimonial Causes Act 1973 s 33(4); Civil Partnership Act 2004 Sch 5 para 64(7)), and the jurisdiction conferred on a county court by these provisions is exercisable notwithstanding that, by reason of the amount claimed in the application, the jurisdiction would not otherwise be exercisable by a county court (Matrimonial Causes Act 1973 s 33(5); Civil Partnership Act 2004 Sch 5 para 64(8)). An application may be so made by the person liable to make payments under an order mentioned in the text or his or her personal representatives and may be made against the person entitled to payments under the order or her or his personal representatives: Matrimonial Causes Act 1973 s 33(3); Civil Partnership Act 2004 Sch 5 para 64(3).

2 Matrimonial Causes Act 1973 s 33(2)(a); Civil Partnership Act 2004 Sch 5 para 64(2)(a). As to orders for maintenance pending suit or the outcome of proceeding see PARA 456.

3 Matrimonial Causes Act 1973 s 33(2)(a); Civil Partnership Act 2004 Sch 5 para 64(2)(b). As to interim orders for maintenance see PARA 545.

4 Matrimonial Causes Act 1973 s 33(2)(b); Civil Partnership Act 2004 Sch 5 para 64(2)(c). As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

5 Matrimonial Causes Act 1973 s 33(2)(c); Civil Partnership Act 2004 Sch 5 para 64(2)(d). As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

6 Matrimonial Causes Act 1973 s 33(1)(a); Civil Partnership Act 2004 Sch 5 para 64(1).

7 Matrimonial Causes Act 1973 s 33(1)(b); Civil Partnership Act 2004 Sch 5 para 64(1).

8 Matrimonial Causes Act 1973 s 33(1); Civil Partnership Act 2004 Sch 5 para 64(4), (5). An order under these provisions for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order: Matrimonial Causes Act 1973 s 33(6); Civil Partnership Act 2004 Sch 5 para 64(6).

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574. Orders for repayment of sums after cessation of order owing to subsequent marriage or civil partnership.

Where:

- 715 (1) a periodical payments order¹ or a secured periodical payments order² in favour of a party to a marriage or a civil partnership has ceased to have effect by reason of the remarriage of, or the formation of a subsequent civil partnership or marriage by³, that party⁴; and
- 716 (2) the person liable to make payments under the order or his or her personal representatives made payments in accordance with it in respect of a period after the date of the remarriage or the formation of the subsequent marriage or civil partnership in the mistaken belief that the order was still subsisting⁵,

the person so liable or his or her personal representatives is or are not entitled to bring proceedings in respect of a cause of action arising out of any of the circumstances mentioned above against the person entitled to payments under the order or her or his personal representatives, but may instead make an application against that person or her or his personal representatives under these provisions⁶. On such an application the court may order the respondent to pay to the applicant a sum equal to the amount of the payments made in respect of the period after the date of the remarriage or the formation of the subsequent marriage or civil partnership or, if it appears to the court that it would be unjust to make that order, it may either order the respondent to pay to the applicant such lesser sum as it thinks fit or dismiss the application⁷.

1 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

2 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

3 As to references to remarriage and the formation of a subsequent civil partnership or marriage see PARA 452 note 1.

4 Matrimonial Causes Act 1973 s 38(1)(a) (s 38(1), (6) amended by the Civil Partnership Act 2004 Sch 27 para 45); Civil Partnership Act 2004 Sch 5 para 65(1)(a).

5 Matrimonial Causes Act 1973 s 38(1)(b) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 para 65(1)(b), (2).

6 Matrimonial Causes Act 1973 s 38(1) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 para 65(3), (4). Such an application may be made in proceedings in the High Court or a county court for leave to enforce, or the enforcement of, payment of arrears under the order in question, but, when not made in such proceedings, must be made to a county court (Matrimonial Causes Act 1973 s 38(3); Civil Partnership Act 2004 Sch 5 para 65(6)), and accordingly, references in these provisions to the 'court' are references to the High Court or a county court, as the circumstances require (Matrimonial Causes Act 1973 s 38(3); Civil Partnership Act 2004 Sch 5 para 65(6)). The jurisdiction so conferred on a county court is exercisable notwithstanding that, by reason of the amount claimed in the application, the jurisdiction would not otherwise be exercisable by a county court: Matrimonial Causes Act 1973 s 38(4); Civil Partnership Act 2004 Sch 5 para 65(7).

7 Matrimonial Causes Act 1973 s 38(2); Civil Partnership Act 2004 Sch 5 para 65(4). An order under these provisions for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order: Matrimonial Causes Act 1973 s 38(5); Civil Partnership Act 2004 Sch 5 para 65(5).

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575. Collection of sums after cessation of order owing to subsequent marriage or civil partnership.

The designated officer for a magistrates' court to whom any payments under a periodical payments order¹ or a secured periodical payments order² are required to be made is not liable for any act done by him in pursuance of the order after the date on which that order ceased to have effect by reason of the remarriage of, or the formation of a subsequent civil partnership or marriage by³, the person entitled to payments under the order⁴, and the collecting officer⁵ under an attachment of earnings order made to secure payments under a periodical payments order or a secured periodical payments order is not liable for any act done by him after such date in accordance with any enactment or rule of court specifying how payments made to him in compliance with the attachment of earnings order are to be dealt with⁶, if, but only if, the act was one which he would have been under a duty to do had the periodical payments order or secured periodical payments order not so ceased to have effect and the act was done before notice in writing of the fact that the person so entitled had remarried or entered into the subsequent marriage or civil partnership was given to him by or on behalf of that person, the person liable to make payments under the payments order or the personal representatives of either of those persons⁷.

1 As to the meaning of 'periodical payments order', and as to the making of a periodical payments order, see PARA 458.

2 As to the meaning of 'secured periodical payments order', and as to the making of a secured periodical payments order, see PARA 467.

3 As to references to remarriage and the formation of a subsequent civil partnership or marriage see PARA 452 note 1.

4 Matrimonial Causes Act 1973 s 38(6)(a) (s 38(6), (7) amended by the Courts Act 2003 Sch 8 para 170); Civil Partnership Act 2004 Sch 5 para 65(8)(a).

5 For these purposes 'collecting officer', in relation to an attachment of earnings order, means the officer of the High Court, the district judge of a county court or a designated officer for a magistrates' court to whom a person makes payments in compliance with the order: Matrimonial Causes Act 1973 s 38(7) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 para 65(10). As to attachment of earnings orders see PARA 627 et seq.

6 Matrimonial Causes Act 1973 s 38(6)(b) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 para 65(8)(b).

7 Matrimonial Causes Act 1973 s 38(6) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 para 65(9).

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(ii) Orders of Magistrates' Courts

576. Power to vary, revoke, suspend or revise order.

Where a magistrates' court has made an order for the making of periodical payments (including payments to or for the benefit of a child of the family¹) where the respondent has failed to maintain the applicant², the applicant or the respondent has agreed to make such financial provision³ or where the parties are living apart by agreement⁴, or has made an interim maintenance order⁵, the court may, on an application⁶ by either spouse or civil partner⁷ or in certain circumstances a child of the family⁸, vary or revoke the order⁹, suspend any provision of it temporarily¹⁰ or revive any provision so suspended¹¹.

The jurisdiction so conferred on the magistrates' court¹² is exercisable even though the proceedings are brought by or against a person residing outside England and Wales¹³. The court may not, however, by virtue of these provisions extend the period for which an interim order is in force¹⁴.

1 As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

2 Ie where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8): see PARA 553.

3 Ie where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14): see PARA 554.

4 Ie where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (paras 15-19): see PARA 556.

5 Ie where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 19 or the Civil Partnership Act 2004 Sch 6 Pt 4 (paras 15-19): see PARAS 563-564.

6 Ie an application made under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 Pt 6 (paras 30-42). The Magistrates' Court Act 1980 s 53(3) (orders with the consent of the defendant without hearing evidence: see **MAGISTRATES** vol 29(2) (Reissue) PARA 761) applies to applications under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 and the Civil Partnership Act 2004 Sch 6 Pt 6 for the variation of orders for periodical payments as it applies to complaints for the variation of the rate of any periodical payments ordered by a magistrates' court to be made: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 16(1) (amended by SI 2005/2930).

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(12)(a) (s 20(12) substituted by the Children Act 1989 Sch 13 para 38); Civil Partnership Act 2004 Sch 6 para 39(a). The respondent on an application for the variation or revocation of an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 Pt 6 is to be the party to the marriage or civil partnership in question, other than the applicant, and, where the order requires payments to be made to or in respect of a child who is 16 years of age or over, that child: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, rr 19(1), 19A(1) (r 19A added by SI 2005/2930). As to the mode of application see PARA 894.

The powers of a magistrates' court to revoke, revive or vary an order for the periodical payment of money, and the power of the clerk of a magistrates' court to vary such an order under the Magistrates' Courts Act 1980 s 60 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 823), and the power of a magistrates' court to suspend or rescind certain other orders under s 63(2) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 827), do not apply in relation to an order made under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt 1 (ss 1-35) or the Civil

Partnership Act 2004 Sch 6: Domestic Proceedings and Magistrates' Courts Act 1978 s 23(2) (amended by the Magistrates' Courts Act 1980 Sch 7 para 161(b); the Maintenance Enforcement Act 1991 Sch 2 para 2); Civil Partnership Act 2004 Sch 6 para 42.

8 le if the application is for the variation of an order for the benefit of the child in question and that child has reached the age of 16: Domestic Proceedings and Magistrates' Courts Act 1978 s 20(12)(b) (as substituted: see note 7); Civil Partnership Act 2004 Sch 6 para 39(b).

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(1)-(3), (5) (s 20(2) substituted by the Matrimonial and Family Proceedings Act 1984 s 11); Civil Partnership Act 2004 Sch 6 para 30(1)(a), (2)(a).

10 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(6); Civil Partnership Act 2004 Sch 6 para 30(1)(b), (2)(b).

11 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(6); Civil Partnership Act 2004 Sch 6 para 30(1)(c), (2)(c).

12 See the text and notes 1-11; and PARAS 577-579.

13 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(1) (amended by SI 2005/2930).

14 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(5); Civil Partnership Act 2004 Sch 6 para 30(2).

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577. Power to order lump sum on variation.

Where a magistrates' court has made an order for the making of periodical payments (including payments to or for the benefit of a child of the family¹) where the respondent has failed to maintain the applicant² or where the applicant or the respondent has agreed to make such financial provision³, the court may, on an application⁴ by either spouse or civil partner⁵ or in certain circumstances a child of the family⁶, make an order for the payment of a lump sum⁷. The amount of the lump sum so ordered must not exceed the maximum amount that may at that time be required to be paid⁸, although the court may make an order for the payment of a lump sum not exceeding that amount even if the person required to pay it was required to pay a lump sum by a previous variation order⁹.

1 As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

2 Ie where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 para 2(1)(a) or (c): see PARA 553.

3 Ie where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14): see PARA 554.

4 Ie an application made under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 Pt 6 (paras 30-42). See further PARA 576 note 6.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(12)(a) (s 20(12) substituted by the Children Act 1989 Sch 13 para 38); Civil Partnership Act 2004 Sch 6 para 39(a). As to the respondent see PARA 576 note 7. As to the mode of application see PARA 894; as to the procedure where proceedings are brought by or against a person residing outside England and Wales see PARA 581.

6 Ie if the application is for the variation of an order for the benefit of the child in question and that child has reached the age of 16: Domestic Proceedings and Magistrates' Courts Act 1978 s 20(12)(b) (as substituted: see note 5); Civil Partnership Act 2004 Sch 6 para 39(b).

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(1), (2) (s 20(2) substituted by the Matrimonial and Family Proceedings Act 1984 s 11); Civil Partnership Act 2004 Sch 6 para 31(1), (2). Where a lump sum order is made under these provisions in circumstances where the respondent has failed to maintain the applicant, it is expressed to have been made under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(b) or (d) or the Civil Partnership Act 2004 Sch 6 para 2(1)(b) or (d) (see PARA 553). Where a lump sum order is made under these provisions where the applicant or the respondent has agreed to make such financial provision (see note 2), the court may order the lump sum to be payable to the other civil partner or to a child of the family or to that other civil partner for the benefit of that child: Domestic Proceedings and Magistrates' Courts Act 1978 s 20(2) (as so substituted); Civil Partnership Act 2004 Sch 6 para 31(2).

8 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(3) or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8): see PARA 553.

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(7); Civil Partnership Act 2004 Sch 6 para 31(3). A 'previous order' is a previous order under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt 1 (ss 1-35) or the Civil Partnership Act 2004 Sch 6. However, where the court has power by virtue of these provisions to make an order for the payment of a lump sum and the respondent or the applicant (as the case may be) has agreed to pay a lump sum of an amount exceeding the maximum amount that may at that time be required to be paid under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt 1 or the Civil Partnership Act 2004 Sch 6 the court may, regardless of the Domestic Proceedings and Magistrates' Courts Act 1978 s 20(7) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 31(3), make an order for the payment of a lump sum of that amount: Domestic Proceedings and Magistrates' Courts Act 1978 s 20(8).

(amended by the Matrimonial and Family Proceedings Act 1984 Sch 1); Civil Partnership Act 2004 Sch 6 para 31(4).

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578. Power to specify when order as varied takes effect.

An order which varies an order for the making of periodical payments¹ may provide that the payments as so varied are to be made from such date as the court may specify, which must not in general be earlier than the date of the making of the application for variation².

¹ ie an order made under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 Pt 6: see PARAS 576-577.

² Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9) (amended by the Children Act 1989 Sch 15; SI 1993/623); Civil Partnership Act 2004 Sch 6 para 32. If, however:

- 102 (1) there is in force an order (the 'order'):
4. (a) that the respondent is to make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified (ie an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 para 2(1)(a) or (c): see PARA 553) (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A)(a)(i) (s 20(9A)-(9C) added by SI 1993/623; Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A), (9B) amended by the Child Support, Pensions and Social Security Act 2000 Sch 3 para 4(1), (3)); Civil Partnership Act 2004 Sch 6 para 33(1)(a)(i));
4
5. (b) for a payment which has been agreed between the parties under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1) or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14) (see PARAS 554-555) making provision for periodical payments by one party to a child of the family or to the other party for the benefit of such a child (ie provision of the kind mentioned in the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(c) or the Civil Partnership Act 2004 Sch 6 para 10(1)(c) (see PARA 554)), regardless of whether it makes provision of any other kind mentioned in those provisions (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A)(a)(ii) (as so added); Civil Partnership Act 2004 Sch 6 para 33(1)(a)(ii));
5
6. (c) that, where the parties are living apart by agreement, the respondent is to make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified (ie an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(b) or the Civil Partnership Act 2004 Sch 6 para 16(1)(b) (see PARA 556)) (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A)(a)(iii) (as so added); Civil Partnership Act 2004 Sch 6 para 33(1)(a)(iii)); or
6
7. (d) which is an interim maintenance order under which the payments are to be made to a child or to the applicant for the benefit of a child (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A)(a)(iv) (as so added); Civil Partnership Act 2004 Sch 6 para 33(1)(a)(iv)),
7
- 103 (2) the order requires payments specified in it to be made to or for the benefit of more than one child without apportioning those payments between them (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A)(b) (as so added); Civil Partnership Act 2004 Sch 6 para 33(1)(b));
- 104 (3) a maintenance calculation (the 'calculation') is made with respect to one or more, but not all, of the children with respect to whom those payments are to be made (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A)(c) (as so added and amended); Civil Partnership Act 2004 Sch 6 para 33(1)(c)); and

- 105 (4) an application is made, before the end of the period of six months beginning with the date on which the calculation was made, for the variation or revocation of the order (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A)(d) (as so added and amended); Civil Partnership Act 2004 Sch 6 para 33(1)(d)),

the court may, in exercise of its powers under these provisions to vary or revoke the order, direct that the variation or revocation is to take effect from the date on which the calculation took effect or any later date: Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9A) (as so added and amended); Civil Partnership Act 2004 Sch 6 para 33(1).

Where:

- 106 (i) an order (the 'child order') of a kind prescribed for the purposes of the Child Support Act 1991 s 10(1) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 555) is affected (ie if it ceases to have effect or is modified by or under s 10) by a maintenance calculation (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9B)(a), (9C) (as so added and amended); Civil Partnership Act 2004 Sch 6 para 33(2)(a), (3));
- 107 (ii) on the date on which the child order became so affected there was in force an order (the 'spousal order' or the 'civil partner's order'):
8. (A) that the respondent is to make to the applicant such periodical payments, and for such term, as may be specified in the order (ie an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 para 2(1)(a) (see PARA 553) (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9B)(b)(i) (as so added); Civil Partnership Act 2004 Sch 6 para 33(2)(b)(i));
- 8
9. (B) for a payment which has been agreed between the parties under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(1) or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14) (see PARAS 554-555) making provision for periodical payments by one party to the other (ie provision of the kind mentioned in the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(2)(a) or the Civil Partnership Act 2004 Sch 6 para 10(1)(a) (see PARA 554)), regardless of whether it makes provision of any other kind mentioned in those provisions (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9B)(b)(ii) (as so added); Civil Partnership Act 2004 Sch 6 para 33(2)(b)(ii));
- 9
10. (C) that, where the parties are living apart by agreement, the respondent is to make to the applicant such periodical payments, and for such term, as may be specified in the order (ie an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 7(2)(a) or the Civil Partnership Act 2004 Sch 6 para 16(1)(a) (see PARA 556)) (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9B)(b)(iii) (as so added); Civil Partnership Act 2004 Sch 6 para 33(2)(b)(iii)); or
- 10
11. (D) which is an interim maintenance order under which the payments are to be made to the applicant, otherwise than for the benefit of a child (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9B)(b)(iv) (as so added); Civil Partnership Act 2004 Sch 6 para 33(2)(b)(iv)); and
- 11
- 108 (iii) an application is made, before the end of the period of six months beginning with the date on which the maintenance calculation was made, for the spousal or civil partner's order to be varied or revoked (Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9B)(c) (as so added and amended); Civil Partnership Act 2004 Sch 6 para 33(2)(c)),

the court may, in exercise of its powers under these provisions to vary or revoke the spousal order, direct that the variation or revocation is to take effect from the date on which the child order became so affected or any later date: Domestic Proceedings and Magistrates' Courts Act 1978 s 20(9B) (as so added and amended); Civil Partnership Act 2004 Sch 6 para 33(2).

As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

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579. Matters to which the court is to have regard.

In exercising its power to vary an order for periodical payments¹ the court must, so far as it appears just to do so, give effect to any agreement which has been reached between the parties in relation to the application; and, if there is no such agreement or if the court decides not to give effect to the agreement, it must have regard to all the circumstances of the case², first consideration being given to the welfare while a minor of any child of the family³ who has not attained the age of 18⁴.

1 Ie the powers conferred by the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 and the Civil Partnership Act 2004 Sch 6 Pt 6: see PARAS 576-577.

2 The circumstances of the case must include any change in any of the matters to which the court was required to have regard when making the order to which the application relates or, in the case of an application for the variation or revocation of an order for a payment agreed between the parties (ie an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14) (see PARA 554)) or on an appeal (ie pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 29 or the Civil Partnership Act 2004 Sch 6 para 46 (see PARA 566)), to which the court would have been required to have regard if that order had been an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8) (see PARA 553): Domestic Proceedings and Magistrates' Courts Act 1978 s 20(11) (amended by the Matrimonial and Family Proceedings Act 1984 s 9); Civil Partnership Act 2004 Sch 6 para 34(3).

3 As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 20(11) (as amended: see note 2); Civil Partnership Act 2004 Sch 6 para 34(1), (2). See *Whitton v Devizes Justices* [1985] Fam Law 125; *Riley v Riley* [1987] FCR 65, [1988] 1 FLR 273.

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580. Power to impose means of payment on variation.

The power of the court¹ to vary an order for the making of periodical payments (other than a qualifying maintenance order²) includes power³, if the court is satisfied that payment has not been made in accordance with the order:

- 717 (1) to order that payments under the order be made directly by the debtor to the creditor⁴;
- 718 (2) to order that payments under the order be made to the designated officer for the court or for any other magistrates' court⁵;
- 719 (3) to order that payments under the order be made by the debtor to the creditor by standing order or such similar method of payment⁶ as may be specified⁷;
- 720 (4) to order that payments under the order be made in accordance with arrangements made by the Secretary of State for their collection⁸; and
- 721 (5) to make an attachment of earnings order⁹ to secure payments under the order¹⁰.

If the court does not propose to exercise its power:

- 722 (a) to order that payments under the order be made by the debtor to the creditor by standing order or similar method of payment¹¹;
- 723 (b) to order that payments under the order be made in accordance with arrangements made by the Secretary of State for their collection¹²; or
- 724 (c) to make an attachment of earnings order¹³,

then, unless, on representations expressly made in that behalf by the person to whom payments under the order are required to be made, it is satisfied that it is undesirable to do so, the court must exercise its power¹⁴ to order that payments be made to the designated officer for the court¹⁵.

Before varying an order under these provisions the court must have regard to any representations made by the parties to the application¹⁶.

¹ ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 and the Civil Partnership Act 2004 Sch 6 paras 30-34: see PARAS 576-579.

² None of the powers of the court, or of a justices' clerk, conferred by the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA or the Civil Partnership Act 2004 Sch 6 paras 35-37, 38(1) (see the text and notes 4-7) is exercisable in relation to an order under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq) for the making of periodical payments which is not a qualifying maintenance order within the meaning of the Magistrates' Courts Act 1980 s 59 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 820): Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(10) (s 20ZA added by the Maintenance Enforcement Act 1991 s 5; Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(2), (3), (10) amended by the Courts Act 2003 Sch 8 para 192); Civil Partnership Act 2004 Sch 6 para 38(2).

³ ie subject to the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(7), (8) and the Civil Partnership Act 2004 Sch 6 para 37: see the text and notes 15-16.

4 Magistrates' Courts Act 1980 s 59(3)(a) (s 59 substituted by the Maintenance Enforcement Act 1991 s 2); Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(1) (as added: see note 2); Civil Partnership Act 2004 Sch 6 para 35.

5 Magistrates' Courts Act 1980 s 59(3)(b) (as substituted (see note 4); amended by the Courts Act 2003 Sch 8 para 208).

6 le falling within the Magistrates' Courts Act 1980 s 59(6) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 820).

7 Magistrates' Courts Act 1980 s 59(3)(c) (as substituted: see note 4). In any case where a magistrates' court has made an order for the making of periodical payments and payments under the order are required to be made by standing or similar order under this provision, an application may be made to the court for the order to be varied, and where an application is so made a justices' clerk, after giving written notice, by post or otherwise, of the application to the respondent and allowing the respondent, within the period of 14 days beginning with the date of the giving of that notice, an opportunity to make written representations, may vary the order to provide that payments under the order are to be made to the designated officer of the court: Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(2), (3) (as added and amended: see note 2); Civil Partnership Act 2004 Sch 6 para 36(1), (2). Applications for variation may be made by either spouse or civil partner or, if the application is for the variation of an order for the making of payments to or in respect of a child and that child has reached 16, by that child: Domestic Proceedings and Magistrates' Courts Act 1978 ss 20(12), 20ZA(9) (s 20(12) substituted by the Children Act 1989 Sch 13 para 38; Domestic Proceedings and Magistrates' Courts Act 1978 ss 20(12), 20ZA(9) as so added); Civil Partnership Act 2004 Sch 6 para 39. As to the mode of application see PARA 894; as to the procedure where proceedings are brought by or against a person residing outside England and Wales see PARA 581. The clerk may proceed with such an application notwithstanding that the respondent has not received written notice of the application: Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(4) (as so added); Civil Partnership Act 2004 Sch 6 para 36(3). Where such an application has been made, the clerk may, if he considers it inappropriate to exercise his power under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(3) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 36(2), refer the matter to the court which may vary the order by exercising one of its powers of variation (as to which see the text and notes 1-13): Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(5) (as so added); Civil Partnership Act 2004 Sch 6 para 36(4).

In any case where the court proposes to exercise the power to order the making of payments by standing or similar order and having given the debtor an opportunity of opening an account from which payments under the order may be made in accordance with the method of payment proposed to be ordered the court is satisfied that the debtor has failed, without reasonable excuse, to open such an account, the court in exercising this power may order that the debtor open such an account: s 59(4); Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(6) (as so added); Civil Partnership Act 2004 Sch 6 para 38(1).

8 Magistrates' Courts Act 1980 s 59(3)(cc) (as substituted (see note 4); added by SI 1994/731).

9 le under the Attachment of Earnings Act 1971 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1431 et seq).

10 Magistrates' Courts Act 1980 s 59(3)(d) (as substituted: see note 4).

11 le the power to make an order under the Magistrates' Courts Act 1980 s 59(3)(c) as applied by the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(1) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 35 (see the text and notes 6-7).

12 le the power to make an order under the Magistrates' Courts Act 1980 s 59(3)(cc) as applied by the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(1) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 35 (see the text and note 8).

13 le the power to make an order under the Magistrates' Courts Act 1980 s 59(3)(d) as applied by the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(1) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 35 (see the text and notes 9-10).

14 le the power to make an order under the Magistrates' Courts Act 1980 s 59(3)(b) as applied by the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(1) or, as the case may be, the Civil Partnership Act 2004 Sch 6 para 35 (see the text and note 5).

15 Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(8) (as added (see note 2); amended by SI 1994/731); Civil Partnership Act 2004 Sch 6 para 37(2).

16 Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA(7) (as added: see note 2); Civil Partnership Act 2004 Sch 6 para 37(1).

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581. Proceedings for variation or revocation by or against a person outside England and Wales.

Where on an application for the variation or revocation of a periodical payments order¹ a court is satisfied that the respondent has been outside England and Wales for the whole of the period beginning one month before the making of and ending with the date of the hearing, it may proceed with the application provided that:

725 (1) the applicant has taken steps to notify the respondent of the making of the application and of the time and place appointed for the hearing by:

12

16. (a) causing a notice in writing to that effect to be delivered to the respondent²;

17. (b) causing a notice in writing to that effect to be sent by post addressed to the respondent at his last known address or usual place of abode or at his place of business or at such other address at which there is ground for believing that it will reach the respondent, in accordance with directions given for the purpose by a justice acting in the same local justice area as that of the court³; or

18. (c) causing a notice to that effect to be inserted in one or more newspapers, in accordance with directions so given⁴; and

13

726 (2) it is reasonable in all the circumstances to proceed in the absence of the respondent⁵.

The court must not, however, make the order for which the application is made unless it is satisfied that during the period of six months immediately preceding the making of the application the respondent was continuously outside England and Wales or was not in England and Wales on more than 30 days and that, having regard to any communication to the court in writing purporting to be from the respondent, it is reasonable in all the circumstances to do so⁶.

A court must not exercise its powers to vary or revoke an order for financial provision⁷ so as to increase the amount of any periodical payments thereby required to be made by any person unless the order⁸ is made at a hearing at which that person appears or a statement has been filed⁹ that service of a copy of the application has been effected on the respondent¹⁰.

¹ ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 paras 30-34 (see PARAS 576-579).

² Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(2)(a)(i) (amended by SI 2005/2930). The Magistrates' Courts Rules 1981, SI 1981/552, r 67(1) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 691) applies for the purpose of proving the delivery of a written notice in pursuance of the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(2)(a)(i) as it applies for the purpose of proving the service of a summons, and in relation to a solemn declaration made outside the United Kingdom, the Magistrates' Courts Rules 1981, SI 1981/552, r 67(1), as so applied, has effect as if for the reference to the authorities mentioned in r 67(1) there were substituted a reference to a consular officer of Her Majesty's government in the United Kingdom or any person for the time being authorised by law, in the place where the declarant is, to administer an oath for any judicial or other legal purpose: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(5).

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(2)(a)(ii) (amended by SI 2005/617). The Magistrates' Courts Rules 1981, SI 1981/552, r 67(2) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 691) applies for the purpose of proving the sending of a written notice in pursuance of the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(2)(a)(ii) or the insertion of a notice in a newspaper (see the text and note 4) as it applies for the purpose of proving the service of any process, provided, as respects the insertion of a notice in a newspaper, that a copy of the newspaper containing the notice is annexed to the certificate: r 22(6).

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(2)(a)(iii). See note 3.

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(2)(b).

6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(3).

7 See note 1.

8 See note 1.

9 le under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(4) (see PARA 895).

10 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 22(4) (amended by SI 2005/2930).

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582. Payment of lump sum by instalments.

A magistrates' court by whose conviction or order a sum is adjudged to be paid may, instead of requiring immediate payment, allow time for payment or order payment by instalments¹, and where, in the exercise of these powers a magistrates' court orders that a lump sum required to be paid² is to be paid by instalments, the court, on an application made by either the person liable to pay or the person entitled to receive that sum, has power to vary that order by varying the number of instalments payable, the amount of any instalment payable and the date on which any instalment becomes payable³.

1 See the Magistrates' Courts Act 1980 s 75; and **MAGISTRATES** vol 29(2) (Reissue) PARA 853.

2 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

3 Domestic Proceedings and Magistrates' Courts Act 1978 s 22 (amended by the Magistrates' Courts Act 1980 Sch 7 para 160); Civil Partnership Act 2004 Sch 6 para 41.

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583. Revival of orders for periodical payments.

Where an order made by a magistrates' court¹ for the making of periodical payments to or in respect of a child², other than an interim maintenance order³, ceases to have effect:

- 727 (1) on the date on which the child reaches the age of 16⁴; or
- 728 (2) at any time after that date but before or on the date on which he attains the age of 18⁵,

the child may apply to the court which made the order for an order for its revival⁶, and if on such an application it appears to the court that:

- 729 (a) the child is, will be or (if an order were made under this provision) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation⁷, whether or not while in gainful employment⁸; or
- 730 (b) there are special circumstances⁹ which justify the making of an order under this provision¹⁰,

the court has power by order to revive the order from such date as the court may specify, not being earlier than the date of the making of the application¹¹.

Any order revived under these provisions may be varied or revoked¹² in the same way as it could have been varied or revoked had it continued in being¹³.

1 le under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

2 As to the meaning of 'child' see PARA 553 note 4.

3 As to the making of interim orders see PARA 563. As to the duration of orders see PARA 560.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 20A(1)(a) (s 20A added by the Family Law Reform Act 1987 Sch 2 para 69; substituted by the Children Act 1989 Sch 13 para 39); Civil Partnership Act 2004 Sch 6 para 40(1)(a).

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 20A(1)(b) (as added and substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 40(1)(b).

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 20A(1) (as added and substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 40(1). The respondents on an application for the revival of an order under these provisions are to be the parties to the proceedings leading to the order which it is sought to have revived: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, rr 19(2), 19A(2) (r 19A added by SI 2005/2930).

7 As to 'trade, profession or vocation' see *Richardson v Richardson* [1993] 4 All ER 673, [1994] 1 WLR 186; *Downing v Downing* (*Downing intervening*) [1976] Fam 288, [1976] 3 All ER 474.

8 Domestic Proceedings and Magistrates' Courts Act 1978 s 20A(2)(a) (as added and substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 40(2)(a).

9 Physical or other disability may amount to such special circumstances: *C v F (disabled child: maintenance orders)* [1999] 1 FCR 39, [1998] 2 FLR 1, CA; *T v S (financial provision for children)* [1994] 1 FCR 743, [1994] 2 FLR 883.

10 Domestic Proceedings and Magistrates' Courts Act 1978 s 20A(2)(b) (as added and substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 40(2)(b).

11 Domestic Proceedings and Magistrates' Courts Act 1978 s 20A(2) (as added and substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 40(2).

12 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 paras 30-34 (see PARAS 576-579).

13 Domestic Proceedings and Magistrates' Courts Act 1978 s 20A(3) (as added and substituted: see note 4); Civil Partnership Act 2004 Sch 6 para 40(3).

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584. Orders for repayment of certain sums paid after cessation of order by reason of subsequent marriage or civil partnership.

Where:

731 (1) an order for financial provision¹ has ceased to have effect² by reason of the remarriage of, or the subsequent formation of a marriage or civil partnership³ by, the party in whose favour it was made⁴; and

732 (2) the person liable to make payments under the order made payments in accordance with it in respect of a period after the date of that remarriage, subsequent marriage or subsequent civil partnership in the mistaken belief that the order was still subsisting⁵,

no proceedings in respect of a cause of action arising out of the circumstances mentioned in heads (1) and (2) above is maintainable by the person so liable or his personal representatives against the person so entitled or his personal representatives⁶ but, on an application made under these provisions⁷, the court may order the respondent to pay to the applicant a sum equal to the amount of the payments made in respect of the period after the date of that remarriage, subsequent marriage or civil partnership or, if it appears to the court that it would be unjust to make that order, it may either order the respondent to pay to the applicant such lesser sum as it thinks fit or dismiss the application⁸.

1 Ie an order made under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 para 2(1)(a) (order for periodical payments: see PARA 553), the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14) (orders for agreed financial provision: see PARA 554) or the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (paras 15-19) (orders for payments where parties are living apart by agreement: see PARA 556).

2 Ie by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 s 4(2) or the Civil Partnership Act 2004 Sch 6 para 26(2): see PARA 560.

3 As to references to remarriage and the formation of a subsequent civil partnership or marriage see PARA 560 note 5.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 35(1)(a) (s 35(1) amended by the Civil Partnership Act 2004 Sch 27 para 58); Civil Partnership Act 2004 Sch 6 para 44(1)(a).

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 35(1)(b) (as amended: see note 4); Civil Partnership Act 2004 Sch 6 para 44(1)(b), (2).

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 35(1) (as amended: see note 4); Civil Partnership Act 2004 Sch 6 para 44(3).

7 An application under these provisions may be made by the person liable to make payments under the order referred to in note 1 or his personal representatives and may be made against the person entitled to payments under that order or his personal representatives; applications must be made to a county court, except that such an application may be made in proceedings in the High Court or a county court for leave to enforce, or the enforcement of, the payment of arrears under an order referred to in note 1: Domestic Proceedings and Magistrates' Courts Act 1978 s 35(3), (4); Civil Partnership Act 2004 Sch 6 para 44(4), (6). Accordingly references in these provisions to the 'court' are references to the High Court or a county court, as

the circumstances require: Domestic Proceedings and Magistrates' Courts Act 1978 s 35(4); Civil Partnership Act 2004 Sch 6 para 44(6). The jurisdiction so conferred on a county court is exercisable by a county court notwithstanding that, by reason of the amount claimed in an application under these provisions, the jurisdiction would not otherwise be exercisable by a county court: Domestic Proceedings and Magistrates' Courts Act 1978 s 35(6); Civil Partnership Act 2004 Sch 6 para 44(7).

8 Domestic Proceedings and Magistrates' Courts Act 1978 s 35(2); Civil Partnership Act 2004 Sch 6 para 44(4). An order under these provisions for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order: Domestic Proceedings and Magistrates' Courts Act 1978 s 35(5); Civil Partnership Act 2004 Sch 6 para 44(5).

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585. Collection of sums after cessation of order owing to subsequent marriage or civil partnership.

The designated officer for a magistrates' court to whom any payments under an order for financial provision¹ are required to be made is not liable for any act done by him in pursuance of the order after the date on which that order ceased to have effect by reason of the remarriage of, or the formation of a subsequent civil partnership or marriage by², the person entitled to payments under the order³, and the collecting officer⁴ under an attachment of earnings order made to secure payments under such an order⁵ is not liable for any act done by him after such date in accordance with any enactment or rule of court specifying how payments made to him in compliance with the attachment of earnings order are to be dealt with⁶, if, but only if, the act was one which he would have been under a duty to do had the order for financial provision not so ceased to have effect and the act was done before notice in writing of the fact that the person so entitled had remarried or entered into a subsequent marriage or civil partnership was given to him by or on behalf of that person, the person liable to make payments under the order or the personal representatives of either of those persons⁷.

1 Is an order made under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a) or the Civil Partnership Act 2004 Sch 6 para 2(1)(a) (order for periodical payments: see PARA 553), the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14) (orders for agreed financial provision: see PARA 554) or the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (paras 15-19) (orders for payments where parties are living apart by agreement: see PARA 556).

2 As to references to remarriage and the formation of a subsequent civil partnership or marriage see PARA 560 note 5.

3 Domestic Proceedings and Magistrates' Courts Act 1978 s 35(7)(a) (s 35(7), (8) amended by the Courts Act 2003 Sch 8 para 196; Domestic Proceedings and Magistrates' Courts Act 1978 s 35(7)(a) amended by the Civil Partnership Act 2004 Sch 27 para 58); Civil Partnership Act 2004 Sch 6 para 44(8)(a).

4 For these purposes 'collecting officer', in relation to an attachment of earnings order, means the officer of the High Court or the officer designated by the Lord Chancellor to whom a person makes payments in compliance with the order: Domestic Proceedings and Magistrates' Courts Act 1978 s 35(8) (as amended: see note 3); Civil Partnership Act 2004 Sch 6 para 44(10). As to attachment of earnings orders see PARA 627 et seq.

5 As to the orders see note 1.

6 Domestic Proceedings and Magistrates' Courts Act 1978 s 35(7)(b) (as amended: see note 3); Civil Partnership Act 2004 Sch 6 para 44(8)(b).

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 35(7) (as amended: see note 3); Civil Partnership Act 2004 Sch 6 para 44(9).

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(4) PREVENTION OF ATTEMPTS TO DEFEAT CLAIMS

586. Protected claims.

Provision is made for the setting aside or restraint of dispositions¹ intended to defeat claims for:

- 733 (1) maintenance pending suit or the outcome of proceedings²;
- 734 (2) financial provision in connection with proceedings for divorce, dissolution, nullity or separation³;
- 735 (3) property adjustment orders in connection with proceedings for divorce, dissolution, nullity or separation⁴;
- 736 (4) pension sharing orders in connection with proceedings for divorce, dissolution or nullity⁵;
- 737 (5) financial provision orders in cases of failure to maintain during the subsistence of a marriage or civil partnership⁶;
- 738 (6) the variation or discharge of orders for financial relief, the settlement or sale of property or pension sharing⁷; or
- 739 (7) the alteration of agreements during the lives of the parties⁸,

including claims and prospective claims for interim orders for maintenance⁹ or for financial provision, property adjustment and pension sharing¹⁰ in the case of an overseas divorce, dissolution, separation or annulment¹¹.

For these purposes 'defeating' claims for relief involves:

- 740 (a) preventing the relief from being granted to the applicant, or to the applicant for the benefit of a child of the family¹²;
- 741 (b) reducing the amount of any relief which might be so granted¹³; or
- 742 (c) frustrating or impeding the enforcement of any order which might be or has been made¹⁴ at the applicant's instance¹⁵.

Depending on the nature of the disposition, the court¹⁶ may either make an order setting it aside¹⁷ or restraining it¹⁸.

1 For these purposes 'disposition' does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise: Matrimonial Causes Act 1973 s 37(6); Matrimonial and Family Proceedings Act 1984 s 23(8); Civil Partnership Act 2004 Sch 5 para 75(2), Sch 7 para 18(1). In connection with dispositions of trust property see *Mubarak v Mubarik* [2007] EWHC 220 (Fam), [2007] All ER (D) 28 (Nov). The Matrimonial Causes Act 1973 s 37 does not apply to a disposition made before 1 January 1968: s 37(7).

2 Ie under the Matrimonial Causes Act 1973 s 22 or the Civil Partnership Act 2004 Sch 5 Pt 8 (para 38) (see PARA 456).

3 Ie under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-7) (see PARA 450 et seq).

4 Ie under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9) (see PARA 498 et seq).

5 le under the Matrimonial Causes Act 1973 s 24B or the Civil Partnership Act 2004 Sch 5 Pt 4 (paras 15-19) (see PARAS 524-525).

6 le under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 Pt 9 (paras 39-45) (see PARA 542 et seq).

7 le under the Matrimonial Causes Act 1973 s 31 or the Civil Partnership Act 2004 Sch 5 Pt 11 (paras 50-62) (see PARA 567 et seq), other than under the Matrimonial Causes Act 1973 s 31(6) or the Civil Partnership Act 2004 Sch 5 para 60(2) (see PARA 474).

8 le under the Matrimonial Causes Act 1973 s 35 or the Civil Partnership Act 2004 Sch 5 para 69 (see PARA 700 et seq).

9 le under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536).

10 le under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531).

11 The provisions relating to the setting aside or restraining of dispositions intended to defeat claims for interim orders for maintenance or financial provision, property adjustment and pension sharing orders relating to an overseas divorce, dissolution, separation or annulment (ie the Matrimonial and Family Proceedings Act 1984 s 23(1)-(8) and the Civil Partnership Act 2004 Sch 7 paras 15-17 (see PARAS 587-588) are without prejudice to any power of the High Court to grant injunctions under the Supreme Court Act 1981 s 37 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 347): Matrimonial and Family Proceedings Act 1984 s 23(9); Civil Partnership Act 2004 Sch 7 para 18(2). As from a day to be appointed these provisions are amended to take account of the renaming of the Supreme Court Act 1981 as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 para 1(2).

12 Matrimonial Causes Act 1973 s 37(1) (amended by the Welfare Reform and Pensions Act 1999 s 19, Sch 3 paras 1, 9); Matrimonial and Family Proceedings Act 1984 s 23(1); Civil Partnership Act 2004 Sch 5 para 75(1) (a), Sch 7 paras 15(9)(a), 16(4). The Matrimonial Causes Act 1973 s 37(1) and the Civil Partnership Act 2004 Sch 5 para 75(1)(a) clarify that the financial relief covered by this provision is relief prevented from being granted to the applicant or to the applicant for the benefit of a child of the family. As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

13 Matrimonial Causes Act 1973 s 37(1) (as amended: see note 12); Matrimonial and Family Proceedings Act 1984 s 23(1); Civil Partnership Act 2004 Sch 5 para 75(1)(b), Sch 7 para 15(9)(a).

14 le under any of the provisions mentioned in the text and notes 2-11.

15 Matrimonial Causes Act 1973 s 37(1) (as amended: see note 12); Matrimonial and Family Proceedings Act 1984 s 23(8); Civil Partnership Act 2004 Sch 5 para 75(1)(c), Sch 7 para 15(9)(b).

16 As to the meaning of 'court' see PARA 346 note 2.

17 See PARA 587.

18 See PARA 588.

UPDATE

586 Protected claims

NOTE 11--Appointed day is 1 October 2009: SI 2009/1604.

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587. Avoidance of transactions.

The court¹ may make an order setting aside a disposition² if it is satisfied³, on an application by one party to a marriage or civil partnership for proceedings for financial relief⁴:

- 743 (1) that the other party has, with the intention of defeating the applicant's claim for financial relief⁵, made a reviewable disposition⁶ and that, if the disposition were set aside, financial relief or different financial relief would be granted to the applicant⁷; or
- 744 (2) in a case where an order for financial relief has been obtained by the applicant against the other party, that the other party has made a reviewable disposition with the intention of defeating the applicant's claim for financial relief⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to the meaning of 'disposition' see PARA 586 note 1. Where the court makes an order setting aside a disposition under these provisions it must give such consequential directions as it thinks fit for giving effect to the order, including directions requiring the making of any payments or the disposal of any property: Matrimonial Causes Act 1973 s 37(3); Matrimonial and Family Proceedings Act 1984 s 23(5); Civil Partnership Act 2004 Sch 5 para 74(6), Sch 7 para 15(6). The court may order that money be paid into court or that a party's solicitor should hold money or property to the order of the court: *Re Mordant, Mordant v Halls* [1997] 2 FCR 378, [1996] 1 FLR 334 (where it was said that, if such an order were made, the party who obtained the order was in the position of a secured creditor in relation to the money or property). Where the court has jurisdiction to entertain an application for an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531) only by virtue of the Matrimonial and Family Proceedings Act 1984 s 15(1)(c) or the Civil Partnership Act 2004 Sch 7 para 7(4) (see PARA 939), it may not make any order under these provisions in respect of any property other than the dwelling-house concerned: Matrimonial and Family Proceedings Act 1984 s 23(4); Civil Partnership Act 2004 Sch 7 para 15(5).

3 In considering whether it is 'satisfied' for these purposes the court must apply the civil standard of proof, ie the balance of probabilities: see *Kemmis v Kemmis (Welland intervening)* [1988] 1 WLR 1307, [1988] 2 FLR 223, CA (where, however, it was said that, since what had to be proved is not merely a dishonourable intention but a dishonest and fraudulent one, the evidence which was required had to be correspondingly more convincing). The courts have rejected any gloss on the civil standard of proof: see *Re H (minors) (sexual abuse: standard of proof)* [1996] AC 563, [1996] 1 All ER 1, HL. It has been said that the question for the court is whether it is satisfied that the disposition was made with the intention of defeating the wife's claim for ancillary relief: see *K v K (avoidance of reviewable transaction)* (1982) 4 FLR 31 at 36, CA. See also *Sherry v Sherry* [1991] 1 FLR 307, [1991] Fam Law 180, CA; *McGladdery v McGladdery* [2000] 1 FCR 315, [1999] 2 FLR 1102, CA; *Le Foe v Le Foe; Woolwich plc v Le Foe* [2002] 1 FCR 107.

4 As to the proceedings for financial relief dispositions for the avoidance of which may be set aside under these provisions see PARA 586.

5 As to what constitutes 'defeating' a claim see PARA 586.

6 Any disposition made by the other party to the proceedings for financial relief in question, whether before or after the commencement of those proceedings, is a 'reviewable disposition' for these purposes unless it was made for valuable consideration, other than marriage or the formation of a civil partnership, to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief: Matrimonial Causes Act 1973 s 37(4); Matrimonial and Family Proceedings Act 1984 s 23(6); Civil Partnership Act 2004 Sch 5 para 75(3), Sch 7 para 15(7), (8). If the third party acted in good faith and without notice of any attempt to defeat the claim for financial relief, the court will not have power to set aside the transaction: *Green v Green (Barclays Bank Ltd, third party)* [1981] 1 All ER 97, [1981] 1 WLR 391.

7 Matrimonial Causes Act 1973 s 37(1), (2)(b) (s 37(1) amended by the Welfare Reform and Pensions Act 1999 s 19, Sch 3 paras 1, 9); Matrimonial and Family Proceedings Act 1984 s 23(2)(b); Civil Partnership Act 2004 Sch 5 para 74(1), (3), Sch 7 para 15(3). An application for these purposes in domestic proceedings must be made in the proceedings for the financial relief in question (Matrimonial Causes Act 1973 s 37(2); Civil Partnership Act 2004 Sch 5 para 74(5)); the court may not make an order under these provisions relating to an overseas divorce, dissolution, annulment or variation (see PARA 586 text and notes 9-11) unless leave has been granted under the Matrimonial and Family Proceedings Act 1984 s 13 or the Civil Partnership Act 2004 Sch 7 para 4 (see PARA 938) for the making of an application for an order for financial relief under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531) (Matrimonial and Family Proceedings Act 1984 s 23(2); Civil Partnership Act 2004 Sch 7 para 15(1)). As to the evidence required on an application for an avoidance of disposition order where the application relates to land see PARA 918. Where an application is made with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied that the disposition or other dealing would apart from this provision have the consequence of defeating the applicant's claim for financial relief it is to be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief: Matrimonial Causes Act 1973 s 37(5)(a); Matrimonial and Family Proceedings Act 1984 s 23(7)(a); Civil Partnership Act 2004 Sch 5 para 75(4)(a), Sch 7 para 16(1), (3).

8 Matrimonial Causes Act 1973 s 37(2)(c); Matrimonial and Family Proceedings Act 1984 s 23(3); Civil Partnership Act 2004 Sch 5 para 74(4), Sch 7 para 15(4). All the jurisdictional requirements for an order under these provisions are satisfied if, but only if, the party making the disposition made it with the intention of preventing financial relief being granted to the other party or of frustrating or impeding the enforcement of any order: *Mubarak v Mubarik* [2007] EWHC 220 (Fam), [2007] All ER (D) 28 (Nov). Where an application is made with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied that the disposition has had the consequence of defeating the applicant's claim for financial relief it is to be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief: Matrimonial Causes Act 1973 s 37(5)(b); Matrimonial and Family Proceedings Act 1984 s 23(7)(b); Civil Partnership Act 2004 Sch 5 para 75(4)(b), Sch 7 para 16(2), (3).

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588. Prevention of transactions.

If the court¹ is satisfied², on an application by one party to proceedings for financial relief³, that the other party to the proceedings is, with the intention of defeating the claim⁴, about to make any disposition⁵ or to transfer out of the jurisdiction or otherwise deal with any property, it may make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim⁶.

Where, on an application by a party to a marriage or a civil partnership⁷, it appears to the court:

- 745 (1) that the marriage or civil partnership has been dissolved or annulled, or that the parties to the marriage or a civil partnership have been legally separated, by means of judicial or other proceedings in an overseas country⁸;
- 746 (2) that the applicant intends to apply for leave to make an application for an order for financial relief⁹ as soon as he or she has been habitually resident¹⁰ in England and Wales for a period of one year¹¹; and
- 747 (3) that the other party to the marriage or civil partnership is, with the intention of defeating a claim for financial relief¹², about to make any disposition¹³ or to transfer out of the jurisdiction, or otherwise deal with any property¹⁴,

the court may¹⁵ make such order as it thinks fit for restraining the other party from taking such action as is mentioned in head (3) above¹⁶.

1 As to the meaning of 'court' see PARA 346 note 2.

2 As to 'satisfied' for these purposes see PARA 587 note 3.

3 As to the proceedings for financial relief dispositions for the avoidance of which may be restrained under these provisions see PARA 586. As to the evidence required on an application for an avoidance of disposition order where the application relates to land see PARA 918.

4 As to what constitutes 'defeating' a claim see PARA 586.

5 As to the meaning of 'disposition' see PARA 586 note 1.

6 Matrimonial Causes Act 1973 s 37(1), (2)(a) (s 37(1) amended by the Welfare Reform and Pensions Act 1999 s 19, Sch 3 paras 1, 9); Matrimonial and Family Proceedings Act 1984 s 23(2)(a); Civil Partnership Act 2004 Sch 5 para 74(1), (2), Sch 7 para 15(1), (2). In domestic proceedings, an application for such an order may be made to the district judge: Family Proceedings Rules 1991, SI 1991/1247, r 2.68(1) (amended by SI 2005/2922). As to the meaning of 'district judge' see PARA 737 note 3. The Family Proceedings Rules 1991, SI 1991/1247, rr 2.65, 2.66 (see PARAS 936-937) apply, with the necessary modifications, to the application as if it were an application for financial relief: r 2.68(2). The court may not make an order under these provisions relating to an overseas divorce, dissolution, annulment or variation (see PARA 586 text and notes 9-11) unless leave has been granted under the Matrimonial and Family Proceedings Act 1984 s 13 or the Civil Partnership Act 2004 Sch 7 para 4 (see PARA 938) for the making of an application for an order for financial relief under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531): Matrimonial and Family Proceedings Act 1984 s 23(2); Civil Partnership Act 2004 Sch 7 para 15(1). Where the court has jurisdiction to entertain an application for an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531) only under the Matrimonial and Family Proceedings Act 1984 s 15(1)(c) or the Civil Partnership Act 2004 Sch 7 para 7(4) (see PARA 939), it may not make any order under these provisions in respect of any property other than the dwelling-house concerned: Matrimonial and Family Proceedings Act 1984 s 23(4); Civil Partnership Act 2004 Sch 7 para 15(5). Where an

application is made with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied that the disposition or other dealing would apart from this provision have the consequence of defeating the applicant's claim for financial relief it is to be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief: Matrimonial Causes Act 1973 s 37(5)(a); Matrimonial and Family Proceedings Act 1984 s 23(7)(a); Civil Partnership Act 2004 Sch 5 para 75(4)(a), Sch 7 para 16(1), (3).

7 As to the making of an application for these purposes see the Family Proceedings Rules 1991, SI 1991/1247, r 3.19 (amended by SI 2005/2922). Where an application under these provisions is referred or adjourned to a judge the proper officer must fix a date, time and place for the hearing of the application or the consideration of the question and give notice of that date to all parties: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(2), (6) (Appendix 4 added by SI 2005/2922). The hearing or consideration must, unless the court otherwise directs, take place in chambers: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(7) (as so added). The judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings: Appendix 4 paras 7(4), 9(11) (as so added). As to the meaning of 'judge' see PARA 737 note 3. As to the meaning of 'proper officer' see PARA 461 note 5.

8 Matrimonial and Family Proceedings Act 1984 s 24(1)(a); Civil Partnership Act 2004 Sch 7 para 17(1)(a). As to the meaning of 'overseas country' see PARA 530 note 1. In relation to civil partnerships, these provisions apply even if the date of the dissolution, annulment or legal separation is earlier than 5 December 2005 (ie the date on which Sch 7 para 17(1) was brought into force by virtue of the Civil Partnership Act 2004 (Commencement No 2) Order 2005, SI 2005/3175): Civil Partnership Act 2004 Sch 7 para 17(2).

9 Ie under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (see PARA 531).

10 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59 et seq.

11 Matrimonial and Family Proceedings Act 1984 s 24(1)(b); Civil Partnership Act 2004 Sch 7 para 17(1)(b).

12 For these purposes the reference to defeating a claim for financial relief is to be construed in accordance with the Matrimonial and Family Proceedings Act 1984 s 23(1) or, as the case may be, the Civil Partnership Act 2004 Sch 5 para 75(1)(a), Sch 7 paras 15(9)(a), 16(4) (see PARA 586), omitting the reference to any order which has been made: Matrimonial and Family Proceedings Act 1984 s 24(2)(a); Civil Partnership Act 2004 Sch 7 para 17(5).

13 As to the meaning of 'disposition' see PARA 586 note 1 (definition applied, for the purposes of the Matrimonial and Family Proceedings Act 1984, by s 24(2)(b)).

14 Matrimonial and Family Proceedings Act 1984 s 24(1)(c); Civil Partnership Act 2004 Sch 7 para 17(1)(c).

15 Ie without prejudice to any power of the High Court to grant injunctions under the Supreme Court Act 1981 s 37 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 347): Matrimonial and Family Proceedings Act 1984 s 24(3); Civil Partnership Act 2004 Sch 7 para 18(2). As from a day to be appointed these provisions are amended to take account of the renaming of the Supreme Court Act 1981 as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 para 1(2).

16 Matrimonial and Family Proceedings Act 1984 s 24(1); Civil Partnership Act 2004 Sch 7 para 17(1). Where an application is made with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied that the disposition or other dealing would apart from this provision have the consequence of defeating the applicant's claim for financial relief it is to be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief: Matrimonial and Family Proceedings Act 1984 ss 23(7)(a), 24(2)(b); Civil Partnership Act 2004 Sch 7 para 17(3), (4).

UPDATE

588 Prevention of transactions

NOTE 15--Appointed day is 1 October 2009: SI 2009/1604.

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(5) PRINCIPLES OF ASSESSMENT

(i) Matters to which Court is to have Regard

589. Duty to consider all the circumstances of the case.

It is the duty of the High Court and county courts¹ in deciding whether and how to exercise their powers to make financial provision orders², property adjustment orders³, orders for the sale of property⁴, pension sharing orders⁵ or (as from a day to be appointed⁶) pension compensation sharing orders⁷, and it is the duty of the High Court, county courts and magistrates' courts in deciding whether and how to exercise their powers to make an order for financial provision during the subsistence of a marriage or civil partnership⁸, to have regard to all the circumstances of the case, first consideration being given to the welfare, while a minor, of any child of the family⁹ who has not attained the age of 18¹⁰.

Courts are also required to have regard to particular matters when making financial and property orders¹¹, to consider (in cases involving divorce, dissolution or nullity) whether it would be appropriate to exercise their powers so as to expedite the termination of the parties' financial obligations to each other¹², to consider the possibility of one or both of the parties remarrying, entering into a subsequent civil partnership or cohabiting¹³, the possibility of reconciliation (where an application is made to a magistrates' court for an order for financial provision during the subsistence of a marriage or civil partnership)¹⁴ and the effects of delay in bringing proceedings¹⁵, and to consider the justice of the proposed terms in the light of any agreements which the parties may have reached¹⁶.

¹ As to the meaning of 'court' see PARA 346 note 2.

² *Ie* under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5): see PARA 458 *et seq*.

³ *Ie* under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9): see PARA 499 *et seq*.

⁴ *Ie* under the Matrimonial Causes Act 1973 s 24A or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14): see PARA 520 *et seq*.

⁵ *Ie* under the Matrimonial Causes Act 1973 s 24B or the Civil Partnership Act 2004 Sch 5 Pt 4 (paras 15-19): see PARA 523 *et seq*.

⁶ The Matrimonial Causes Act 1973 s 25(1) and the Civil Partnership Act 2004 Sch 5 para 20 are amended, as from a day to be appointed, by the Pensions Act 2008 ss 120, 148, Sch 6 paras 1, 4, 14, 16(1)-(3), Sch 11 Pt 4. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

⁷ *Ie* under the Matrimonial Causes Act 1973 s 24E or the Civil Partnership Act 2004 Sch 5 Pt 4A (paras 19A-19F): see PARA 523 *et seq*.

⁸ *Ie* under the *Ie* Matrimonial Causes Act 1973 s 27(1) or the Civil Partnership Act 2004 Sch 5 para 39(1) (see PARA 542), or the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or s 7 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8) or Sch 6 Pt 3 (paras 15-19) (see PARA 553 *et seq*).

9 As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973 and the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARAS 477 note 3, 553 note 4.

10 Matrimonial Causes Act 1973 ss 25(1), 27(3), (3A) (ss 25(1), 27(3) substituted by the Matrimonial and Family Proceedings Act 1984 ss 3, 4; Matrimonial Causes Act 1973 ss 25(1) amended by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 5(a); and prospectively amended (see note 6); Matrimonial Causes Act 1973 s 27(3A) added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(2) and amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 13); Domestic Proceedings and Magistrates' Courts Act 1978 ss 3(1), 7(5) (s 3(1) substituted by the Matrimonial and Family Proceedings Act 1984 s 9); Civil Partnership Act 2004 Sch 5 paras 20, 43(1), (2), Sch 6 paras 4, 19 (Sch 5 para 20 prospectively amended: see note 6). As to the matters to which the court is to have regard in deciding how to exercise its powers when making orders in favour of children of the family see PARAS 597-598. The welfare of child is the first but not the paramount consideration (see *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 All ER 336, CA; and *SRJ v DWJ (financial provision)* [1999] 3 FCR 153, [1999] 2 FLR 176, CA); implicitly, the objective must be to achieve a fair outcome (see *White v White* [2001] 1 AC 596 at 604, [2001] 1 All ER 1 at 8, HL per Lord Nicholls of Birkenhead; applied in *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FCR 331).

11 See PARA 590.

12 See PARA 592.

13 See PARA 593.

14 See PARA 594.

15 See PARA 595.

16 See PARA 596.

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590. Particular matters to which the court must have regard.

The High Court and county courts¹, as regards the exercise of their powers to make periodical payments orders², secured periodical payments orders³, lump sum orders⁴, property adjustment orders⁵, orders for the sale of property⁶, pension sharing orders⁷ or (as from a day to be appointed⁸) pension compensation sharing orders⁹, and the High Court, county courts and magistrates' courts as regards the exercise of their powers to make orders for financial provision during the subsistence of a marriage or civil partnership¹⁰, must in particular have regard to:

- 748 (1) the income, earning capacity, property and other financial resources which each of the parties to the marriage or civil partnership has, or is likely to have, in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage or civil partnership to take steps to acquire¹¹;
- 749 (2) the financial needs, obligations and responsibilities which each of the parties to the marriage or civil partnership has, or is likely to have, in the foreseeable future¹²;
- 750 (3) the standard of living enjoyed by the family before, as the case may be, the breakdown of the marriage or civil partnership, the failure to provide reasonable maintenance (where the High Court or a county court is considering a claim for maintenance during the subsistence of a marriage or civil partnership) or the occurrence of the conduct which is alleged as the ground of the application or, where parties are living apart, before the occurrence of the living apart (where a magistrates' court is considering an order for financial provision during the subsistence of a marriage or civil partnership)¹³;
- 751 (4) the age of each party to the marriage or civil partnership and the duration of the marriage or civil partnership¹⁴;
- 752 (5) any physical or mental disability of either of the parties to the marriage or civil partnership¹⁵;
- 753 (6) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family¹⁶;
- 754 (7) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it¹⁷; and
- 755 (8) in the case of proceedings for divorce, dissolution or nullity only, the value to each of the parties to the marriage or civil partnership of any benefit which, by reason of the dissolution or annulment of the marriage or civil partnership, that party will lose the chance of acquiring¹⁸.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Ie under the Matrimonial Causes Act 1973 s 23(1)(a) or the Civil Partnership Act 2004 Sch 5 para 2(1)(a): see PARA 458 et seq.

3 Ie under the Matrimonial Causes Act 1973 s 23(1)(b) or the Civil Partnership Act 2004 Sch 5 para 2(1)(b): see PARA 467 et seq.

4 le under the Matrimonial Causes Act 1973 s 23(1)(c) or the Civil Partnership Act 2004 Sch 5 para 2(1)(c): see PARA 476 et seq.

5 le under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9): see PARA 499 et seq.

6 le under the Matrimonial Causes Act 1973 s 24A or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14): see PARA 520 et seq.

7 le under the Matrimonial Causes Act 1973 s 24B or the Civil Partnership Act 2004 Sch 5 Pt 4 (paras 15-19): see PARA 523 et seq.

8 The Matrimonial Causes Act 1973 s 25(2) and the Civil Partnership Act 2004 Sch 5 para 21 are amended, as from a day to be appointed, by the Pensions Act 2008 ss 120, 148, Sch 6 paras 1, 4, 14, 16(1), (4), Sch 11 Pt 4. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

9 le under the Matrimonial Causes Act 1973 s 24E or the Civil Partnership Act 2004 Sch 5 Pt 4A (paras 19A-19F): see PARA 523 et seq.

10 le under the Matrimonial Causes Act 1973 s 27(1)(a) or the Civil Partnership Act 2004 Sch 5 para 39(1)(a) (see PARA 542) or the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(a), (b) or s 7 or the Civil Partnership Act 2004 Sch 6 para 2(1)(a), (b) or Sch 6 Pt 3 (paras 15-19) (see PARA 553 et seq).

11 Matrimonial Causes Act 1973 ss 25(2)(a), 27(3) (ss 25(2), 27(3) substituted by the Matrimonial and Family Proceedings Act 1984 ss 3, 4; Matrimonial Causes Act 1973 ss 25(2) amended by the Pensions Act 1995 s 166(2); the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 5(b); and prospectively amended (see note 8); Matrimonial Causes Act 1973 s 27(3A), (3B) added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(2) and amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 13); Domestic Proceedings and Magistrates' Courts Act 1978 ss 3(2)(a), 7(5) (s 3 substituted, s 7(5) amended, by the Matrimonial and Family Proceedings Act 1984 s 9, Sch 1 para 22); Civil Partnership Act 2004 Sch 5 paras 21(1), (2)(a), 43(1), (2), Sch 6 paras 5(1), (2)(a), 19 (Sch 5 para 21(1) prospectively amended: see note 6). The matters to which the court is to have regard pursuant to this requirement include any benefits under a pension arrangement which a party to the marriage or civil partnership has or is likely to have and any PPF compensation (ie compensation payable under the Pensions Act 2004 Pt 2 Chapter 3 (ss 126-181) (pension protection: see **SOCIAL SECURITY AND PENSIONS**) or corresponding Northern Ireland legislation: see PARA 532 note 5) to which a party to the marriage or civil partnership is likely to be entitled: Matrimonial Causes Act 1973 ss 25B(1)(a), 25E(1)(a) (ss 25B, 25E added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25B(1)(a), (b) amended by the Welfare Reform and Pensions Act 1999 Sch 4 para 1); Civil Partnership Act 2004 Sch 5 paras 24(1), 30(1).

It has been held that in approaching the assessment of maintenance under the Domestic Proceedings and Magistrates' Courts Act 1978 s 3, the magistrates should follow the same principles as are applied by the courts under the Matrimonial Causes Act 1973 s 25 (*Macey v Macey* (1981) 3 FLR 7, 11 Fam Law 248; see also *Vasey v Vasey* [1985] FLR 596 at 601, [1985] Fam Law 158, CA), and that in a complex matter a magistrates' court is not the appropriate court to investigate a party's finances, and such a matter should be transferred to the High Court (*Brown v Brown* (1972) 117 Sol Jo 87, DC; and see *Goodall (formerly Jolly) v Jolly* [1984] FLR 143, sub nom *Goodall v Jolley* [1984] Fam Law 23). As to the position where an applicant is receiving supplementary benefits see *Wills v Wills* [1984] FLR 672, [1984] Fam Law 309, DC (husband living with parents). As to income and resources generally see PARA 599 et seq. See also *Q v Q (ancillary relief: periodical payments)* [2005] EWHC 402 (Fam), [2005] 2 FLR 640 (court also had regard to likely future decreases in salary in the case of a professional footballer); and PARA 592.

12 Matrimonial Causes Act 1973 s 25(2)(b) (as substituted and amended: see note 11); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(b) (as so substituted); Civil Partnership Act 2004 Sch 5 para 21(2)(b), Sch 6 para 5(2)(b). As to needs, obligations and responsibilities generally see PARAS 610-613.

13 Matrimonial Causes Act 1973 ss 25(2)(c), 27(3B) (as substituted, added and amended: see note 11); Domestic Proceedings and Magistrates' Courts Act 1978 ss 3(2)(c), 7(5) (as so substituted and amended); Civil Partnership Act 2004 Sch 5 paras 21(2)(c), 43(4), Sch 6 paras 5(2)(c), 19. As to standard of living generally see PARA 614.

14 Matrimonial Causes Act 1973 s 25(2)(d) (as substituted and amended: see note 11); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(d) (as so substituted); Civil Partnership Act 2004 Sch 5 para 21(2)(d), Sch 6 para 5(2)(d). In connection with the duration of a recognised overseas relationship see the Civil Partnership (Treatment of Overseas Relationships) Order 2005, SI 2005/3042, art 3(3), (4). As to age and duration generally see PARAS 615-616.

15 Matrimonial Causes Act 1973 s 25(2)(e) (as substituted and amended: see note 11); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(e) (as so substituted); Civil Partnership Act 2004 Sch 5 para 21(2)(e), Sch 6 para 5(2)(e). As to disability generally see PARA 617.

16 Matrimonial Causes Act 1973 s 25(2)(f) (as substituted and amended: see note 11); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(f) (as so substituted); Civil Partnership Act 2004 Sch 5 para 21(2)(f), Sch 6 para 5(2)(f). See also *S v S (ancillary relief after lengthy separation)* [2006] EWHC 2339 (Fam), [2007] 2 FCR 762, [2007] 1 FLR 2120 (wife not entitled to share of business that husband set up after their separation). As to contributions generally see PARAS 618-619.

17 Matrimonial Causes Act 1973 s 25(2)(g) (as substituted and amended: see note 11); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(g) (as so substituted); Civil Partnership Act 2004 Sch 5 para 21(2)(g), Sch 6 para 5(2)(g). Conduct of the parties which does not fall within this requirement may be considered as being within 'all the circumstances of the case' (and thus a relevant factor: see PARA 589): see eg *Primavera v Primavera* [1992] 1 FCR 78, [1992] 1 FLR 16, CA. It has been held (in proceedings for financial support during the subsistence of a marriage) that the past conduct of a party is only to be taken into account in exceptional cases where it would offend a reasonable person's sense of justice to disregard such conduct: see *Robinson v Robinson* [1983] Fam 42, [1983] 1 All ER 391, CA (husband completely blameless; marriage had broken down solely on account of wife's decision to end cohabitation; magistrates entitled to conclude that wife's conduct was gross and obvious and that it would be unjust to disregard it), following *Wachtel v Wachtel* [1973] Fam 72 at 81, [1973] 1 All ER 829, CA and *West v West* [1978] Fam 1, [1977] 2 All ER 705; *Vasey v Vasey* [1985] FLR 596 at 601, [1985] Fam Law 158, CA. As to conduct generally see PARA 621.

18 Matrimonial Causes Act 1973 s 25(2)(h) (as substituted and amended (see note 11); amended by the Pensions Act 1995 s 166(2)); Civil Partnership Act 2004 Sch 5 para 21(2)(h). The matters to which the court is to have regard pursuant to this requirement include any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage or civil partnership, a party to the marriage or civil partnership will lose the chance of acquiring any PPF compensation which by reason of the dissolution or annulment of the marriage or civil partnership a party to the marriage or civil partnership will lose the chance of acquiring entitlement to: Matrimonial Causes Act 1973 ss 25B(1)(b), 25E(1)(b) (as so added and amended); Civil Partnership Act 2004 Sch 5 paras 24(2), 30(2). As to loss of benefit generally see PARA 622.

UPDATE

590 Particular matters to which the court must have regard

NOTE 11--See also *Murphy v Murphy* [2009] All ER (D) 125 (Sep), CA; and *C v C (ancillary relief: trust fund)* [2009] EWHC 1491 (Fam), [2009] Fam Law 920.

NOTE 17--See *C v T* [2009] All ER (D) 43 (Jun) (inequitable to make financial provision for husband whose conduct amounted to grossest breach of trust and who had been responsible for destruction of marriage).

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591. Overall purpose of court's powers.

The purpose of the powers conferred on the court in proceedings for financial relief is to enable the court to make fair financial arrangements on or after divorce, dissolution, nullity of marriage or civil partnership or judicial or legal separation, as the case may be, in the absence of agreement between the former spouses or civil partners¹. Those powers must always be exercised with that objective in view, giving first consideration to the welfare of any children².

In any calculation the court must have a starting point; and historically a starting point of one-third of the combined resources of the parties, both capital and income, had been considered as good as any other³. The 'one-third' approach has now been rejected as the basis of assessment⁴, although a 'one-third' calculation may be used as a method of checking that any proposed order is not wholly disproportionate⁵.

In seeking to achieve a fair outcome, there is no place for discrimination between the parties and their respective roles⁶. The court must apply the statutory provisions, there being no presumption of an equal division of assets⁷. Before the court reaches a firm conclusion and makes an order giving one party a larger share of the assets than the other, it would always be well advised to check its tentative views against the yardstick of equality of division; and, as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so⁸.

The court will consider the net effect of any proposed order on the parties concerned⁹.

1 For a thorough review of the court's approach to proceedings for financial relief see *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL. The three main principles to be considered in relation to the distribution of assets are need, compensation and sharing: see *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 3 All ER 1; *Charman v Charman* [2007] EWCA Civ 503, [2007] 2 FCR 217, [2007] 1 FLR 1246; and see further *Martin-Dye v Martin-Dye* [2006] EWCA Civ 681, [2006] 2 FCR 325; *P v P (inherited property)* [2004] EWHC 1364 (Fam), [2006] 2 FCR 579, [2005] 1 FLR 576; *P v P (financial relief: illiquid assets)* [2004] EWHC 2277 (Fam), [2005] 1 FLR 548; *RP v RP* [2006] EWHC 3409 (Fam), [2008] 2 FCR 613, [2007] 1 FLR 2105; *NA v MA* [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760, [2007] Fam Law 295 (post nuptial agreement was not enforceable as the wife's will had been overborne by the husband); *VB v JP* [2008] EWHC 112 (Fam), [2008] 2 FCR 682, [2008] 1 FLR 742.

2 See *White v White* [2001] 1 AC 596 at 604, 605, [2001] 1 All ER 1 at 8, HL per Lord Nicholls of Birkenhead. As to the requirement to give first consideration to the welfare of children see PARA 589 et seq.

3 See eg *Wachtel v Wachtel* [1973] Fam 72, [1973] 1 All ER 113; varied on appeal [1973] Fam 72 at 94, [1973] 1 All ER 829 at 839, CA.

4 See eg *P v P (financial provision: lump sum)* [1978] 3 All ER 70, [1978] 1 WLR 483, CA; *Page v Page* (1981) 2 FLR 198, CA; *Stockford v Stockford* (1981) 3 FLR 58, 12 Fam Law 30, CA; *Furniss v Furniss* (1981) 3 FLR 46, 12 Fam Law 30, CA; *Preston v Preston* [1982] Fam 17, [1982] 1 All ER 41, CA.

5 *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA (husband was extremely wealthy and the wife had made no direct contribution to his wealth; it was held that in respect of both financial provision and property adjustment there was no justification for applying a mathematical solution; the court had to determine what were the wife's reasonable requirements, bearing in mind the family's lifestyle, and award sufficient to meet those requirements); and see *Potter v Potter* [1982] 3 All ER 321 at 324, [1982] 1 WLR 1255 at 1257, CA per Dunn LJ.

6 See *White v White* [2001] 1 AC 596 at 605, [2001] 1 All ER 1 at 8, HL per Lord Nicholls of Birkenhead; applied in *Dharamshi v Dharamshi* [2001] 1 FCR 492, [2001] 1 FLR 736, CA; *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FCR 331.

7 See note 6.

8 See *Scheeres v Scheeres* [1999] 2 FCR 476, [1999] 1 FLR 241; *White v White* [2001] 1 AC 596 at 605, [2001] 1 All ER 1 at 9, HL per Lord Nicholls of Birkenhead and at 615, 18 per Lord Cooke of Thorndon. For cases where there was a departure from the broad objective of equality see *N v N (financial provision: sale of company)* [2001] 3 FCR 316, [2001] 2 FLR 69 (departure due to difficulties associated with valuation and realisation of assets over time); *S v S (financial provision: departing from equality)* [2001] 2 FLR 246 (departure due to the fact that the award necessary to achieve equality would discriminate against husband).

9 *Stockford v Stockford* (1981) 3 FLR 58, 12 Fam Law 30, CA.

UPDATE

591 Overall purpose of court's powers

NOTE 1--See *Radmacher (formerly Granatino) v Granatino* [2010] EWCA Civ 649, [2010] 2 FCR 645 (see further PARA 712); *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092.

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592. Termination of financial obligations after divorce, dissolution etc.

Where on or after the grant of a decree of divorce or nullity of marriage or an order for dissolution or nullity of a civil partnership the court¹ decides to exercise its powers to make a periodical payments order², a secured periodical payments order³, a lump sum order⁴, a property adjustment order⁵, an order for the sale of property⁶, a pension sharing order⁷ or (as from a day to be appointed⁸) a pension compensation sharing orders⁹, in favour of a party to the marriage or civil partnership, it is the duty of the court to consider whether it would be appropriate to exercise those powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable¹⁰. Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage or civil partnership it must, in particular, consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party¹¹.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Ie under the Matrimonial Causes Act 1973 s 23(1)(a) or the Civil Partnership Act 2004 Sch 5 para 2(1)(a): see PARA 458 et seq.

3 Ie under the Matrimonial Causes Act 1973 s 23(1)(b) or the Civil Partnership Act 2004 Sch 5 para 2(1)(b): see PARA 467 et seq.

4 Ie under the Matrimonial Causes Act 1973 s 23(1)(c) or the Civil Partnership Act 2004 Sch 5 para 2(1)(c): see PARA 476 et seq.

5 Ie under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9): see PARA 499 et seq.

6 Ie under the Matrimonial Causes Act 1973 s 24A or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14): see PARA 520 et seq.

7 Ie under the Matrimonial Causes Act 1973 s 24B or the Civil Partnership Act 2004 Sch 5 Pt 4 (paras 15-19): see PARA 523 et seq.

8 The Matrimonial Causes Act 1973 s 25A(1) and the Civil Partnership Act 2004 Sch 5 para 23 are amended, as from a day to be appointed, by the Pensions Act 2008 ss 120, 148, Sch 6 paras 1, 5, 14, 16(1), (5), Sch 11 Pt 4. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions.

9 Ie under the Matrimonial Causes Act 1973 s 24E or the Civil Partnership Act 2004 Sch 5 Pt 4A (paras 19A-19F): see PARA 523 et seq.

10 Matrimonial Causes Act 1973 s 25A(1) (s 25A added by the Matrimonial and Family Proceedings Act 1984 s 3; Matrimonial Causes Act 1973 s 25A(1) amended by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 6; prospectively amended (see note 8)); Civil Partnership Act 2004 Sch 5 para 23(1), (2) (Sch 5 para 23(1) prospectively amended: see note 8). In *Minton v Minton* [1979] AC 593, [1979] 1 All ER 79, HL the principle of the importance of achieving a clean break was recognised, and these provisions impose an obligation on the court to consider one: see *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 All ER 336, CA. Where the court decides to order maintenance for a fixed period without there being any right to extend that period, it is essential that the order refers to the Matrimonial Causes Act 1973 s 25A(1) or (as the case may be) the Civil Partnership Act 2004 Sch 5 para 23(1), (2) and follows the wording thereof: see *Richardson v Richardson* [1993]

4 All ER 673, [1994] 1 WLR 186; *Richardson v Richardson (No 2)* [1994] 2 FCR 826, [1994] 2 FLR 1051 (affd [1997] 2 FCR 453, [1996] 2 FLR 617, CA); *SB v PB (financial provision)* [1995] 2 FCR 62, sub nom *B v B (consent order: variation)* [1995] 1 FLR 9. See also *Q v Q (ancillary relief: periodical payments)* [2005] EWHC 402 (Fam), [2005] 2 FLR 640 (court also had regard to likely future decreases in salary in the case of a professional footballer).

11 Matrimonial Causes Act 1973 s 25A(2) (as added: see note 10); Civil Partnership Act 2004 Sch 5 para 23(3). Where the court seeks to achieve an immediate clean break by the dismissal of claims to periodical payments and secured periodical payments, it is essential that the order refers to the Matrimonial Causes Act 1973 s 25A(1) or (as the case may be) the Civil Partnership Act 2004 Sch 5 para 23(1), (2), and follows the wording thereof: see the cases cited in note 10; *SB v PB (financial provision)* [1995] 2 FCR 62, sub nom *B v B (consent order: variation)* [1995] 1 FLR 9.

Although the court will recognise that it is desirable that persons should not remain locked into financial dependency if in justice to both sides such dependency can be brought to an end (*Minton v Minton* [1979] AC 593, [1979] 1 All ER 79, HL), there is no presumption in favour of a clean break (see *Barrett v Barrett* [1988] FCR 707, [1988] 2 FLR 516, CA). Further, it has been held that it will not be usual to provide for the termination of a periodical payments order in the case of a woman in her fifties, in the absence of significant capital or earning capacity: see *Flavell v Flavell* [1997] 1 FCR 332, [1997] 1 FLR 353, CA. Where a woman is young, healthy and childless, it is almost inevitable that she will be regarded as having earning capacity: see eg *Mathias v Mathias* [1972] Fam 287, [1972] 3 All ER 1, CA; *Graves v Graves* (1973) 4 Fam Law 124; *Frisby v Frisby* (1983) 14 Fam Law 19.

As a general rule spouses and civil partners will not be encouraged to regard the other spouse or civil partner as potentially liable to provide periodical payments without there being any obligation on his or her part to fend for himself or herself, but there is no hard and fast rule, each case depending on its own facts: *Soni v Soni* [1984] FLR 294, [1984] Fam Law 268.

UPDATE

592 Termination of financial obligations after divorce, dissolution etc

NOTE 11--See *MD v D* [2008] EWHC 1929 (Fam), [2008] All ER (D) 232 (Dec) (periodical payments order inadequate; additional lump sum awarded).

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593. Remarriage and cohabitation.

Both parties to proceedings for financial relief are subject to a duty of full and frank disclosure; and this extends to a duty, even in the financial negotiations prior to the issue of proceedings, to disclose an intention to remarry or cohabit¹. In relation to claims for capital, it has been said that remarriage or cohabitation -- and, presumably, the entering into of a subsequent civil partnership -- should not reduce the amount ordered, since the claimant will have earned his share of the capital assets². Where, however, a claimant is seeking a greater share of the assets based on need, the prospects of remarriage or the entering into of a subsequent civil partnership will be relevant³. In relation to a claim for periodical payments, such a claim cannot survive remarriage or the entering into of a subsequent civil partnership⁴. Cohabitation does not automatically bring about the loss of a right to claim periodical payments nor does an order for periodical payments automatically end on cohabitation⁵. Cohabitation may be one of the factors for the court to take into account when determining the correct level of periodical payments⁶, although it does not necessarily result in the making of a nominal order for maintenance⁷.

1 See *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424, [1985] 1 All ER 106, HL; and see *Shaw v Shaw* [2002] EWCA Civ 1298, [2002] 3 FCR 298, [2002] 2 FLR 1204 (consent order not reopened where wife's oral evidence at trial disclosed extent of new relationship).

2 See *Wachtel v Wachtel* [1973] Fam 72, [1973] 1 All ER 113; *Duxbury v Duxbury* (1985) [1992] Fam 62n, [1990] 2 All ER 77, CA; *B v B (financial provision: leave to appeal)* [1994] 1 FCR 885, [1994] 1 FLR 219.

3 See *Tinsdale v Tinsdale* (1983) 4 FLR 641, 13 Fam Law 148, CA (where it was held unjust to order outright transfer of house to wife when real possibility of remarriage).

4 See the Matrimonial Causes Act 1973 s 28; the Civil Partnership Act 2004 Sch 5 para 47; and PARA 460.

5 *MH v MH* (1981) 3 FLR 429; *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 All ER 336, CA; *Atkinson v Atkinson* [1988] Fam 93, [1987] 3 All ER 849, CA; *Atkinson v Atkinson (No 2)* [1996] 1 FLR 51.

6 See eg *S v S* [1987] 1 FLR 71.

7 See *Atkinson v Atkinson* [1988] Fam 93, [1987] 3 All ER 849, CA; *Atkinson v Atkinson (No 2)* [1996] 1 FLR 51, CA.

UPDATE

593 Remarriage and cohabitation

NOTE 4--Where it is the party who is making the periodical payments who remarries, neither the present nor the former spouse has priority over the income and assets: *Vaughan v Vaughan* [2010] EWCA Civ 349, [2010] All ER (D) 04 (Apr).

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594. Reconciliation.

Where an application is made to a magistrates' court for an order for financial provision during the subsistence of a marriage or civil partnership¹ the court, before deciding whether to exercise its powers to make such an order, must consider whether there is any possibility of reconciliation between the parties² and, if at any stage of the proceedings on that application it appears to the court that there is a reasonable possibility of such a reconciliation, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect a reconciliation³.

¹ ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8): see PARA 553 et seq.

² Domestic Proceedings and Magistrates' Courts Act 1978 s 26(1); Civil Partnership Act 2004 Sch 6 para 7(1) (a).

³ Domestic Proceedings and Magistrates' Courts Act 1978 s 26(1); Civil Partnership Act 2004 Sch 6 para 7(1) (b). Where the court so adjourns any proceedings it may request an officer of CAFCASS, a Welsh family proceedings officer (unless the relationship in question is a civil partnership) or any other person to attempt to effect a reconciliation between the parties to the marriage or civil partnership and, where any such request is made, that officer must report in writing to the court whether the attempt has been successful or not, but must not include in that report any other information: Domestic Proceedings and Magistrates' Courts Act 1978 s 26(2) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 57; the Children Act 2004 Sch 3 para 1); Civil Partnership Act 2004 Sch 6 para 7(2), (3). As to CAFCASS and Welsh family proceedings officers see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 230 et seq.

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595. Delay.

Delay in bringing an application for financial relief is clearly one of the circumstances of the case to which it is the court's duty to have regard, and delay in presenting or prosecuting a claim and an inability to show need when the claim is determined may result in a smaller award than in a case where the claim is brought promptly, or no award at all¹. It has been said that delay can put the court in the simple position of not being able to do justice between the parties according to the merits of the case². There are, however, cases where delay in bringing an application is justified³; and the courts have on occasion adjourned proceedings for financial relief in order to await specified events⁴. The jurisdiction is not limited by time⁵, delay going not to jurisdiction but to the exercise of discretion⁶.

1 *Chambers v Chambers* (1979) 1 FLR 10 (wife's delay and lack of need made it unreasonable for husband to raise a lump sum); cf *Churchill v Churchill* (1980) 11 Fam Law 179, CA; *Lombardi v Lombardi* [1973] 3 All ER 625, [1973] 1 WLR 1276, CA. See also *S v S (financial provision)* [1989] FCR 582, [1990] 2 FLR 252, CA.

2 *D v W (application for financial provision: effect of delay)* [1984] Fam Law 152.

3 *Pearce v Pearce* (1979) 1 FLR 261, CA. As to the relevance of after-acquired assets see also *Schuller v Schuller* [1990] FCR 626, [1990] 2 FLR 193, CA.

4 See eg *Hardy v Hardy* (1981) 2 FLR 321, CA; *MT v MT (financial provision: lump sum)* [1991] FCR 649, [1992] 1 FLR 362.

5 See the Matrimonial Causes Act 1973 ss 23(1), 24(1); the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5), Sch 5 Pt 2 (paras 6-9) (see PARAS 458 et seq, 467 et seq, 476 et seq, 492 et seq, 499 et seq, 506 et seq), which apply on granting a decree of divorce or order of dissolution, a decree or order of nullity of marriage or civil partnership or a decree of judicial separation or a separation order or at any time thereafter: *Twiname v Twiname* [1992] 1 FCR 185, [1992] 1 FLR 29, CA (in matrimonial and civil partnership jurisdiction there is no statute of limitation). See also *Baker v Baker* [1996] 1 FCR 567, [1995] 2 FLR 829, CA (where there was a real possibility that the wife would not receive an adequate or any part of the lump sum ordered and she ought to have the flexibility to apply for an extension of her periodical payments).

6 *Twiname v Twiname* [1992] 1 FCR 185, [1992] 1 FLR 29, CA.

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596. Agreements and consent orders.

Even where parties reach an agreement, the court is still under an obligation to consider the justice of the proposed terms¹. The weight to be attached to such an agreement will vary from case to case depending on the circumstances². The agreement does not amount to a contract enforceable in law, the only way of rendering the bargain enforceable being to convert the concluded agreement into an order of the court³. In determining whether an agreement has been reached, the court is entitled to exercise a broad discretion when surveying the negotiations to see whether those negotiations led to an overall consensus⁴. Where it is contended that bad legal advice led to an agreement, the whole of the solicitor's file should be produced and without prejudice privilege will not apply⁵.

1 See eg *Edgar v Edgar* [1980] 3 All ER 887, [1981] 1 WLR 1410, CA; *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FCR 323, [2008] 1 FLR 1467; *S v S* [2008] EWHC 2038 (Fam), [2008] All ER (D) 16 (Sep).

2 See *Edgar v Edgar* [1980] 3 All ER 887 at 893, [1981] 1 WLR 1410 at 1417 per Ormrod LJ; *Camm v Camm* (1982) 4 FLR 577, 13 Fam Law 112, CA; *Xydhias v Xydhias* [1999] 2 All ER 386, [1999] 1 FCR 289, CA. See also *Smith v Smith* [2000] 3 FCR 374, CA (the existence of a prior agreement between the parties for a lump sum payment in full and final settlement is only one of the considerations to which a judge must give weight on an application for ancillary relief), although that decision was justified only by the particular circumstances of the case and did not reflect a change of approach or principle making it any easier to depart from an earlier agreement (see *A v B (ancillary relief: property division)* [2005] EWHC 314 (Fam), [2005] 2 FLR 730).

3 *Xydhias v Xydhias* [1999] 2 All ER 386, [1999] 1 FCR 289, CA; *Wood v Rost* [2007] EWHC 511 (Fam), [2007] 2 FCR 728.

4 See note 3.

5 *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA; *Xydhias v Xydhias* [1999] 2 All ER 386, [1999] 1 FCR 289, CA.

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(ii) Welfare of Children

597. Orders in relation to children of the party against whom order is sought.

The High Court and county courts¹, as regards the exercise of their powers to make periodical payments orders², secured periodical payments orders³, lump sum orders⁴, property adjustment orders⁵ and orders for the sale of property⁶ in relation to a child of the family⁷, and the High Court, county courts and magistrates' courts as regards the exercise of their powers to make orders for financial provision in relation to such a child during the subsistence of a marriage or civil partnership⁸, must, in particular and in addition to their duty to give first consideration to the welfare of any child of the family⁹, have regard to:

- 756 (1) the financial needs of the child¹⁰;
- 757 (2) the income, earning capacity (if any), property and other financial resources of the child¹¹;
- 758 (3) any physical or mental disability of the child¹²;
- 759 (4) the manner in which he was being and in which the parties to the marriage or civil partnership expected him to be educated or trained¹³;
- 760 (5) the income, earning capacity, property and other financial resources which each of the parties to the marriage or civil partnership has, or is likely to have, in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage or civil partnership to take steps to acquire¹⁴;
- 761 (6) the financial needs, obligations and responsibilities which each of the parties to the marriage or civil partnership has, or is likely to have, in the foreseeable future¹⁵;
- 762 (7) the standard of living enjoyed by the family before, as the case may be, the breakdown of the marriage or civil partnership, the failure to provide or to make a proper contribution towards reasonable maintenance for the child to whom the application relates (where the High Court or a county court is considering a claim for maintenance during the subsistence of a marriage or civil partnership) or the occurrence of the conduct which is alleged as the ground of the application or, where parties are living apart, before the occurrence of the living apart (where a magistrates' court is considering an order for financial provision during the subsistence of a marriage or civil partnership)¹⁶;
- 763 (8) in the case of the High Court and county courts only, any physical or mental disability of either of the parties to the marriage or civil partnership¹⁷.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Ie under the Matrimonial Causes Act 1973 s 23(1)(d), (2), (4) or the Civil Partnership Act 2004 Sch 5 para 2(1)(d): see PARA 492 et seq.

3 Ie under the Matrimonial Causes Act 1973 s 23(1)(e), (2), (4) or the Civil Partnership Act 2004 Sch 5 para 2(1)(e): see PARA 492 et seq.

4 Ie under the Matrimonial Causes Act 1973 s 23(1)(f), (2), (4) or the Civil Partnership Act 2004 Sch 5 para 2(1)(f): see PARA 492 et seq.

5 lie under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9): see PARA 499 et seq.

6 lie under the Matrimonial Causes Act 1973 s 24A or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14): see PARA 520 et seq.

7 As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973 and the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARAS 477 note 3, 553 note 4.

8 lie under the Matrimonial Causes Act 1973 s 39(1)(b) or the Civil Partnership Act 2004 Sch 5 para 39(1)(b) (see PARA 542), or the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(c) or (d) or s 7 or the Civil Partnership Act 2004 Sch 6 para 2(1)(c) or (d) or Sch 6 Pt 3 (paras 15-19) (see PARA 553 et seq).

9 As to this overriding duty see PARA 295.

10 Matrimonial Causes Act 1973 ss 25(3)(a), 27(3A) (s 25 substituted by the Matrimonial and Family Proceedings Act 1984 s 3; Matrimonial Causes Act 1973 s 27(3A), (3B) added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(2); amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 13); Domestic Proceedings and Magistrates' Courts Act 1978 ss 3(3)(a), 7(5) (s 3 substituted, s 7(5) amended, by the Matrimonial and Family Proceedings Act 1984 s 9, Sch 1 para 22); Civil Partnership Act 2004 Sch 5 paras 22(1), (2)(a), 44(1), (2), (3)(a), Sch 6 paras 6(1), (2)(a), 19.

11 Matrimonial Causes Act 1973 s 25(3)(b) (as substituted: see note 10); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(3)(b) (as so substituted); Civil Partnership Act 2004 Sch 5 para 22(2)(b), Sch 6 para 6(2)(b).

12 Matrimonial Causes Act 1973 s 25(3)(c) (as substituted: see note 10); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(3)(c) (as so substituted); Civil Partnership Act 2004 Sch 5 para 22(2)(c), Sch 6 para 6(2)(c).

13 Matrimonial Causes Act 1973 s 25(3)(d) (as substituted: see note 10); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(3)(e) (as so substituted); Civil Partnership Act 2004 Sch 5 para 22(2)(d), Sch 6 para 6(2)(e).

14 Matrimonial Causes Act 1973 ss 25(2)(a), (3)(e) (as substituted (see note 10); s 25(2) amended by the Pensions Act 1995 s 166(2); the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 5(b)); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(a) (as so substituted); Civil Partnership Act 2004 Sch 5 paras 21(2)(a), 22(2)(e), Sch 6 paras 5(2)(a), 6(2)(f). The matters to which the court is to have regard pursuant to this requirement include any benefits under a pension arrangement which a party to the marriage or civil partnership has or is likely to have and any PPF compensation (ie compensation payable under the Pensions Act 2004 Pt 2 Chapter 3 (ss 126-181) (pension protection: see **SOCIAL SECURITY AND PENSIONS**) or corresponding Northern Ireland legislation: see PARA 532 note 5) to which a party to the marriage or civil partnership is likely to be entitled: Matrimonial Causes Act 1973 ss 25B(1)(a), 25E(1)(a) (ss 25B, 25E added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25B(1)(a), (b) amended by the Welfare Reform and Pensions Act 1999 Sch 4 para 1); Civil Partnership Act 2004 Sch 5 paras 24(1), 30(1). In a complex matter a magistrates' court is not the appropriate court to investigate a party's finances, and such a matter should be transferred to the High Court: *Brown v Brown* (1972) 117 Sol Jo 87, DC; and see *Goodall (formerly Jolly) v Jolly* [1984] FLR 143, sub nom *Goodall v Jolley* [1984] Fam Law 23. As to the position where an applicant is receiving supplementary benefits see *Wills v Wills* [1984] FLR 672, [1984] Fam Law 309, DC (husband living with parents). As to income and resources generally see PARA 599 et seq. See also *Q v Q (ancillary relief: periodical payments)* [2005] EWHC 402 (Fam), [2005] 2 FLR 640 (court also had regard to likely future decreases in salary in the case of a professional footballer); and PARA 592.

15 Matrimonial Causes Act 1973 s 25(2)(b) (as substituted and amended: see note 14); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(b) (as so substituted); Civil Partnership Act 2004 Sch 5 para 21(2)(b), Sch 6 para 5(2)(b). As to needs, obligations and responsibilities generally see PARAS 610-613.

16 Matrimonial Causes Act 1973 ss 25(2)(c), 27(3B) (as added, substituted and amended: see notes 10, 14); Domestic Proceedings and Magistrates' Courts Act 1978 ss 3(3)(d), 7(5) (as so substituted and amended); Civil Partnership Act 2004 Sch 5 paras 21(2)(c), 44(4), Sch 6 paras 6(2)(d), 19. As to standard of living generally see PARA 614.

17 Matrimonial Causes Act 1973 s 25(2)(e) (as substituted and amended: see notes 14); Civil Partnership Act 2004 Sch 5 para 21(2)(e). As to disability generally see PARA 617.

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598. Orders in relation to a child who is not a child of the party against whom the order is sought.

The High Court and county courts¹, as regards the exercise of their powers to make periodical payments orders², secured periodical payments orders³, lump sum orders⁴, property adjustment orders⁵ and orders for the sale of property⁶ against a party to a marriage or civil partnership in favour of a child of the family⁷ who is not a child of that party, and the High Court, county courts and magistrates' courts as regards the exercise of their powers to make orders for financial provision against such a party and in respect of such a child during the subsistence of a marriage or civil partnership⁸, must, in particular and in addition to their duty to give first consideration to the welfare of any child of the family⁹, have regard to:

764 (1) whether that party assumed any responsibility for the child's maintenance, and, if so, the extent to which, and the basis on which, that party assumed such responsibility and the length of time for which that party discharged such responsibility¹⁰;

765 (2) whether, in assuming and discharging such responsibility, that party did so knowing that the child was not his or her own¹¹; and

766 (3) the liability of any other person to maintain the child¹².

1 As to the meaning of 'court' see PARA 346 note 2.

2 Ie under the Matrimonial Causes Act 1973 s 23(1)(d), (2), (4) or the Civil Partnership Act 2004 Sch 5 para 2(1)(d): see PARA 492 et seq.

3 Ie under the Matrimonial Causes Act 1973 s 23(1)(e), (2), (4) or the Civil Partnership Act 2004 Sch 5 para 2(1)(e): see PARA 492 et seq.

4 Ie under the Matrimonial Causes Act 1973 s 23(1)(f), (2), (4) or the Civil Partnership Act 2004 Sch 5 para 2(1)(f): see PARA 492 et seq.

5 Ie under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9): see PARA 499 et seq.

6 Ie under the Matrimonial Causes Act 1973 s 24A or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14): see PARA 520 et seq.

7 As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973 and the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARAS 477 note 3, 553 note 4.

8 Ie under the Matrimonial Causes Act 1973 s 39(1)(b) or the Civil Partnership Act 2004 Sch 5 para 39(1)(b) (see PARA 542), or the Domestic Proceedings and Magistrates' Courts Act 1978 s 2(1)(c) or (d) or s 7 or the Civil Partnership Act 2004 Sch 6 para 2(1)(c) or (d) or Sch 6 Pt 3 (paras 15-19) (see PARA 553 et seq).

9 As to this overriding duty see PARA 295.

10 Matrimonial Causes Act 1973 ss 25(4)(a), 27(3A) (s 25 substituted by the Matrimonial and Family Proceedings Act 1984 s 3; Matrimonial Causes Act 1973 s 27(3A) added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63(2); amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 13); Domestic Proceedings and Magistrates' Courts Act 1978 ss 3(4)(a), 7(5) (s 3 substituted, s 7(5) amended, by the Matrimonial and Family Proceedings Act 1984 s 9, Sch 1 para 22); Civil Partnership Act 2004 Sch 5 paras 22(1), (3)(a), (b), 44(1), (2), (3)(b), Sch 6 paras 6(1), (3)(a), (b), 19.

11 Matrimonial Causes Act 1973 s 25(4)(b) (as substituted: see note 10); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(4)(b) (as so substituted); Civil Partnership Act 2004 Sch 5 para 22(3)(c), Sch 6 para 6(3)(c).

12 Matrimonial Causes Act 1973 s 25(4)(c) (as substituted: see note 10); Domestic Proceedings and Magistrates' Courts Act 1978 s 3(4)(c) (as so substituted); Civil Partnership Act 2004 Sch 5 para 22(3)(d), Sch 6 para 6(3)(d).

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(iii) Income, Earning Capacity and Resources

599. Income to be taken into account.

The court must take into account (inter alia) income from all sources¹. Examples of income that has been so taken into account are:

- 767 (1) voluntary payments²;
- 768 (2) income paid under a discretionary trust³;
- 769 (3) income available from overtime⁴ and perquisites from employment⁵;
- 770 (4) income available from sustainable borrowing⁶;
- 771 (5) income from state benefits⁷;
- 772 (6) income that could be made available to either party on appropriate reorganisation of his or her corporate finances⁸;
- 773 (7) income available from capital⁹; and
- 774 (8) income acquired after separation¹⁰.

The court may infer the availability of an income from the standard of living of a party to the marriage or civil partnership¹¹.

1 See PARAS 590, 597.

2 See eg *Malo v Malo* (1786) 2 Sw & Tr 657n (voluntary allowance received by husband); *Clinton v Clinton* (1866) LR 1 P & D 215 (voluntary allowance from trust); *Bonsor v Bonsor* [1897] P 77 (voluntary regular payment by relative); *Martin v Martin* [1919] P 283, CA (voluntary payment); *M v M (maintenance pending suit)* [2002] EWHC 317 (Fam), [2002] 2 FLR 123 (voluntary regular payment by relative).

3 See *Howard v Howard* [1945] P 1, [1945] 1 All ER 91, CA; *Browne v Browne* [1989] 1 FLR 291, CA (the court will look to the reality of the resources that are available but will not put pressure on third parties); *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053, [2006] 2 FLR 422 (orders for production of documents relating to discretionary trust by third parties upheld).

4 *Klucinski v Klucinski* [1953] 1 All ER 683, [1953] 1 WLR 522, DC.

5 *Rodewald v Rodewald* [1977] Fam 192, [1977] 2 All ER 609, CA.

6 *J-PC v J-AF* [1995] P 215, sub nom *J v J* [1955] 2 All ER 85, CA; *Sibley v Sibley* (1979) 2 FLR 121, 10 Fam Law 49; *Newton v Newton* [1989] FCR 521, [1990] 1 FLR 33, CA; *P v P* [1994] 1 FCR 293, sub nom *P v P (financial relief: non-disclosure)* [1994] 2 FLR 381.

7 *Claxton v Claxton* (1981) 3 FLR 415, 12 Fam Law 62 (attendance allowance); *Slater v Slater* (1982) 3 FLR 364, 12 Fam Law 153, CA (single parent allowance).

8 *N v N* (1928) 138 LT 693; *Thomas v Thomas* [1996] 2 FCR 544, [1995] 2 FLR 668, CA.

9 *Whitfield v Whitfield* [1986] 1 FLR 99, [1985] Fam Law 329, CA; *Boylan v Boylan* [1988] FCR 689, [1988] 1 FLR 282.

10 *Lombardi v Lombardi* [1973] 3 All ER 625, [1973] 1 WLR 1276, CA.

11 *Robinson v Robinson* (1973) 2 FLR 1, CA; *Baker v Baker* [1996] 1 FCR 567, [1995] 2 FLR 829, CA (the standard of proof for inferring resources is the ordinary civil standard).

UPDATE

599 Income to be taken into account

NOTE 3--See *SR v CR (ancillary relief: family trusts)* [2008] EWHC 2329 (Fam), (2008) ITCLR 395 (order made departing from equality because husband would most likely benefit from trust in future).

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600. Earning capacity.

The court must make a realistic assessment of the earning capacity of both parties and should not approach an application for financial relief on the basis that there is a presumption of a clean break¹.

The effect of children on a party's earning capacity is obvious and well recognised. Although a court may order a clean break where there are children², the court will rarely make such an order unless the party who will be raising the children has substantial capital or an earning capacity³.

After a brief marriage or civil partnership there may be a greater expectation on both parties to be self-sufficient and pursue their respective earning capacities⁴; and it is almost unavoidable that the young, healthy and child-free party will be held to have an earning capacity⁵.

The earning capacity of a person may also be relevant when considering orders in relation to what was the former family home⁶.

1 See *Barrett v Barrett* [1988] FCR 707 at 713, [1988] 2 FLR 516 at 521, CA per Butler Sloss LJ ('I, for my part, do not think that a wife in these circumstances at this age [44], who has not had full-time employment for many years, looking for and willing to find work and indeed prepared to take a course to make her more fit to get employment and still not finding a job, should be obliged to go back to the court some time shortly before the four years is up and say, 'I cannot find work. I do not know what to do'. It would be far more suitable for the husband first to write to the wife's solicitors and say, 'Why are you not getting work? What efforts have you made?' and, if he is not satisfied, to go back to the court to say the time has come . . . to have this order brought to an end if she was not making genuine, but unsuccessful, efforts to get employment').

2 See *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 All ER 336, CA.

3 *Waterman v Waterman* [1989] FCR 267, [1989] 1 FLR 380, CA; *N v N (consent order: variation)* [1994] 2 FCR 275, [1993] 2 FLR 868, CA. See also *Fisher v Fisher* [1989] FCR 309, [1989] 1 FLR 423, CA (where the court recognised that a young child born to the mother by another man affected her earning capacity in a material way); *Parra v Parra* [2002] EWHC 877 (Fam), [2002] 3 FCR 513 (clean break order included 'claw-back' provision so that wife could also enjoy any future benefit resulting from development of co-owned land).

4 See eg *Khan v Khan* [1980] 1 All ER 497, [1980] 1 WLR 355; and PARA 616.

5 See eg *Mathias v Mathias* [1972] Fam 287, [1972] 3 All ER 1, CA; *Frisby v Frisby* (1983) 14 Fam Law 19; and PARA 616.

6 See eg *Walker v Walker* (1982) 4 FLR 44, 12 Fam Law 122 (where it was held that a Mesher order (see PARA 316) was appropriate because the wife would have a substantial earning capacity when the children were grown up and would be able to fund a mortgage). See also *Mitchell v Mitchell* [1984] FLR 387, [1984] Fam Law 176, CA (wife's earning capacity relevant when considering the proportion of the proceeds of sale of the former matrimonial home that she should have under a Mesher order).

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601. Property and financial resources.

The court must taken into account (inter alia) all the property and financial resources of the parties¹. The court will generally consider the net assets of the parties after taking into account relevant secured liabilities, costs of disposal and the incidence of tax². However, in proceedings for financial relief the court does not exercise a quasi-bankruptcy jurisdiction and cannot order the payment of debts to unsecured third parties³. The court should also differentiate between debts that must be repaid ('hard debts') and debts where a party feels under a moral obligation to pay ('soft debts')⁴. It may be appropriate to add back into a party's resources costs that have been paid⁵.

The court must have regard to the property which each of the parties has or is likely to have in the foreseeable future. The following types of future property have been considered:

- 775 (1) pension gratuities⁶;
- 776 (2) money likely to be received from inheritance⁷;
- 777 (3) money that could be made available from a business⁸; and
- 778 (4) money and other assets contributed by the family of one party⁹.

An award of personal injury compensation will be taken into account as part of the property of the party holding it¹⁰. However, the reason for the availability of the capital in the hands of one party and the size of the award will be relevant factors in all the circumstances of the case¹¹.

The fact that a property may be vested in the parties' joint names may be a factor but should not be allowed to be a dominating one¹². The court's principal task in proceedings for financial relief concerning a former family home of which one party is the sole legal owner is to decide whether that legal ownership is subject to any trust in favour of the other party and then to decide whether an order should be made in that other party's favour, applying the statutory criteria¹³. An existing tenancy may be 'property'¹⁴, but an expired tenancy will not¹⁵.

The court will consider property held by a party outside the jurisdiction; and it may make orders in relation to that property¹⁶. Orders for ancillary relief operate in personam rather than in rem. However, although a court may have jurisdiction to make orders in relation to foreign property, it may decline to exercise that jurisdiction if the order is unlikely to be effective¹⁷.

Where a party to the marriage or civil partnership holds property jointly with a third party, the court may declare the extent of the third party's rights in the property¹⁸. If the third party declines to intervene, it is doubtful whether the court may declare the extent of that party's interest in the property¹⁹.

1 See PARAS 590, 597.

2 See *O'D v O'D* [1976] Fam 83, sub nom *O'Donnell v O'Donnell* [1975] 2 All ER 993, CA ('puts him on the right scale of wealth'); *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

3 See *Mullard v Mullard* (1981) 3 FLR 330, 12 Fam Law 63, CA; *Burton v Burton* [1986] 2 FLR 419, [1986] Fam Law 330.

4 See *M v B (ancillary proceedings: lump sum)* [1998] 1 FCR 213, [1998] 1 FLR 53, CA.

5 See *Leadbeater v Leadbeater* [1985] FLR 789, [1985] Fam Law 280, followed in *A v A (costs: appeal)* [1996] 1 FCR 186, [1996] 1 FLR 14, but not in *FN v FN (financial provision)* [1996] 3 FCR 56, sub nom *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833.

6 Benefits under a pension arrangement now form part of the statutory scheme for calculating financial relief in divorce, dissolution or nullity cases (see the Matrimonial Causes Act 1973 ss 25B, 25E, the Civil Partnership Act 2004 Sch 5 paras 24, 30; and PARA 590 notes 9, 16); however the following cases may continue to be relevant: *Morris v Morris* (1977) 7 Fam Law 244, CA (army gratuity; adjournment ordered); *Richardson v Richardson* (1978) 9 Fam Law 86, CA (pension receivable in three years taken into account); *Priest v Priest* (1978) 1 FLR 189, 9 Fam Law 252, CA (husband to pay one-third of his gratuity to wife on receipt in three years' time); *Milne v Milne* (1981) 2 FLR 286, CA (husband to pay 50% of gratuity to wife on receipt in ten years' time); *Roberts v Roberts* [1986] 2 All ER 483, [1986] 1 WLR 437 (where it was doubted whether lump sum adjournment should be for more than four to five years), doubted in *MT v MT* [1991] FCR 649, [1992] 1 FLR 362 but considered in *Ranson v Ranson* [1988] 1 WLR 183, [1988] 1 FLR 292, CA.

7 See *Calder v Calder* (1975) 6 Fam Law 242, CA (husband likely to inherit; wife's lump sum increased to reflect his interests); *Michael v Michael* [1986] 2 FLR 389, [1986] Fam Law 334, CA (property 'can extend to a mere expectancy but it would be a rare case where the court would take into account prospective inheritance'); *K v K (financial provision)* [1990] FCR 372, sub nom *K v K (conduct)* [1990] 2 FLR 225 (wife's inheritance prospects not sufficiently proximate; her mother was aged 79 and in good health); *Horsman v Horsman* [1993] 2 FCR 357, sub nom *H v H (financial provision: capital allowance)* [1993] 2 FLR 335 (life tenant could appoint trust fund to a wide number of beneficiaries).

8 See *Smith v Smith* (1976) 6 Fam Law 245, CA; *Thomas v Thomas* [1996] 2 FCR 544, [1995] 2 FLR 668, CA; *Davies v Davies* [1986] 1 FLR 497, [1986] Fam Law 138 (real possibility of future assets from farming partnership).

9 See *TL v ML (ancillary relief: claim against assets of extended family)* [2005] EWHC 2850 (Fam), [2006] 1 FCR 465, [2006] 1 FLR 1263 (distinction between donor (who may withhold his bounty, even if so to do was unreasonable) and a fiduciary trustee (who is under a legal obligation to consider the applicant's interests)).

10 See *Daubney v Daubney* [1976] Fam 267, [1976] 2 All ER 453, CA; *Wagstaff v Wagstaff* [1992] 1 All ER 275, [1992] 1 WLR 320, CA; *C v C (financial provision: personal damages)* [1995] 1 FCR 75, [1995] 2 FLR 171. Where one party inflicted the injuries which led to the award to the other, the first party's conduct may of itself be relevant: see eg *Jones v Jones* [1976] Fam 8, [1975] 2 All ER 12, CA; *H v H (financial relief: attempted murder as conduct)* [2005] EWHC 2911 (Fam), [2006] 1 FLR 990.

11 See *Wagstaff v Wagstaff* [1992] 1 All ER 275 at 280, [1992] 1 WLR 320 at 325, CA per Butler Sloss LJ. See also *H v H (financial provision: conduct)* [1994] 2 FCR 1031, [1994] 2 FLR 801; *A v A (financial provision)* [1995] 2 FCR 137, sub nom *A v A (financial provision: conduct)* [1995] 1 FLR 345.

12 See *Browne (formerly Pritchard) v Pritchard* [1975] 3 All ER 721, [1975] 1 WLR 1366, CA; *Walsh v Corcoran* (1982) 4 FLR 59, 12 Fam Law 147, CA; *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

13 *Cooper v Kaur* [2001] 1 FCR 12, CA.

14 See *Jones v Jones* [1997] Fam 59, [1997] 2 WLR 373, CA; *Newlon Housing Trust v Alsulamein* [1999] 1 AC 313, [1998] 4 All ER 1, HL.

15 See *Newlon Housing Trust v Alsulamein* [1999] 1 AC 313, [1998] 4 All ER 1, HL. Early authority suggested that the court should not order the transfer of a council tenancy unless the local authority approved the transfer (see *Thompson v Thompson* [1976] Fam 25, [1975] 2 All ER 208, CA; *Regan v Regan* [1977] 1 All ER 428, [1977] 1 WLR 84; *Rodewald v Rodewald* [1977] Fam 192, [1977] 2 All ER 609, CA); but those authorities are now regarded as outdated, the exercise by the court of its powers in proceedings for financial relief no longer being dominated by local authority housing policy (see *Jones v Jones* [1997] Fam 59, [1997] 2 WLR 373, CA).

16 See *Razelos v Razelos* [1969] 3 All ER 929, sub nom *Razelos v Razelos (No 2)* [1970] 1 WLR 392; *Hamlin v Hamlin* [1986] Fam 11, [1985] 2 All ER 1037, CA. A party who wishes to prevent an exhaustive financial inquiry into offshore accounts which are designed to be impenetrable will have to be even fuller and franker about his assets than would be necessary with conventional offshore accounts: see *J v V (disclosure: offshore corporations)* [2003] EWHC 3110 (Fam), [2004] 1 FLR 1042.

17 See *Hamlin v Hamlin* [1986] Fam 11, [1985] 2 All ER 1037, CA.

18 See *Tebbutt v Haynes* [1981] 2 All ER 238, CA; *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA.

19 See *Harwood v Harwood* [1992] 1 FCR 1 at 15, [1991] 2 FLR 274 at 290, CA.

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602. State benefits.

If the total available resources of the parties are so modest that an order for maintenance will leave the payer with a sum which is inadequate to meet his own financial commitments, the court may have regard to the fact that, in proper cases, state benefits will be available to the other party and children¹. Although there is no overriding principle that an order for maintenance should not reduce the income of the payer below the amount of any specific state benefit, common sense demands that an order for maintenance should not result in the payer's being below subsistence level². Although a party will owe his primary obligations to his first partner and children, the court will not ignore reasonable outgoings that are necessary to support a new family³.

1 *Ashley v Ashley* [1968] P 582, [1965] 3 All ER 554, DC; *Barnes v Barnes* [1972] 3 All ER 872, [1972] 1 WLR 1381, CA; *Allen v Allen* [1986] 2 FLR 265, [1986] Fam Law 268, CA; *Delaney v Delaney* [1991] FCR 161, [1990] 2 FLR 457, CA.

2 *Kershaw v Kershaw* [1966] P 13, [1964] 3 All ER 635, DC; *Billington v Billington* [1974] Fam 24, [1974] 1 All ER 546, DC; *Shallow v Shallow* [1979] Fam 1, [1978] 2 All ER 483, CA; *Stockford v Stockford* (1981) 3 FLR 58, 12 Fam Law 30, CA; *Allen v Allen* [1986] 2 FLR 265, [1986] Fam Law 268, CA; *Ashley v Blackman* [1988] Fam 85, [1988] 3 WLR 222; *Delaney v Delaney* [1991] FCR 161, [1990] 2 FLR 457, CA; *E v C (calculation of child maintenance)* [1996] 1 FCR 612, sub nom *E v C (child maintenance)* [1996] 1 FLR 472.

3 *Cockburn v Cockburn* [1957] 3 All ER 260, [1957] 1 WLR 1020, CA; *Macey v Macey* (1981) 3 FLR 7, 11 Fam Law 248; *Furniss v Furniss* (1981) 3 FLR 46, 12 Fam Law 30, CA; *Stockford v Stockford* (1981) 3 FLR 58, 12 Fam Law 30, CA; *Slater v Slater* (1982) 3 FLR 364, 12 Fam Law 153, CA; *Delaney v Delaney* [1991] FCR 161, [1990] 2 FLR 457, CA; *E v C (calculation of child maintenance)* [1996] 1 FCR 612, sub nom *E v C (child maintenance)* [1996] 1 FLR 472.

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603. Reasonable requirements.

In many claims for financial relief the need to consider the financial needs, obligations and responsibilities of the parties¹ had been subsumed into a wider, judicially developed concept of 'reasonable requirements'; and that wider concept appeared in turn to have displaced consideration of the parties' available resources² as a factor in its own right³. However, a claimant's financial needs, even when interpreted generously and called 'reasonable requirements', are not to be treated as determinative, there being no support in the statutory provisions to the contrary nor anything in those provisions, or the underlying objective of securing fair financial arrangements, which leads to the supposition that the available assets become immaterial once the claimant's financial needs are satisfied⁴.

1 See PARAS 590, 597, 610-613.

2 See PARAS 590, 597.

3 See *O'D v O'D* [1976] Fam 83, sub nom *O'Donnell v O'Donnell* [1975] 2 All ER 993, CA (where the phrase 'reasonable requirements' was coined; the wife's position was considered not from the narrow point of need but to ascertain her reasonable requirements); *Page v Page* (1981) 2 FLR 198, CA (where there was enough capital to provide adequately for both husband and wife and it was held that, when considering the needs and obligations of the parties, the court could take a broad view); *Preston v Preston* [1982] Fam 17, [1982] 1 All ER 41, CA (where the word 'needs' was held to be equivalent to 'reasonable requirements'); *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA (where the soundness of the approach was considered); *Conran v Conran* [1998] 1 FCR 144, [1997] 2 FLR 615 (where it was held that the court could survey the wife's reasonable requirements without reference to the contribution she had made to the marriage); *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FCR 707, [2008] 1 FLR 1508 (where the wife unreasonably inflated her expenditure during the post-separation period in order to exaggerate her 'requirements').

4 *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL. '[The statutory scheme (see PARAS 590, 597)] does not rank the matters listed [therein] in any kind of hierarchy. The weight, or importance, to be attached to these matters depends upon the facts of the particular case. But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband?': *White v White* at 608 and at 11, 12 per Lord Nicholls of Birkenhead. See also *Dharamshi v Dharamshi* [2001] 1 FCR 492, [2001] 1 FLR 736, CA.

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604. Duxbury calculations.

It was customary to approach the capitalisation of maintenance by adopting the method which came to be known as the Duxbury calculation¹; but the use of that method of calculation, although a useful guide in assessing the amount of money required to provide for a person's financial needs, should be approached with caution². It may be particularly inappropriate where the parties are young and the marriage or civil partnership is of short duration³. Similarly, where the parties are elderly, the use of the Duxbury calculation may be manifestly unfair⁴.

1 As to the Duxbury calculation see PARA 483. Earlier authority emphasised that the Duxbury calculation was only one method of approaching a wife's capitalised income needs: see *B v B* [1990] FCR 105, [1990] 1 FLR 20; *Gojkovic v Gojkovic* [1992] Fam 40, [1990] 2 All ER 84, CA; *Vicary v Vicary* [1993] 1 FCR 533, [1992] 2 FLR 271, CA; *FN v FN (financial provision)* [1996] 3 FCR 56, sub nom *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833; *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA.

2 *White v White* [2001] 1 AC 596 at 609, [2001] 1 All ER 1 at 12, HL per Lord Nicholls of Birkenhead.

3 *F v F (ancillary relief; substantial assets)* [1996] 2 FCR 397, [1995] 2 FLR 45; *FN v FN (financial provision)* [1996] 3 FCR 56, sub nom *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833.

4 *FN v FN (financial provision)* [1996] 3 FCR 56, sub nom *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833; *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL; cf *W v W (financial provision)* [1996] 3 FCR 641, sub nom *W v W (judicial separation: ancillary relief)* [1995] 2 FLR 259.

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605. Provision for adult children.

It has been said that, when assessing the amount of a lump sum provision, it is not legitimate to taken into account a party's wish to be in a position to make provision by will for their adult children¹, and that proposition has been accepted but only to a strictly limited extent².

¹ See *Page v Page* (1981) 2 FLR 198 at 201, CA per Ormrod LJ and at 203 per Dunn LJ; *Preston v Preston* [1982] Fam 17 at 25, [1982] 1 All ER 41 at 47, CA per Ormrod LJ and at 36, 56 per Brandon LJ; *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA; cf *Vicary v Vicary* [1993] 1 FCR 533, [1992] 2 FLR 271, CA.

² 'I agree that a parent's wish to be in a position to leave money to his or her children would not normally fall within [the statutory scheme (see PARAS 590, 597)] as a financial need, either of the husband or of the wife. But this does not mean that this natural parental wish is wholly irrelevant . . . in a case where resources exceed the parties' financial needs. In principle, a wife's wish to have money so that she can pass some on to her children at her discretion is every bit as weighty as a similar wish by a husband . . . In my view, in a case where resources exceed needs, the correct approach is as follows. The judge has regard to all the facts of the case and to the overall requirements of fairness. When doing so, the judge is entitled to have in mind the wish of a claimant wife that her award should not be confined to living accommodation and a vanishing fund of capital earmarked for living expenses which would leave nothing for her to pass on. The judge will give to that factor whatever weight, be it much or little or none at all, he considers appropriate in the circumstances of the particular case: *White v White* [2001] 1 AC 596 at 609, 610, [2001] 1 All ER 1 at 13, HL per Lord Nicholls of Birkenhead.

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606. Unforeseen contingencies.

The court has not been prepared to increase an order for the payment of capital in order to make provision for unforeseen contingencies, that is to say a 'rainy day' payment or a 'Besterman cushion'¹. However, as a result of the rejection of the concept of 'reasonable requirements' and the greater emphasis now placed on overall fairness², it may be that the courts will adopt a more relaxed approach to this head of claim.

¹ See *Re Besterman, Besterman v Grusin* [1984] Ch 458, sub nom *Re Besterman* [1984] 2 All ER 656, CA (decided under the Inheritance (Provision for Family and Dependents) Act 1975); *O'Neill v O'Neill* [1993] 2 FCR 297, CA; *Horsman v Horsman* [1993] 2 FCR 357, sub nom *H v H (financial provision)* [1993] 2 FLR 35; *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA; *A v A (financial provision)* [1998] 3 FCR 421, [1998] 2 FLR 180.

² See PARAS 591, 603.

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607. No presumption of equality of division.

The proposition that in every case the starting point in relation to a division of the parties' assets should be equality has been rejected¹. Nevertheless, the court's conclusion sometimes involves a more or less equal division of the available assets but more often that is not so and the court's decision will mean that one party will receive a bigger share than the other². Before reaching a firm conclusion and making an order providing that one party is to receive more assets than the other, the court will always be well advised to check its tentative views against the yardstick of equality of division; and, as a general rule, equality should be departed from only if, and to the extent that, there is good reason for doing so³.

1 See *White v White* [2001] 1 AC 596 at 605, 606, [2001] 1 All ER 1 at 9, HL per Lord Nicholls of Birkenhead ('a presumption of equal division would go beyond the permissible bounds of interpretation'). Similarly, where one party has brought substantially more capital into the marriage than did the other party, see *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FCR 707, [2008] 1 FLR 1508; *B v B (ancillary relief)* [2008] EWCA Civ 284, [2008] 2 FLR 1627, [2008] All ER (D) 282 (Mar).

2 *White v White* [2001] 1 AC 596 at 605, [2001] 1 All ER 1 at 9, HL per Lord Nicholls of Birkenhead and at 615, 18 per Lord Cooke of Thorndon; applied in *Dharamshi v Dharamshi* [2001] 1 FCR 492, [2001] 1 FLR 736, CA; *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97, [2001] 2 FCR 331. For cases where there was a departure from the broad objective of equality see *N v N (financial provision: sale of company)* [2001] 2 FLR 69 (departure due to difficulties associated with valuation and realisation of assets over time); *S v S (financial provision: departing from equality)* [2001] 2 FLR 246 (departure due to the fact that the award necessary to achieve equality would discriminate against husband); *L v L (financial provision: contributions)* [2002] 2 FCR 413 (departure due to fact that parties' fortune made from sale of husband's business).

3 See note 2. The principle of equality should not be complicated by excessive analysis or calculations when determining the division of assets: *H-J v H-J (financial provision: equality)* [2002] 1 FLR 415. It is unacceptable to place greater value on the contribution of the breadwinner than that of the homemaker, as justification for an unequal division of assets: *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] Fam 103, [2003] 4 All ER 342. See also *G v G (financial provision: equal division)* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143 (long marriage and respective contributions by husband as breadwinner and wife as homemaker necessitated provision which reflected equally their financial needs); *Sorrell v Sorrell* [2005] EWHC 1717 (Fam), [2006] 1 FCR 75 (husband was talented businessman who had made 'special contribution').

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608. Substantial assets.

In most cases the limited assets held by the parties will create their own constraints on the court's exercise of its discretionary powers to grant financial relief. Where, however, there are substantial assets, the court must consider the full range of matters to which it is to have regard in deciding how to exercise those discretionary powers¹.

In cases where the assets are substantial the court used to, and is still likely to, order a clean break².

Where a respondent discloses assets which would be sufficient to meet the claimant's justifiable claim, more detailed disclosure should not be ordered³.

¹ See *Preston v Preston* [1982] Fam 17, [1982] 1 All ER 41, CA. For a thorough review of the correct approach in such cases see *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

² See *C v C (financial provision)* [1989] FCR 558, [1989] 1 FLR 11; and PARA 592.

³ See *Thyssen-Bornemisza v Thyssen-Bornemisza (No 2)* [1985] FLR 1069, [1985] Fam Law 283, CA; *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA.

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609. Businesses.

In framing its orders, the court must consider the legal identity of any business and may only make orders that fall within its statutory jurisdiction¹. Where a company is the alter ego of a party, it may be possible to ignore minority interests and to make orders piercing the corporate veil, thereby disregarding the corporate identity². Further, prior to the hearing of the application for financial relief, the court may grant injunctive relief preserving corporate assets, on an application made within the proceedings for ancillary relief, rather than on an application under company law³.

In many instances the future financial welfare of the family after separation will still depend on the continuation of a business in which the parties have been involved: considerable expense may be incurred by the pursuit of an attempt to achieve a valuation of a business, such valuations being an art rather than a science, and consequently the courts have deprecated any attempt to achieve a precise valuation of a business interest held by one party if that interest is not to be sold⁴. In such circumstances a broad assessment of the value of the business interest will usually suffice⁵. It used to be said⁶ that the correct approach was to balance the wife's reasonable requirements against the husband's ability to pay⁷; but that approach is unlikely now to be applied by the courts⁸. It is anticipated that the courts will continue to deprecate expensive and unnecessary attempts to achieve a precise valuation of a business if that business is not to be sold; but some evidence of the value of a business interest will often be necessary⁹.

Where a business is not to be sold, the court is likely to pay particular regard to the liquidity of the business as a source of funding for financial relief¹⁰. Although the court will seek to avoid forcing the collapse of a business¹¹, it should not accept on face value a suggestion that a business will be forced to collapse¹², and there will be instances where a forced sale of a business is the only method of achieving justice between the parties¹³.

1 See *Dinch v Dinch* [1987] 1 All ER 818, [1987] 1 WLR 252, HL.

2 See *Nicholas v Nicholas* [1984] FLR 285, [1984] Fam Law 118, CA; *Green v Green* [1993] 1 FLR 326, [1993] Fam Law 119; but cf *Crittenden v Crittenden* [1991] FCR 70, [1990] 2 FLR 361, CA.

3 See *Shipman v Shipman* [1991] FCR 628, [1991] 1 FLR 250 (court has an inherent jurisdiction to preserve assets); *Poon v Poon* [1994] 2 FCR 777, [1994] 2 FLR 857.

4 See eg *Potter v Potter* [1982] 3 All ER 321, [1982] 1 WLR 1255, CA; *B v B (financial provision)* [1989] FCR 146, [1989] 1 FLR 119; *Priestley v Priestley* [1989] FCR 657, sub nom *P v P* [1989] 2 FLR 241.

5 See *Evans v Evans* [1990] 2 All ER 147, sub nom *Practice Note* [1990] 1 WLR 575n.

6 Ie prior to the decision in *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

7 See *Potter v Potter* [1982] 3 All ER 321, [1982] 1 WLR 1255, CA; *Priestley v Priestley* [1989] FCR 657, sub nom *P v P* [1989] 2 FLR 241; *Evans v Evans* [1990] 2 All ER 147, sub nom *Practice Note* [1990] 1 WLR 575n; *B v B (financial provision)* [1989] FCR 146, [1989] 1 FLR 119.

8 Ie because of the rejection in *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL of the concept of 'reasonable requirements': see PARA 603. 'If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should

the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband be left with a much larger share?': *White v White* at 608, 12 per Lord Nicholls of Birkenhead.

9 See eg *Dickinson v Jones, Alexander & Co* [1993] 2 FLR 521, [1990] Fam Law 137 (negligence claim).

10 See *Thomas v Thomas* [1996] 2 FCR 544, [1995] 2 FLR 668, CA.

11 See eg *P v P (financial provision: lump sum)* [1978] 3 All ER 70, [1978] 1 WLR 483, CA.

12 See *O'D v O'D* [1976] Fam 83, sub nom *O'Donnell v O'Donnell* [1975] 2 All ER 993, CA.

13 See *Woods v Woods* (1982) 12 Fam Law 213, CA; *Webber v Webber* (1982) 12 Fam Law 179, CA; *Moorish v Moorish* [1984] Fam Law 26, CA.

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(iv) Needs, Obligations and Responsibilities

610. Consideration of financial needs, obligations and responsibilities.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to (inter alia) the financial needs, obligations and responsibilities which each of the parties to the marriage or civil partnership has, or is likely to have, in the foreseeable future¹.

In most cases, where the parties are of limited means, their needs will be a central feature of the case². In particular, the housing needs of the parties and of the children of the family will often be focal³. It has been said that there is no presumption that both parties are entitled to purchase accommodation⁴. In order that the children do not witness their parents having an entirely disparate standard of living, it will generally be regarded as in the interests of the children that both parents should have a home in which to have contact with the children⁵. A sentimental attachment to a property will not of itself justify a party's remaining in it⁶.

1 See PARAS 590, 597.

2 *S v S* [1977] Fam 127, [1977] 1 All ER 56, CA; *M v B (ancillary proceedings: lump sum)* [1998] 1 FCR 213, [1998] 1 FLR 53, CA.

3 *Clutton v Clutton* [1991] 1 All ER 340, [1991] 1 WLR 359, CA; *M v B (ancillary proceedings: lump sum)* [1998] 1 FCR 213, [1998] 1 FLR 53, CA.

4 *Brown v Brown* (1981) 3 FLR 161, 11 Fam Law 247, CA (one party in secure alternative rented accommodation; it may be wrong to force the sale of the former matrimonial home); *Piglowka v Piglowski* [1999] 3 All ER 632, [1999] 1 WLR 1360, HL.

5 *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333, CA; *Delaney v Delaney* [1991] FCR 161, [1990] 2 FLR 457, CA.

6 *Crewe v Crewe* [1984] Fam Law 213, CA.

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611. Matters to which the court will have regard.

In assessing financial needs the court will have regard to a person's age, health and accustomed standard of living, and may also have regard to the available pool of resources: there is clearly some overlap between the factors which the court is to take into account¹, but the end product of that assessment of financial needs should be seen, and treated by the court, for what it is, that is to say only one of the several factors to which the court is to have particular regard². Thus, in deciding what will be a fair outcome, the court must also have regard to other factors such as available resources and the parties' contributions³.

1 See PARAS 590, 597.

2 *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

3 *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

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612. Long-term housing.

Where the court does not order an immediate sale of the family home it will have to consider whether the home should be transferred outright to the occupant party or whether it should be subjected to some form of deferred sale or trust. The classic forms of deferred sale or trust are known as Mesher orders or Martin orders¹. There has been a wealth of authority to suggest that a Mesher order should not be made if the occupant party will be left with inadequate funds to rehouse himself at the end of the period of deferment². Mesher orders may, however, be appropriate where both parties could be rehoused at the end of the period of deferment³ or where the marriage or civil partnership has been of short duration⁴. Courts recognise that the preservation of the family home may be important for the children and that a move should not be lightly contemplated⁵.

1 As to Mesher and Martin orders see PARA 316.

2 See eg *Harvey v Harvey* [1982] Fam 83, [1982] 1 All ER 693, CA; *Mortimer v Mortimer-Griffin* [1986] 2 FLR 315, [1986] Fam Law 305, CA; *Clutton v Clutton* [1991] 1 All ER 340, [1991] 1 WLR 359, CA; *Rust v Rust* [1996] CLY 2884.

3 *Mitchell v Mitchell* [1984] FLR 387, [1984] Fam Law 176, CA.

4 *Drinkwater v Drinkwater* [1984] FLR 627, [1984] Fam Law 245, CA.

5 *Mullard v Mullard* (1981) 3 FLR 330, 12 Fam Law 63, CA; *B v B (financial provision: welfare of the child and conduct)* [2002] 1 FLR 555.

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613. Debts and lists of expenditure.

The obligation of a party to repay indebtedness may well represent a need of that party. Such a need will, however, have to be balanced against the other needs of the parties and the court should differentiate between debts that must be repaid ('hard debts') and debts where a party feels under a moral obligation to pay ('soft debts')¹. The court does not have power to order the payment of unsecured debts².

In proceedings for financial relief each party will be required to make a list of projected expenditure³. Lists of expenditure will be scrutinised carefully by the court and the court will generally approach such lists with a broad brush⁴.

1 *Mullard v Mullard* (1981) 3 FLR 330, 12 Fam Law 63, CA.

2 *M v B (ancillary proceedings: lump sum)* [1998] 1 FCR 213, [1998] 1 FLR 53, CA.

3 See PARA 925.

4 *Campbell v Campbell* [1998] 2 FCR 123, [1997] 2 FLR 609, CA; *FN v FN (financial provision)* [1996] 3 FCR 56, sub nom *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833; *B v B (financial provision)* [1989] FCR 146, [1989] 1 FLR 119.

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(v) Standard of Living

614. Consideration of family's standard of living.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to (inter alia) the standard of living enjoyed by the family before the breakdown of the marriage or civil partnership or other relevant event¹.

It will usually be unavoidable that the standard of living of both parties will diminish following their separation². However, the qualitative assessment of the parties' standard of living during the marriage or civil partnership may influence the court's determination of the appropriate provision that should be made after separation³. Even where the assets are not divided equally between the parties, it may be appropriate to ensure that the parties' standards of living are not wholly unequal, particularly where there are children⁴. Where the parties have adopted a frugal standard of living during the marriage or civil partnership in the expectation of future wealth, this should not act as a limiting factor within the proceedings for relief⁵. Equally, extravagance will not bolster a claim⁶. The standard of living during the marriage or civil partnership may give a true indication of the financial resources and power of the parties⁷. The standard of living during a marriage or civil partnership of short duration may, however, be a factor of little significance⁸.

1 See PARAS 590, 597.

2 *R v R (financial provision: reasonable needs)* [1994] 2 FLR 1044, [1995] Fam Law 15.

3 See *Preston v Preston* [1982] Fam 17 at 26, [1982] 1 All ER 41 at 48, CA ('In this case the wife is entitled to expect a very high standard of living which would include a home in a house or flat at the top end of the market, and probably a second home in the country or abroad, together with a very high spending power'); *Nicholas v Nicholas* [1984] FLR 285 at 289, CA ('In deciding what standard of accommodation was appropriate for [the wife], it is reasonable to look at the kind of accommodation that over the years the parties themselves lived in as they steadily improved their position and standard of living as a result of the success in his business ventures'); *Boylan v Boylan* [1988] FCR 689 at 697, [1988] 1 FLR 282 at 289 ('It is, therefore, relevant to this issue that the wife is the former spouse of a man of substantial wealth and it is by that standard that her reasonable requirements should be judged and an assessment made as to whether or not she would suffer undue hardship on the termination of the payments').

4 *Kershaw v Kershaw* [1966] P 13, [1964] 3 All ER 635; *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 All ER 336, CA. See, however, *McCartney v Mills McCartney* [[2008] EWHC 401 (Fam), [2008] 1 FCR 707, [2008] 1 FLR 1508; *B v B (ancillary relief)* [2008] EWCA Civ 284, [2008] 2 FLR 1627, [2008] All ER (D) 282 (Mar).

5 See *Preston v Preston* [1982] Fam 17 at 25, [1982] 1 All ER 41 at 47, CA ('The acceptance by the wife of a frugal standard of living throughout the marriage, enabling the husband to plough back into the business a large proportion of the profits and so develop it into a considerable enterprise, is a factor which can properly be reflected in the lump sum award'); *Boylan v Boylan* [1988] FCR 689, [1988] 1 FLR 282; *H v H (clean break: non-disclosure: costs)* [1994] 2 FLR 309, sub nom *H v H (financial provision: lump sum)* [1994] Fam Law 15.

6 *F v F (ancillary relief: substantial assets)* [1996] 2 FCR 397, [1995] 2 FLR 45.

7 *Hardy v Hardy* (1981) 2 FLR 321, 11 Fam Law 153, CA; *Priestley v Priestley* [1989] FCR 657, sub nom *P v P* [1989] 2 FLR 241; *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1993] 1 WLR 1167, CA.

8 *Attar v Attar (No 2)* [1985] FLR 653, [1985] Fam Law 252; *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FCR 707, [2008] 1 FLR 1508.

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(vi) Age of Parties and Duration of Marriage or Civil Partnership

615. Age of parties.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to (inter alia) the age of each party to the marriage or civil partnership¹. A young, healthy, child-free party is almost always bound to be treated as having earning capacity². An older party may have a more vulnerable earning capacity so that a clean break cannot be contemplated³. It may be unfair for an older party to be prejudiced after a long marriage or civil partnership by having a Duxbury fund⁴ that is limited by his restricted life expectancy⁵.

1 See PARA 590.

2 *Soni v Soni* [1984] FLR 294, [1984] Fam Law 268 (wives should not be encouraged to regard their husbands as liable to maintain them for life without there being any obligation on their part to provide for themselves; the younger the wife and the shorter the marriage, particularly if there are no children, the more difficult it is for her to persuade the court that she is unable to earn her own living and to obtain an order requiring the husband to make any substantial, continuing provision for her; but there is no hard and fast rule).

3 *Flavell v Flavell* [1997] 1 FCR 332, [1997] 1 FLR 353, CA.

4 See PARAS 483, 604.

5 *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

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616. Duration of marriage or civil partnership.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to (inter alia) the duration of the marriage or civil partnership¹, and this will operate as a limiting factor in any proceedings for relief. Usually, where there are no children of the family, the court will seek to restore the parties to financial independence following a marriage or civil partnership of short duration². Where, however, there are children, the court may impose a continuing financial responsibility by way of a periodical payments order³, although in some cases any order for periodical payments may be limited in time⁴. Further, after a marriage or civil partnership of short duration where there are children, the preservation of the former family home may be necessary⁵. The focus for the court's considerations, particularly where the parties are not young, is likely to be on their respective needs and the effect that the marriage or civil partnership has had on them both⁶. Cohabitation before the marriage or civil partnership may be relevant as part of all the circumstances of the case⁷.

1 See PARA 590.

2 *Attar v Attar (No 2)* [1985] FLR 653, [1985] Fam Law 252; *Leadbeater v Leadbeater* [1985] FLR 789, [1985] Fam Law 280; *Hedges v Hedges* [1990] FCR 952, [1991] 1 FLR 196, CA.

3 See eg *C v C (financial provision: short marriage)* [1997] 3 FCR 360, sub nom *C v C (financial relief: short marriage)* [1997] 2 FLR 26, CA.

4 *Waterman v Waterman* [1989] FCR 267, [1989] 1 FLR 380, CA; *Mawson v Mawson* [1994] 2 FCR 852, [1994] 2 FLR 985 (periodical payments ordered for a fixed period).

5 See eg *Drinkwater v Drinkwater* [1984] FLR 627, [1984] Fam Law 245, CA (Mesher order made after a four-year marriage where husband had brought house to marriage).

6 *S v S* [1977] Fam 127, [1977] 1 All ER 56, CA.

7 *Kokosinski v Kokosinski* [1980] Fam 72, [1980] 1 All ER 1106; *Foley v Foley* [1981] Fam 160, [1981] 2 All ER 857, CA; *Day v Day* [1988] FCR 470, [1988] 1 FLR 278; *GW v RW* [2003] EWHC 611 (Fam), [2003] 2 FCR 289, [2003] 2 FLR 108 (cohabitation to be counted as part of the duration of the marriage where relationship moved seamlessly from cohabitation to marriage; period of estrangement not to so be counted); *Co v Co (ancillary relief: pre-marriage cohabitation)* [2004] EWHC 287 (Fam), [2004] 1 FLR 1095 (cohabitation immediately prior to, and seamlessly followed by, marriage, was a non-financial factor or circumstance to which the court had to have regard). See also PARA 593.

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(vii) Disability

617. Consideration of physical or mental disability of parties.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to (inter alia) any physical or mental disability of either of the parties to the marriage or civil partnership¹. Disability may be particularly relevant when considering the parties' needs². Also, a disability may affect a person's earning capacity³. Even where a disability limits life expectancy dramatically, a claimant will not lose the right to claim relief⁴.

¹ See PARAS 590, 597.

² See eg *B v B (financial provision)* (1982) 3 FLR 298, 12 Fam Law 92, CA (multiple sclerosis); *Chadwick v Chadwick* [1985] FLR 606, [1985] Fam Law 96, CA ('seriously disabling illness'); *Seaton v Seaton* [1986] 2 FLR 398, [1986] Fam Law 267, CA (drink problem and stroke); *Sakkas v Sakkas* [1987] Fam Law 414 (multiple sclerosis); *Ashley v Blackman* [1988] Fam 85, [1988] 3 WLR 222 (schizophrenic wife); *K v K (financial provision)* [1990] FCR 372, sub nom *K v K (conduct)* [1990] 2 FLR 225 (husband's drink problem).

³ See eg *S v S (financial provision: cohabitation after divorce)* [1994] 2 FCR 1225, sub nom *S v S (financial provision) (post-divorce cohabitation)* [1994] 2 FLR 228; *C v C (ancillary relief: structured settlement)* [1996] 1 FCR 283, sub nom *C v C (financial provision: personal damages)* [1995] 2 FLR 171; *W v W (financial provision)* [1997] 2 FCR 126, sub nom *W v W (periodical payments: pensions)* [1996] 2 FLR 480.

⁴ *Smith v Smith (Smith and others intervening)* [1992] Fam 69, [1991] 2 All ER 306, CA; *M v M (property adjustment: impaired life expectancy)* [1994] 2 FCR 174, [1993] 2 FLR 723, CA; *Barber v Barber* [1993] 1 FCR 65, [1993] 1 FLR 476, CA.

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(viii) Contributions

618. Consideration of parties' respective contributions.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to (inter alia) the contributions which each of the parties has made, or is likely to make, to the welfare of the family, including any contribution by looking after the home or caring for the family¹. This has always been an important feature of the statutory system², particularly in cases where there is a surplus of assets beyond the needs of the parties³. The significance of this requirement has been highlighted by recent judicial decision, in which the court has rejected the distinction between the direct contribution, that is say financial, and indirect contribution, that is to say care for the home, children and so on⁴. However, financial contributions made by one party through inheritance, gift or pre-marital or pre-civil-partnership ownership of assets will still be of particular relevance⁵. Just as positive contributions may enhance a claim⁶, so negative contributions may limit it⁷. A party's contribution may create an entitlement to a share of the assets, even if that entitlement is not supported by need⁸. In a marriage or civil partnership of short duration the issue of contribution may be irrelevant⁹.

1 See PARAS 590, 597.

2 For the background to this provision see *Wachtel v Wachtel* [1973] Fam 72 at 93, [1973] 1 All ER 829 at 838, CA, per Lord Denning MR.

3 See *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL; *Foster v Foster* [2003] EWCA Civ 565, [2005] 3 FCR 26, [2003] 2 FLR 299 (both parties contributing to accumulation of assets); and PARA 619.

4 See eg *Conran v Conran* [1998] 1 FCR 144, [1997] 2 FLR 615; *White v White* [2001] 1 AC 596 at 605, [2001] 1 All ER 1 at 8, 9, HL per Lord Nicholls of Birkenhead ('In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles . . . whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice either party . . . if, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money earner and against the home-maker and the child-carer. There are cases, of which the Court of Appeal decision in *Page v Page* (1981) 2 FLR 198, CA is perhaps an instance, where the court may have lost sight of this principle').

5 See *P v P (financial provision: lump sum)* [1978] 3 All ER 70, [1978] 1 WLR 483, CA; *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL; and PARA 620.

6 See eg *Gojkovic v Gojkovic* [1992] Fam 40, [1990] 2 All ER 84, CA.

7 *E v E (financial provision)* [1989] FCR 591, [1990] 2 FLR 233; *A v A (financial provision)* [1998] 3 FCR 421, [1998] 2 FLR 180.

8 See eg *Smith v Smith (Smith and others intervening)* [1992] Fam 69, [1991] 2 All ER 306, CA (wife had died of liver disease). The 'entitlement' argument will not, however, always dominate as there may be other factors of relevance: see eg *Schuller v Schuller* [1990] FCR 626, [1990] 2 FLR 193 (20-year marriage; wife inherited assets from another man; lump sum order to wife of modest size to achieve overall equality between the parties).

9 *Attar v Attar (No 2)* [1985] FLR 653, [1985] Fam Law 252.

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619. Financial contributions.

A distinction used to be drawn between direct financial contributions, for example contributions to the financial resources of the parties by inheritance, work or gift from third parties, and indirect contributions, for example caring for the children and the home or supporting the other party¹. There is, however, one principle of universal application, that in seeking to achieve a fair outcome there is no place for discrimination between the parties and their respective roles². Typically, both parties share the activities of earning money, running their home and, where applicable, caring for their children, and whatever the division of labour chosen by the parties, or forced on them by circumstances, fairness requires that this should not prejudice or advantage either party when considering³ the parties' contributions. If, in their different spheres, each contributed equally to the family, then in principle it does not matter which of them earned the money and built up the assets: there should be no bias in favour of the money-earner and against the home-maker and the child-carer⁴.

Contributions should be considered broadly and are not merely an 'add-on' to reasonable requirements⁵.

¹ See eg *Page v Page* (1981) 2 FLR 198, CA; *Preston v Preston* [1982] Fam 17, [1982] 1 All ER 41, CA; *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA.

² *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL.

³ See under the Matrimonial Causes Act 1973 s 25(2)(f), Domestic Proceedings and Magistrates' Courts Act 1978 s 3(2)(f), and the Civil Partnership Act 2004 Sch 5 para 21(2)(f), Sch 6 para 5(2)(f): see PARA 590. See also *S v S (ancillary relief after lengthy separation)* [2006] EWHC 2339 (Fam), [2007] 2 FCR 762, [2007] 1 FLR 2120 (wife not entitled to share of business that husband set up after their separation).

⁴ *White v White* [2001] 1 AC 596 at 605, [2001] 1 All ER 1 at 9, HL per Lord Nicholls of Birkenhead. 'There are cases, of which the Court of Appeal decision in *Page v Page* (1981) 2 FLR 198, CA is perhaps one example, where the court may have lost sight of this principle': *White v White* at 605, 9 per Lord Nicholls of Birkenhead. See also *S v S* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496 (seven-year marriage; husband made significant financial contribution before and during the marriage; husband entitled to 60% of matrimonial property and to retain all pre-matrimonial property).

⁵ *S v S* (1980) 10 Fam Law 240 (affd [1980] CA Transcript 664); *Conran v Conran* [1998] 1 FCR 144, [1997] 2 FLR 615.

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620. Inherited money and property.

Money that is given to or inherited by one party during the marriage or civil partnership together with money brought into the marriage or civil partnership by one party is to be regarded as the contribution by the party who introduced it¹. However, in the ordinary course this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to that property².

1 'This distinction [between inherited property and property owned before the marriage, on the one hand, and 'matrimonial property', on the other hand] is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called 'matrimonial property'. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property. Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant factors to be considered': *White v White* [2001] 1 AC 596 at 610, [2001] 1 All ER 1 at 13, 14, HL per Lord Nicholls of Birkenhead.

2 *White v White* [2001] 1 AC 596 at 610, [2001] 1 All ER 1 at 14, HL per Lord Nicholls of Birkenhead.

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(ix) Conduct

621. Consideration of parties' conduct.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard to (inter alia) the conduct of each of the parties, if that conduct is such that it would, in the opinion of the court, be inequitable to disregard it¹. It is, however, rare for the court to take conduct into account and, where it does, the court must consider the conduct of both parties in the context of the marriage or civil partnership as a whole² and a finding that conduct is relevant is only one of the factors which the court is to take into account³.

The relevant conduct may take a number of different forms:

- 779 (1) reckless financial behaviour⁴;
- 780 (2) adultery⁵;
- 781 (3) violence⁶; and
- 782 (4) conduct within the course of the litigation⁷.

In proceedings where periodical payments, a lump sum or property are or is in issue, the court must have regard, in particular, to (inter alia) any substantial contested allegations of conduct when considering whether the complexity, difficulty or gravity of the issues are such that they ought to be tried in the High Court⁸.

1 See PARA 590.

2 See *Harnett v Harnett* [1973] Fam 156, [1973] 2 All ER 593; affd [1974] 1 All ER 764, [1974] 1 WLR 219, CA.

3 See *Vasey v Vasey* [1985] FLR 596; *H v H (financial relief: conduct)* [1999] 1 FCR 225, [1998] 1 FLR 971. In earlier cases the court applied a test of whether the conduct of which complaint was made was 'gross and obvious' (see *Wachtel v Wachtel* [1973] Fam 72, [1973] 1 All ER 113), although the current practice is to apply the wording of the statutory provision.

4 See eg *Martin v Martin* [1976] Fam 335, [1976] 3 All ER 625, CA; *Moorish v Moorish* [1984] Fam Law 26, CA; *K v K (financial provision)* [1990] FCR 372 sub nom *K v K (conduct)* [1990] 2 FLR 225; *L v L (financial provision)* [1994] 1 FCR 134, sub nom *L v L (financial provision: lump sum)* [1993] Fam Law 471; *Beach v Beach* [1995] 2 FCR 526, [1995] 2 FLR 160; *M v M (financial misconduct: subpoena against third party)* [2006] 2 FCR 555, [2006] 2 FLR 1253 (gambling); *X v X* [2005] EWHC 296 (Fam), [2005] 2 FLR 487 (money laundering).

5 See eg *Cuzner (formerly Underdown) v Underdown* [1974] 2 All ER 351, [1974] 1 WLR 641, CA; *Bleazard v Bleazard and Mul* (1978) 1 FLR 253, 9 Fam Law 249, CA; *Ibbetson v Ibbetson* [1984] FLR 545, [1984] Fam Law 309; *Atkinson v Atkinson* [1988] Fam 93, [1987] 3 All ER 849, CA.

6 See eg *Armstrong v Armstrong* (1974) 4 Fam Law 156, CA; *Jones v Jones* [1976] Fam 8, [1975] 2 All ER 12, CA; *M v M (financial provision: conduct)* (1981) 3 FLR 83; *Hall v Hall* [1984] FLR 631, [1984] Fam Law 54, CA; *Evans v Evans* [1989] FCR 133, [1989] 1 FLR 351, CA; *H v H (financial provision: conduct)* [1994] 2 FCR 1031, [1994] 2 FLR 801; *A v A (financial provision)* [1995] 2 FCR 137, sub nom *A v A (financial provision: conduct)* [1995] 1 FLR 345.

7 See eg *B v B (real property: assessment of interests)* [1988] 2 FLR 490, [1988] Fam Law 435 (wife's non-disclosure); *M v M (financial provision: party incurring excessive costs)* [1995] 3 FCR 321 (husband making

excessive applications); *M v M (financial misconduct: subpoena against third party)* [2006] 2 FCR 555, [2006] 2 FLR 1253.

8 See PARA 744.

UPDATE

621 Consideration of parties' conduct

NOTES 5, 6--See *C v T* [2009] All ER (D) 43 (Jun) (inequitable to make financial provision to husband as his conduct amounted to grossest breach of trust, and he had been responsible for destruction of the marriage).

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(x) Loss of Benefit

622. Consideration of value of benefits.

It is the duty of the court, in deciding whether to exercise its powers to grant financial relief and, if so, in what manner, to have regard, in the case of proceedings for divorce or nullity of marriage or dissolution or nullity of civil partnership only, to (inter alia) the value to each of the parties to the marriage or civil partnership of any benefit which, by reason of the dissolution or annulment of the marriage or civil partnership, that party will lose the chance of acquiring¹. Pursuant to this requirement the court is under no obligation to award compensation for the loss of widow's pension rights; but it may in its discretion do so².

¹ See PARA 590.

² See *T v T (financial relief: pensions)* [1998] 2 FCR 364, [1998] 1 FLR 1072; *Burrow v Burrow* [1999] 2 FCR 549, [1999] 1 FLR 508.

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(6) ENFORCEMENT

(i) Enforcement Generally

623. Enforcement of civil judgments.

There is no distinct body of rules governing the enforcement of maintenance and related financial orders made in family proceedings¹. Such orders are in principle enforceable by the same methods of enforcement which are available to enforce civil judgments generally². Procedure in the High Court is governed by the Rules of the Supreme Court (Revision) 1965³ and procedure in county courts is governed by the County Court Rules 1981⁴, both of which continue to apply, with the necessary modifications, to family proceedings in the High Court and county courts⁵.

Before any process is issued for the enforcement of an order made in family proceedings for the payment of money to any person, an affidavit must be filed verifying the amount due under the order and showing how that amount is arrived at⁶.

1 As to the meaning of 'family proceedings' see PARA 744 note 3; and see also, as to the assignment of business, PARA 731.

2 Means of payment orders (see PARAS 644-646) and orders for sale (see PARAS 520-522) are, however, peculiar to family proceedings. A judgment summons may only issue to enforce judgments or orders of the type specified in the Administration of Justice Act 1970 s 11: see PARAS 644-646. It is only appropriate to use the bankruptcy process as a means of enforcement of orders made in family proceedings if wholly exceptional circumstances exist: see PARA 692.

3 I.e. the Rules of the Supreme Court (Revision) 1965, SI 1965/1776: see PARA 1005.

4 I.e. the County Court Rules 1981, SI 1981/1687: see PARA 1005.

5 See the Family Proceedings Rules 1991, SI 1991/1247, r 1.3(1); and PARA 1005. The principal provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to enforcement of orders generally are contained in Pt VII Chapters 1, 2 (rr 7.1-7.6) (see PARA 943 et seq); and the enforcement of maintenance orders is governed mainly by the Maintenance Orders Act 1958, the Magistrates' Courts (Maintenance Orders Act 1958) Rules 1959, SI 1959/3, the Magistrates' Courts (Attachment of Earnings) Rules 1971, SI 1971/809, the Magistrates' Courts Act 1980, the Magistrates' Courts Rules 1981, SI 1981/552, and the Family Proceedings Rules 1991, SI 1991/1247, Pt VII (rr 7.16-7.39): see PARA 664 et seq. As to the reciprocal enforcement of maintenance orders see the Maintenance Orders (Facilities for Enforcement) Act 1920, the Maintenance Orders Act 1950 and the Maintenance Orders (Reciprocal Enforcement) Act 1972; PARA 677; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 284-335.

6 Family Proceedings Rules 1991, SI 1991/1247, r 7.1(1).

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624. Enforcement of undertakings.

The appropriate method of enforcing an undertaking will depend on the nature of the obligation which it embodies. If the obligation is of a financial nature, the undertaking may not be enforced by an application to commit for contempt of court¹. It has, however, been held that financial undertakings may be enforced by judgment summons if they are an integral and indivisible part of the order². Thus, undertakings to pay school fees and a monthly maintenance supplement have been held to be enforceable by judgment summons³, as has an undertaking to discharge any capital gains tax due on a transfer of shares pursuant to a consent order⁴. Arrears which have accrued under an undertaking to pay school fees are recoverable by third party debt proceedings⁵. Provided that the procedural conditions are satisfied, non-financial undertakings may be enforced by committal for contempt of court or proceedings for sequestration⁶.

1 *Buckley v Crawford* [1893] 1 QB 105.

2 *Symmons v Symmons* [1993] 2 FCR 247, [1993] 1 FLR 317 (where the court's jurisdiction to enforce by way of undertaking was held to derive from the reference in the Administration of Justice Act 1970 Sch 8 para 2A (see PARA 642) to an order for periodical or other payments made, or having effect as if made, under the Matrimonial Causes Act 1973 Pt II (ss 21-40A)).

3 See note 2.

4 *M v M (enforcement: judgment summons)* [1993] Fam Law 469.

5 *Gandolfo v Gandolfo* [1981] QB 359, sub nom *Gandolfo v Gandolfo (Standard Chartered Bank Ltd, garnishee)* [1980] 1 All ER 833, CA. As to third party debt proceedings see PARA 640.

6 *London and Birmingham Rly Co v Grand Junction Canal Co* (1835) 1 Ry & Can Cas 224.

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625. Enforcing agreements in financial orders.

Where an order of the court consists of in part a recital containing an agreement imposing an obligation on a party and in part an order, the contractual provisions may be enforced as though they were orders of the court, provided that the court would have had jurisdiction to make an order in like terms¹.

¹ *Horsman v Horsman* [1993] 2 FCR 357, sub nom *H v H (financial provision)* [1993] 2 FLR 35. In that case the order contained a recital whereby a husband agreed to provide a replacement car for the wife every three years; and the agreement was held to be capable of enforcement within the proceedings, even though it was not the subject of an undertaking. However, it appears that the method of enforcement contemplated by the court was conversion of the contractual obligation into a periodical payments order and the subsequent quantification and enforcement of arrears. It thus seems that this relief will not be available in cases where the payee's claim for periodical payments has been dismissed. See also *Atkinson v Castan* (1991) Times, 17 April, CA. If a party seeking to enforce an agreement is unable to invoke the court's powers within its jurisdiction in family proceedings, but is compelled to pursue ordinary civil remedies, the claim should nevertheless be brought within the family proceedings as in *Amey v Amey* [1992] 1 FCR 289, [1992] 2 FLR 89 (where the agreement did not form part of a consent order). See, however, *Standley v Stewkesbury* [1998] 3 FCR 564, [1998] 2 FLR 610, CA (where the wife brought a claim for damages for an alleged breach of a term of an agreement contained in a consent order; neither *Horsman v Horsman* nor *Amey v Amey* was referred to in the judgment). See also *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583, sub nom *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745 (Orthodox Jewish husband failing to take steps to obtain a get; wife sought specific performance of ante-nuptial agreement).

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626. Enforcing maintenance agreements.

Maintenance agreements concluded outside the framework of court proceedings¹ may be enforced in one or both of two ways. First, if the jurisdiction exists, a court order may be sought in the terms of the agreement. Thus, in proceedings for financial relief the party relying on the agreement may issue an application for the other party to show cause why an order should not be made in the terms of the agreement². Once the order is made, it will be enforceable in the usual way. Secondly, the alternative, which may be the only option if the court has no jurisdiction to make an order in the terms of the agreement, is to sue on the bargain as a matter of contract, claiming damages or specific performance³.

¹ ie such as those recognised by the Matrimonial Causes Act 1973 ss 34-36 and the Civil Partnership Act 2004 Sch 5 paras 68-73: see PARAS 697, 700-704.

² *Dean v Dean* [1978] Fam 161, [1978] 3 All ER 758; *Edgar v Edgar* [1980] 3 All ER 887, [1981] 1 WLR 1410, CA; *Xydhias v Xydhias* [1999] 2 All ER 386, [1999] 1 FCR 289, CA.

³ See eg *Amey v Amey* [1992] 1 FCR 289, [1992] 2 FLR 89. See also *Standley v Stewkesbury* [1998] 3 FCR 564, [1998] 2 FLR 610, CA.

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(ii) Methods of Enforcement

A. ATTACHMENT OF EARNINGS ORDERS

627. Making of orders.

Provision is made¹ for a person entitled to receive maintenance payments² under a maintenance order³, or for the debtor⁴, to apply to the court⁵ for an attachment of earnings order⁶ requiring the employer⁷ of the person by whom the payment is required to be made to make deductions from that person's earnings⁸ in compliance with the order⁹, and for the enforcement of such orders¹⁰.

1 le under the Attachment of Earnings Act 1971: see PARAS 628-635. An attachment of earnings order may also be made under the Maintenance Enforcement Act 1991: see PARA 645.

2 For these purposes, except where the context otherwise requires, 'maintenance payments' means payments required under a maintenance order: Attachment of Earnings Act 1971 s 25(1).

3 As to the meaning of 'maintenance order' see PARA 628 note 1.

4 As to the meaning of 'debtor' see PARA 628 note 8.

5 For these purposes, except where the context otherwise requires, the 'court', in relation to an attachment of earnings order, means the court which made the order, subject to rules of court as to the venue for, and the transfer of, proceedings in county courts and magistrates' courts: Attachment of Earnings Act 1971 s 25(1).

6 As to the meaning of 'attachment of earnings order' see PARA 629.

7 For these purposes, unless the context otherwise requires, the 'employer', in relation to an attachment of earnings order, means the person who is required by the order to make deductions from earnings paid by him to the debtor: Attachment of Earnings Act 1971 s 25(1). Nevertheless it is not necessary to prove an actual relationship of employer and employee in every case, the crucial prerequisite being that the income received by the debtor should constitute earnings: see PARA 629. The income of a self-employed person is not 'earnings' and may not be attached: see s 24(1)(a); and PARA 630.

As to the obligation of the debtor's employers to notify changes of employment and earnings see s 15(c); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1454. As to Crown employment see s 22; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1445.

8 As to the meaning of 'earnings' see PARA 630.

9 See PARA 628 et seq. For procedure see PARA 943. As to attachment of earnings orders in magistrates' courts see PARA 656; and **MAGISTRATES** vol 29(2) (Reissue) PARAS 837-847.

10 As to enforcement of attachment of earnings orders see the Attachment of Earnings Act 1971 s 23; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1465-1466.

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628. Power to attach earnings.

The High Court, county courts and magistrates' courts are empowered to make attachment of earnings orders to secure payments under maintenance orders¹. The High Court may make an attachment of earnings order to secure payments under a High Court maintenance order²; a county court may make an attachment of earnings order to secure payments under a High Court or a county court maintenance order³; and a magistrates' court may make an attachment of earnings order to secure payments under a magistrates' court maintenance order⁴.

The persons who may apply for such an order are:

- 783 (1) the person to whom payment under the maintenance order is required to be made, whether directly or through an officer of any court⁵;
- 784 (2) without prejudice to the above, where the application is to a magistrates' court for an order to secure maintenance payments and there is in force a means of payment order⁶ requiring those payments to be made to the designated officer for a magistrates' court, that officer⁷; and
- 785 (3) the debtor⁸.

¹ See the text and notes 2-4. The maintenance orders within the scope of this title to which the Attachment of Earnings Act 1971 applies include:

- 109 (1) orders for alimony, maintenance or other payments made, or having effect as if made, under the Matrimonial Causes Act 1965 Pt II (ss 15-32) (repealed) (Attachment of Earnings Act 1971 Sch 1 para 1);
- 110 (2) orders for payments to or in respect of a child, being an order made, or having effect as if made, under the Matrimonial Causes Act 1965 Pt III (ss 33-38) (repealed) (Attachment of Earnings Act 1971 Sch 1 para 2);
- 111 (3) orders for periodical or other payments made, or having effect as if made, under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) (see PARA 450 et seq) (Attachment of Earnings Act 1971 Sch 1 para 3 (substituted by the Matrimonial Causes Act 1973 Sch 2 para 13));
- 112 (4) orders for maintenance or other payments to or in respect of a spouse or child, being an order made under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) (see PARA 553 et seq) (Attachment of Earnings Act 1971 Sch 1 para 4 (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 Sch 2 para 32));
- 113 (5) orders to which the Maintenance Orders Act 1950 s 16 applies by virtue of s 16(2)(b) or (c) (ie certain orders made by courts in Scotland or Northern Ireland: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 293) and which have been registered in a court in England and Wales under Pt II (ss 16-25) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 293-300) (Attachment of Earnings Act 1971 Sch 1 para 9);
- 114 (6) maintenance orders within the meaning of the Maintenance Orders (Facilities for Enforcement) Act 1920 registered in, or confirmed by, a court in England and Wales under that Act (Commonwealth orders enforceable in the United Kingdom: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 301-309) (Attachment of Earnings Act 1971 Sch 1 para 10);
- 115 (7) maintenance orders within the meaning of the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) duly registered in a magistrates' court (see **CONFLICT OF**

LAWS vol 8(3) (Reissue) PARAS 310-322) (Attachment of Earnings Act 1971 Sch 1 para 11 (added by the Maintenance Orders (Reciprocal Enforcement) Act 1972 Schedule para 7));

- 116 (8) maintenance orders within the meaning of the Civil Jurisdiction and Judgments Act 1982 Pt I (ss 1-15) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65) which are duly registered in a magistrates' court (Attachment of Earnings Act 1971 Sch 1 para 13 (added by the Civil Jurisdiction and Judgments Act 1982 Sch 12 Pt I para 6));
- 117 (9) a maintenance judgment within the meaning of EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 28) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I' Regulation: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65), which is registered in a magistrates' court under that Regulation (Attachment of Earnings Act 1971 Sch 1 para 14 (added by SI 2007/1655));
- 118 (10) an order made under the Civil Partnership Act 2004 Sch 5 (financial relief in the High Court or a county court etc), for periodical or other payments (see PARA 450 et seq) (Attachment of Earnings Act 1971 Sch 1 para 15 (Sch 1 paras 15, 16 added by the Civil Partnership Act 2004 Sch 27 para 35)); and
- 119 (11) an order made under the Civil Partnership Act 2004 Sch 6 (financial relief in magistrates' courts etc), for maintenance or other payments to or in respect of a civil partner or child (see PARA 553 et seq) (Attachment of Earnings Act 1971 Sch 1 para 16 (as so added)).

'Maintenance order' includes such an order which has been discharged if any arrears are recoverable thereunder: s 2(a). As to the content of an attachment of earnings order see PARA 629. As to the procedure on an application in the High Court for an attachment of earnings order see PARA 635; and as to the power to make attachment of earnings orders under the Maintenance Enforcement Act 1991 see PARA 645. Any reference in the Attachment of Earnings Act 1971 to sums payable under a judgment or order, or to the payment of such sums, includes a reference to costs and the payment of them: s 25(2). See also *Graham v Graham* [1993] 1 FCR 339, [1992] 2 FLR 406, CA. Financial undertakings, which are an integral and indivisible part of a maintenance order, have been held to be enforceable by judgment summons: *Symmons v Symmons* [1993] 2 FCR 247, [1993] 1 FLR 317.

2 Attachment of Earnings Act 1971 s 1(1). A 'High Court maintenance order' is any of the maintenance orders listed in note 1 which is enforceable by the High Court: s 2(b). As to the procedure on an application see PARA 943; and as to a county court's powers to make consolidated attachment of earnings orders see s 17; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1459. Where proceedings are brought in the High Court or a county court for the enforcement of a maintenance order by committal under the Debtors Act 1869 s 5 (see PARA 642 et seq), the court may make an attachment of earnings order instead of dealing with the case under s 5: Attachment of Earnings Act 1971 s 3(4)(a).

3 Attachment of Earnings Act 1971 s 1(2)(a). A 'county court maintenance order' is a maintenance order enforceable by a county court: s 2(b). See note 2.

4 Attachment of Earnings Act 1971 s 1(3)(a). A 'magistrates' court maintenance order' is a maintenance order enforceable by a magistrates' court: s 2(b). As to the procedure on an application see s 19; and **MAGISTRATES** vol 29(2) (Reissue) PARA 845. As to the jurisdiction of magistrates' courts in respect of persons residing outside England and Wales see s 20; and **MAGISTRATES** vol 29(2) (Reissue) PARA 838.

5 Attachment of Earnings Act 1971 s 3(1)(a).

6 Is an order under the Magistrates' Courts Act 1980 s 59 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 820) or the Maintenance Orders Act 1950 s 19(2) (see **CONFLICT OF LAW** vol 8(2) (Reissue) PARA 296).

7 Attachment of Earnings Act 1971 s 3(1)(c) (amended by the Magistrates' Courts Act 1980 Sch 7 para 97; the Maintenance Enforcement Act 1991 Sch 2 para 1; and the Courts Act 2003 Sch 8 para 141). For additional duties, and restrictions on the actions, of the designated officer see the Attachment of Earnings Act 1971 s 18; and **MAGISTRATES** vol 29(2) (Reissue) PARA 843.

8 Attachment of Earnings Act 1971 s 3(1)(d). For these purposes, except where the context otherwise requires, the 'debtor', in relation to an attachment of earnings order, means the person by whom payment is required by the maintenance order to be made: ss 2(e), 25(1). As to the debtor's obligation to notify changes of employment and earnings see s 15(a), (b); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1454.

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629. Effect of an attachment of earnings order.

For the purposes of the enforcement of maintenance orders¹ an attachment of earnings order is an order directed to a person who appears to the court to have the debtor in his employment² and operates as an instruction to that person:

- 786 (1) to make periodical deductions from the debtor's earnings³; and
- 787 (2) at such times as the order may require, or as the court may allow, to pay the amounts deducted to the collecting officer of the court⁴, as specified in the order⁵,

and it must contain prescribed particulars⁶ enabling the debtor to be identified by the employer⁷. Where an attachment of earnings order has been made, the employer must, if he has been served with the order, comply with it; but he is under no liability for non-compliance before seven days have elapsed since the service⁸.

Any sums paid to the collecting officer under an attachment of earnings order made to secure maintenance payments⁹ are, when paid to the person entitled to receive those payments, to be deemed to be payments made by the debtor (with such deductions, if any, in respect of income tax as the debtor is entitled or required to make) so as to discharge:

- 788 (a) first, any sums for the time being due and unpaid under the related maintenance order, a sum due at an earlier date being discharged before a sum due at a later date¹⁰; and
- 789 (b) secondly, any costs incurred in proceedings relating to the related maintenance order which were payable by the debtor when the attachment of earnings order was made or last varied¹¹.

1 As to the meaning of 'maintenance order' see PARA 628 note 1.

2 As to the meaning of 'debtor' see PARA 628 note 8. For these purposes the relationship of employer and employee is to be treated as subsisting between two persons if one of them, as a principal and not as a servant or agent, pays to the other any sum defined as 'earnings' by the Attachment of Earnings Act 1971 s 24 (see PARA 630): s 6(2).

3 Attachment of Earnings Act 1971 s 6(1)(a) (s 6(1)(a) prospectively substituted, s 6(1B) prospectively added, by the Tribunals, Court and Enforcement Act 2007 Sch 15 para 2). As to the meaning of 'earnings' see PARA 630. Until a day to be appointed the deductions referred to in the text are those which the employer is directed to make in accordance with the Attachment of Earnings Act 1971 Sch 3 Pt I (paras 1-6) (as to which see **CIVIL PROCEDURE** vol 12 (2009) PARA 1443); as from that day the deductions are those which are specified in the attachment of earnings order itself (Attachment of Earnings Act 1971 s 6(1)(a) (as so prospectively substituted)) and it is further provided that if a court (whether a county court or another court) makes any other attachment of earnings order, the order must specify that periodical deductions are to be made in accordance with Sch 3 Pt I (s 6(1)(b) (as so prospectively added)). At the date at which this volume states the law no such day had been appointed.

4 For the purposes of an attachment of earnings order the 'collecting officer of the court' is, subject to later variation of the order under the Attachment of Earnings Act 1971 s 9 (see PARA 634):

120 (1) in the case of an order made by the High Court, either the proper officer of the High Court or the appropriate officer of such county court as the order may specify (s 6(7)(a) (s 6(7)(a), (b) amended, s 6(8) added, by the Administration of Justice Act 1977 s 19(5));

121 (2) in the case of an order made by a county court, the appropriate officer of that court (Attachment of Earnings Act 1971 s 6(7)(b) (as so amended)); and

122 (3) in the case of an order made by a magistrates' court (see PARA 656), the designated officer for that court or for another magistrates' court specified in the order (Attachment of Earnings Act 1971 s 6(7)(c) (amended by the Courts Act 2003 Sch 8 para 142)).

'Appropriate officer' means an officer designated by the Lord Chancellor: Attachment of Earnings Act 1971 s 6(8) (as so added).

5 Attachment of Earnings Act 1971 s 6(1)(b).

6 See CPR Sch 2 CCR Ord 27 r 10(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1441.

7 Attachment of Earnings Act 1971 s 6(3).

8 Attachment of Earnings Act 1971 s 7(1). As to compliance with the order, and the employer's right to deduct his clerical and administrative costs, see s 7(2)-(5); the Attachment of Earnings (Employer's Deduction) Order 1991, SI 1991/356; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1443. Failure to comply with an attachment of earnings order is an offence: see the Attachment of Earnings Act 1971 s 23(2)(a); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1466.

9 As to the meaning of 'maintenance payments' see PARA 627 note 2.

10 Attachment of Earnings Act 1971 s 13(2)(a). As to the application of sums generally see s 13(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1452.

11 Attachment of Earnings Act 1971 s 13(2)(b).

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630. Meaning of 'earnings'.

For the purposes of the enforcement of maintenance orders¹ 'earnings' means any sums payable to a person:

- 790 (1) by way of wages² or salary, including any fees, bonus, commission, overtime pay or other emoluments³ payable in addition to wages or salary or payable under a contract of service⁴;
- 791 (2) by way of pension⁵, including an annuity in respect of past services, whether or not rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments, of any office or employment⁶; or
- 792 (3) by way of statutory sick pay⁷.

The following are not to be treated as earnings for these purposes:

- 793 (a) sums payable by any public department of the government of Northern Ireland or of a territory outside the United Kingdom⁸;
- 794 (b) pay or allowances payable to the debtor⁹ as a member of Her Majesty's forces¹⁰, other than pay or allowances payable by his employer to him as a special member of a reserve force¹¹;
- 795 (c) a tax credit¹²;
- 796 (d) pension, allowances or benefit payable under any enactment relating to social security¹³;
- 797 (e) pension or allowances payable in respect of disablement or disability¹⁴; and
- 798 (f) guaranteed minimum pension¹⁵.

1 As to the meaning of 'maintenance order' see PARA 628 note 1. As to the court's power to determine whether particular payments are earnings see the Attachment of Earnings Act 1971 ss 16, 21; **CIVIL PROCEDURE** vol 12 (2009) PARA 1456; and **MAGISTRATES** vol 29(2) (Reissue) PARA 844. As to the court's power to obtain a statement of earnings etc see s 14; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1437, 1453.

2 For these purposes 'wages' includes wages payable to a person as a seaman, other than wages payable to him as a seaman of a fishing boat: Attachment of Earnings Act 1971 s 24(2)(e) (s 24(2)(e), (3) amended by the Merchant Shipping Act 1995 s 39(1), Sch 13 para 46). 'Seaman' includes every person, except masters and pilots, employed or engaged in any capacity on board any ship; and 'fishing boat' means a vessel of whatever size, and in whatever way propelled, which is for the time being employed in sea fishing or in the sea-fishing service: Attachment of Earnings Act 1971 s 24(3) (as so amended). 'Wages' also includes emoluments: s 24(3) (as so amended). Sums paid by the employer into a holiday fund for the employee are not wages and thus not earnings (*LCC v Henry Boot & Sons Ltd* [1959] 3 All ER 636, [1959] 1 WLR 1069, HL) but they would seem to fall within the definition of 'other emoluments'. Potential, as opposed to anticipated, earnings are not directly attachable, but may be taken into account as resources in determining the judgment debtor's means: *Pepper v Pepper* [1960] 1 All ER 529, [1960] 1 WLR 131.

3 See note 2.

4 Attachment of Earnings Act 1971 s 24(1)(a). As to the obligation of the debtor and his employers to notify changes of employment and earnings see s 15; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1454.

5 Payments made by trustees to a third party for the benefit of the debtor are not attachable: *Edmonds v Edmonds* [1965] 1 All ER 379n, [1965] 1 WLR 58.

- 6 Attachment of Earnings Act 1971 s 24(1)(b).
- 7 Attachment of Earnings Act 1971 s 24(1)(c) (added by the Social Security Act 1985 Sch 4 para 1). As to statutory sick pay see **EMPLOYMENT** vol 39 (2009) PARA 498 et seq.
- 8 Attachment of Earnings Act 1971 s 24(2)(a).
- 9 As to the meaning of 'debtor' see PARA 628 note 8.
- 10 As to enforcement against members of Her Majesty's forces see PARAS 693-695.
- 11 Attachment of Earnings Act 1971 s 24(2)(b) (amended by SI 2998/3086). The reference in the text to membership of a 'reserve force' is a reference to membership within the meaning of the Reserve Forces Act 1996: see **ARMED FORCES** vol 2(2) (Reissue) PARA 223 et seq.
- 12 Attachment of Earnings Act 1971 s 24(2)(ba) (added by the Tax Credits Act 2002 Sch 3 para 1). The reference in the text to a tax credit is a reference to a tax credit within the meaning of the Tax Credits Act 2002: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 934 et seq.
- 13 Attachment of Earnings Act 1971 s 24(2)(c) (amended by the Social Security Act 1986 Sch 10 para 102).
- 14 Attachment of Earnings Act 1971 s 24(2)(d). A fireman's ill-health pension may be attached if the amount payable is calculated by reference to length of service alone and not by reference to degree of disablement: *Miles v Miles* [1979] 1 All ER 865, [1979] 1 WLR 371, CA.
- 15 Attachment of Earnings Act 1971 s 24(2)(e). The reference in the text to 'guaranteed minimum pension' is a reference to guaranteed minimum pension within the meaning of the Pension Schemes Act 1993 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 878).

UPDATE

630 Meaning of 'earnings'

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

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631. Interrelation with alternative remedies open to creditors.

Money paid into court under an attachment of earnings order before a debtor's bankruptcy vests in the creditor and not in the debtor's trustee in bankruptcy; but money deducted by the employer but not yet paid into court vests in the bankrupt's estate¹.

Where an attachment of earnings order² has been made to secure maintenance payments³, no order or warrant of commitment may be issued in consequence of any proceedings for the enforcement of the related maintenance order⁴ begun before the making of the attachment of earnings order⁵.

An attachment of earnings order made to secure maintenance payments ceases to have effect on the making of an order of commitment or the issue of a warrant of commitment for the enforcement of the related maintenance order or on the exercise for that purpose of the power conferred on a magistrates' court⁶ to postpone the issue of such a warrant⁷.

1 *Re Green (a bankrupt), ex p Official Receiver v Cutting* [1979] 1 All ER 832, [1979] 1 WLR 1211.

2 As to the effect and operation of an attachment of earnings order see PARA 629.

3 As to the meaning of 'maintenance payments' see PARA 627 note 2.

4 As to the meaning of 'maintenance order' see PARA 628 note 1.

5 Attachment of Earnings Act 1971 s 8(1). As to termination of an employer's liability to make deductions see s 12; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1451. Where proceedings are brought in the High Court or a county court for the enforcement of a maintenance order by committal under the Debtors Act 1869 s 5 (see PARA 642 et seq) the court may make an attachment of earnings order instead of dealing with the case under s 5: Attachment of Earnings Act 1971 s 3(4)(a).

6 ie by the Magistrates' Courts Act 1980 s 77(2): see **MAGISTRATES** vol 29(1) (Reissue) PARA 860.

7 Attachment of Earnings Act 1971 s 8(3) (amended by the Magistrates' Courts Act 1980 Sch 7 para 98). Notice of cesser of the order must be given by the proper officer of the court to the employer: see the Attachment of Earnings Act 1971 s 12(1); and PARA 635.

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632. Rate of deduction.

An attachment of earnings order¹ must specify:

- 799 (1) the normal deduction rate, that is to say the rate, expressed as a sum of money per week, month or other period, at which the court thinks it reasonable for the debtor's² earnings³ to be applied to meeting his liability⁴; and
- 800 (2) the protected earnings rate, that is to say the rate, so expressed, below which, having regard to the debtor's resources and needs⁵, the court thinks it reasonable that the earnings actually paid to him should not be reduced⁶.

In the case of an order made to secure payments under a maintenance order⁷, not being an order for the payment of a lump sum, the normal deduction rate:

- 801 (a) is to be determined after taking account of any right or liability of the debtor to deduct income tax when making the payments⁸; and
- 802 (b) is not to exceed the rate which appears to the court necessary for the purpose of securing payment of the sums falling due from time to time under the maintenance order and securing payment within a reasonable period of any sums already due and unpaid under the maintenance order⁹.

1 As to the effect and operation of an attachment of earnings order see PARA 629. As from a day to be appointed these provisions are expressed to apply to a 'Schedule 3 deductions order', that is, an attachment of earnings order under which periodical payments are to be made in accordance with the Attachment of Earnings Act 1971 Sch 3 Pt I (paras 1-6) (as to which see **CIVIL PROCEDURE** vol 12 (2009) PARA 1443), rather than to the attachment of earnings order itself: see the Attachment of Earnings Act 1971 ss 6(5), 25(1) (prospectively amended by the Tribunals, Court and Enforcement Act 2007 Sch 15 paras 2, 6). At the date at which this volume states the law no such day had been appointed.

2 As to the meaning of 'debtor' see PARA 628 note 8.

3 As to 'earnings' see PARA 630. For this purpose, potential earnings are not relevant: *Pepper v Pepper* [1960] 1 All ER 529, [1960] 1 WLR 131, DC.

4 Attachment of Earnings Act 1971 s 6(5)(a).

5 For this purpose the debtor's 'needs' include the needs of any person for whom he must, or reasonably may, provide: Attachment of Earnings Act 1971 s 25(3).

6 Attachment of Earnings Act 1971 s 6(5)(b). The court is not prohibited from fixing, as the protected earnings rate, a figure below that prescribed for social security purposes as a person's normal requirement: see *Billington v Billington* [1974] Fam 24, [1974] 1 All ER 546, DC.

7 As to the meaning of 'maintenance order' see PARA 628 note 1.

8 Attachment of Earnings Act 1971 s 6(6)(a).

9 Attachment of Earnings Act 1971 s 6(6)(b).

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633. Reduction of rate in certain cases.

The collecting officer of the court¹ must take steps to have the normal deduction rate² specified by an attachment of earnings order³ reduced where it appears to him that:

- 803 (1) the aggregate of the payments made for the purpose of the related maintenance order⁴ by the debtor⁵, whether under the attachment of earnings order or otherwise, exceeds the aggregate of the payments required up to that time by the maintenance order⁶;
- 804 (2) the normal deduction rate specified by the attachment of earnings order (or, where two or more such orders are in force in relation to the maintenance order, the aggregate of the normal deduction rates specified by those orders) exceeds the rate of payments required by the maintenance order⁷; and
- 805 (3) no proceedings for the variation or discharge⁸ of the attachment of earnings order are pending⁹.

In the case of an order made by the High Court or a county court, the collecting officer must give the prescribed notice¹⁰ to the person to whom he is required to pay sums received under the order, and to the debtor; and the court must make the appropriate variation order¹¹, unless it thinks fit at the request of the debtor to discharge the attachment of earnings order or to vary it in some other way¹². In the case of an order made by a magistrates' court, the collecting officer must apply to the court for the appropriate variation order; and the court must grant the application unless the debtor appears at the hearing and requests the court to discharge the attachment of earnings order, or to vary it in some other way, and the court thinks fit to comply with the request¹³.

1 As to the meaning of 'collecting officer of the court' see PARA 629 note 4.

2 As to the normal deduction rate see PARA 632.

3 As to the effect and operation of an attachment of earnings order see PARA 629.

4 As to the meaning of 'maintenance order' see PARA 628 note 1.

5 As to the meaning of 'debtor' see PARA 628 note 8.

6 Attachment of Earnings Act 1971 s 10(1)(a).

7 Attachment of Earnings Act 1971 s 10(1)(b).

8 As to the variation and discharge of attachment of earnings orders generally see PARA 634.

9 Attachment of Earnings Act 1971 s 10(1)(c).

10 At the date at which this volume states the law no notice had been prescribed for these purposes.

11 For these purposes the 'appropriate variation order' means an order varying the attachment of earnings order in question by reducing the normal deduction rate so as to secure that that rate (or, where two or more orders are in force, the aggregate of those rates) is the same as the rate of payments required by the maintenance order, or is such lower rate as the court thinks fit having regard to the amount of excess payments made: Attachment of Earnings Act 1971 s 10(4).

12 Attachment of Earnings Act 1971 s 10(2).

13 Attachment of Earnings Act 1971 s 10(3). For additional duties, and restrictions on the actions, of the designated officer see s 18; and **MAGISTRATES** vol 29(2) (Reissue) PARA 843.

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634. Variation, lapse or discharge of orders.

For the purposes of the enforcement of maintenance orders¹ the court may make an order discharging or varying an attachment of earnings order². Where an order is so varied the employer³ must, if he has been served with notice of the variation, comply with the order as varied; but he is under no liability for non-compliance before seven days have elapsed since the service⁴. Rules of court may make provision as to the circumstances in which an attachment of earnings order may be varied or discharged by the court of its own motion⁵.

Where an attachment of earnings order has been made and the person to whom it is directed ceases to have the debtor in his employment⁶, the order lapses (except as respects deduction from earnings paid after the cesser and payment to the collecting officer⁷ of amounts deducted at any time) and is of no effect unless and until the court again directs it to a person (whether the same as before or another) who appears to the court to have the debtor in his employment⁸.

1 As to the meaning of 'maintenance order' see PARA 628 note 1.

2 Attachment of Earnings Act 1971 s 9(1). As to the effect and operation of an attachment of earnings order see PARA 629.

3 As to the meaning of 'employer' see PARA 627 note 7.

4 Attachment of Earnings Act 1971 s 9(2). Failure to comply with the order is an offence: see s 23(2)(a); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1466.

5 See the Attachment of Earnings Act 1971 s 9(3); CPR Sch 2 CCR Ord 27 r 13; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1446.

6 As to when the relationship of employer and employee is to be treated as subsisting see the Attachment of Earnings Act 1971 s 6(2); and PARA 629.

7 As to the collecting officer see PARA 629 note 4.

8 Attachment of Earnings Act 1971 s 9(4). The lapse of an order under s 9(4) does not prevent its being treated as remaining in force for other purposes (s 9(5)), and provision is made for identifying a debtor's current employer where an order lapses under s 9(4) (see ss 15A-15D; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1455). Where a person is served with an attachment of earnings order directed to him and he has not the debtor in his employment, or the debtor subsequently ceases to be in his employment, he must, in either case, within ten days from the date of service or, as the case may be, the cesser, give notice of that fact to the court: s 7(2).

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635. Cessation of order.

An attachment of earnings order¹ made to secure maintenance payments² ceases to have effect on the making of an order of commitment or the issue of a warrant of commitment for the enforcement of the related maintenance order³ or on the exercise for that purpose of the power conferred on a magistrates' court⁴ to postpone the issue of such a warrant⁵.

Such an order also ceases to have effect:

- 806 (1) on the grant of an application for registration⁶ of the related maintenance order⁷;
- 807 (2) where the related maintenance order is registered⁸, on the giving of notice with a view to cancellation of registration⁹;
- 808 (3) on the discharge of the related maintenance order while it is not so registered¹⁰;
- 809 (4) on the related maintenance order ceasing to be registered¹¹ in a court in England or Wales, or becoming registered¹² in a court in Scotland or Northern Ireland¹³.

Provision is made as to the termination of an employer's liability to make deductions following the cessation of an attachment of earnings order¹⁴.

1 As to the effect and operation of an attachment of earnings order see PARA 629.

2 As to the meaning of 'maintenance payments' see PARA 627 note 2.

3 As to the meaning of 'maintenance order' see PARA 628 note 1.

4 Ie by the Magistrates' Courts Act 1980 s 77(2): see **MAGISTRATES** vol 29(1) (Reissue) PARA 860.

5 Attachment of Earnings Act 1971 s 8(3) (amended by the Magistrates' Courts Act 1980 Sch 7 para 98).

6 Ie under the Maintenance Orders Act 1958 s 2: see PARA 666 et seq.

7 Attachment of Earnings Act 1971 s 11(1)(a). This provision has effect, in the case of an application for registration under the Maintenance Orders Act 1958 s 2(1), notwithstanding that the grant of the application may subsequently become void under s 2(2) (see PARA 667): Attachment of Earnings Act 1971 s 11(2).

8 Ie under the Maintenance Orders Act 1958 Pt I (ss 1-5): see PARA 664 et seq.

9 Attachment of Earnings Act 1971 s 11(1)(b).

10 Attachment of Earnings Act 1971 s 11(1)(c). Where the related maintenance order is discharged as mentioned in s 11(1)(c) and it appears to the court discharging the order that arrears under it will remain to be recovered after the discharge, that court may, if it thinks fit, direct that the attachment of earnings order will continue to have effect: s 11(3).

11 Ie under the Maintenance Orders Act 1950 Pt II (ss 16-25): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 293-300.

12 See note 11.

- 13 Attachment of Earnings Act 1971 s 11(1)(d).
- 14 See the Attachment of Earnings Act 1971 s 12; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1451.

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B. CHARGING ORDERS

636. Making of orders.

Where, under a judgment or order of the High Court or a county court¹, a person (the 'debtor') is required to pay a sum of money to another person (the 'creditor') then, for the purpose of enforcing that judgment or order, the appropriate court² may make an order (a 'charging order') imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due³ under the judgment or order⁴. In family proceedings a charging order may be used to secure payment of maintenance orders, which include lump sum orders for these purposes, orders for costs, and, arguably, financial undertakings⁵.

A charging order may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters⁶.

A charge imposed by a charging order has the like effect and is enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand⁷.

1 For these purposes references to a judgment or order of the High Court or a county court are to be taken to include references to a judgment, order, decree or award, however called, of any court or arbitrator, including any foreign court or arbitrator, which is or has become enforceable, whether wholly or to a limited extent, as if it were a judgment or order of the High Court or a county court: Charging Orders Act 1979 s 6(2).

To be enforceable by charging order the judgment or order must require payment to the creditor, not to the court or a third party, of sums in respect of which the debtor is in default: *Ward v Shakeshaft* (1860) 1 Drew & Sm 269; but see *Graham v Graham* [1993] 1 FCR 339, [1992] 2 FLR 406, CA (where an order for payment into court pending determination of an application for ancillary relief was held to be enforceable by judgment summons). It must be at least arguable that such an order may be secured by charging order. See also *L v L (payment of school fees)* [1997] 3 FCR 520, sub nom *L v L (school fees: maintenance: enforcement)* [1997] 2 FLR 252, CA.

2 For these purposes the 'appropriate court' is:

123 (1) in a case where the property to be charged is a fund in court, the court in which that fund is lodged (Charging Orders Act 1979 s 1(2)(a));

124 (2) in a case where the above does not apply and the order to be enforced is a maintenance order of the High Court, the High Court or a county court (s 1(2)(b));

125 (3) in a case where neither of the above applies and the judgment or order to be enforced is a judgment or order of the High Court for a sum exceeding the county court limit, the High Court or a county court (s 1(2)(c) (amended by the Administration of Justice Act 1982 Sch 3 Pt II paras 2, 3(b))); and

126 (4) in any other case, a county court (Charging Orders Act 1979 s 1(2)(d)).

As to the meaning of 'maintenance order' see the Attachment of Earnings Act 1971 s 2(a); and PARA 628 note 1 (definition applied by the Charging Orders Act 1979 s 1(2) (as so amended)). 'County court limit' means the county court limit for the time being specified in an Order in Council under the County Courts Act 1984 s 145 (see **COURTS** vol 10 (Reissue) PARA 710), as the county court limit for the purposes of the Charging Orders Act 1979 s 1: s 1(2) (amended by the Administration of Justice Act 1982 Sch 3 para 6; the County Courts Act 1984 Sch 2 para 71).

Where a person applies to the High Court for a charging order to enforce more than one judgment or order, that court is the appropriate court in relation to the application if it would otherwise be the appropriate court on an application relating to one or more of the judgments or orders concerned: Charging Orders Act 1979 s 1(4).

3 However, the court cannot be faulted if in the exercise of its discretion it declines to make a charging order where the debtor has complied with an order for payment of a judgment debt by instalments and is thus not in arrears: *Mercantile Credit Co Ltd v Ellis* [1987] CLY 2917, CA. The debt to be enforced must be a quantified sum at the date of the application. Thus an order for costs must be duly assessed or otherwise quantified before a charging order may be made to enforce it: *A & M Records Inc v Darakdjian* [1975] 3 All ER 983, [1975] 1 WLR 1610. In an exceptional case (*Robinson v Bailey* [1942] Ch 268, [1942] 1 All ER 498) an order may be made where the sum outstanding, although fixed, is to be paid in the future (*Bagnall v Carlton* (1877) 6 ChD 130).

4 Charging Orders Act 1979 ss 1(1), (3), 6(1). For the relevant rules of court relating to applications for charging orders see CPR Pt 73; PARA 944; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1471-1477. Whether claimed or not, interest accruing on the original order and the costs of enforcing the security are included in the sum charged by the charging order; and recovery of such sums is not subject to any limitation period: *Ezekiel v Orakpo* [1997] 1 WLR 340, CA.

5 See *Graham v Graham* [1993] 1 FCR 339, [1992] 2 FLR 406, CA. Financial undertakings which are an integral and indivisible part of a maintenance order have been held to be enforceable by judgment summons, and there thus seems no good reason why they should not also be secured by charging order: see *Symmons v Symmons* [1993] 2 FCR 247, [1993] 1 FLR 317; *M v M (enforcement: judgment summons)* [1993] Fam Law 469.

6 Charging Orders Act 1979 s 3(1).

7 Charging Orders Act 1979 s 3(4).

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637. Property which may be charged.

A charge may be imposed by a charging order¹ only on:

- 810 (1) any interest held by the debtor² beneficially in any asset of a specified kind³ or under any trust⁴; or
- 811 (2) any interest held by a person as trustee of a trust (the 'trust'), if the interest is in such an asset or is an interest under another trust and:
 - 14
 - 19. (a) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust⁵;
 - 20. (b) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit⁶; or
 - 21. (c) in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit⁷.
- 15

¹ As to the meaning of 'charging order' see PARA 636.

² As to the meaning of 'debtor' see PARA 636.

³ The assets are:

- 127 (1) land (Charging Orders Act 1979 s 2(2)(a));
- 128 (2) government stock (s 2(2)(b)(i));
- 129 (3) stock of any body, other than a building society incorporated within England and Wales (s 2(2)(b)(ii));
- 130 (4) stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales (s 2(2)(b)(iii));
- 131 (5) units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales (s 2(2)(b)(iv)); and
- 132 (6) funds in court (s 2(2)(c)).

References to any of the securities referred to in heads (2)-(5) include references to any such securities standing in the name of the Accountant General: s 6(3). 'Stock' includes shares, debentures and any securities of the body concerned, whether or not constituting a charge on the assets of that body; 'government stock' means any stock issued by Her Majesty's government in the United Kingdom or any funds of, or annuity granted by, that government; and 'unit trust' means any trust established for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever: s 6(1). As to the meaning of 'building society' see the Building Societies Act 1986 ss 5(3), 119(1), 125; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856 (definition applied by the Charging Orders Act 1979 s 6(1) (amended by the Building Societies Act 1986 Sch 18 para 14)).

In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in heads (2) to (6) above, the court making the order may provide for the charge to extend to any interest or

dividend payable in respect of the asset: Charging Orders Act 1979 s 2(3). 'Dividend' includes any distribution in respect of any unit of a unit trust: s 6(1).

The Lord Chancellor may by order made by statutory instrument amend s 2(2) by adding to, or removing from, the kinds of asset for the time being referred to there, any asset of a kind which in his opinion ought to be so added or removed: s 3(7). At the date at which this volume states the law no such order had been made.

4 Charging Orders Act 1979 s 2(1). See *National Westminster Bank v Stockman* [1981] 1 All ER 800, [1981] 1 WLR 67; *Clark v Chief Land Registrar* [1993] Ch 294, [1993] 2 All ER 936 (affd [1994] Ch 370, [1994] 4 All ER 96, CA).

5 Charging Orders 1979 s 2(1)(b)(i).

6 Charging Orders 1979 s 2(1)(b)(ii).

7 Charging Orders 1979 s 2(1)(b)(iii).

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638. Principles to be applied.

In deciding whether to make a charging order¹ the court must consider all the circumstances of the case and, in particular, any evidence before it as to the personal circumstances of the debtor² and whether any other creditor³ of the debtor would be likely to be unduly prejudiced by the making of the order⁴.

Special considerations apply where an application for a charging order is made against a family home which is the subject of proceedings for financial relief⁵.

1 As to the meaning of 'charging order' see PARA 636.

2 As to the meaning of 'debtor' see PARA 636.

3 As to the meaning of 'creditor' see PARA 636.

4 Charging Orders Act 1979 s 1(5). These principles were considered in *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1982] 1 All ER 685 at 690, [1982] 1 WLR 301 at 307, CA per Lord Brandon of Oakbrook; and approved [1983] 2 AC 192 at 207, [1983] 1 All ER 564 at 571, 572, HL per Lord Brightman.

5 *Harman v Glencross* [1986] Fam 81, [1986] 1 All ER 545, CA; *Austin-Fell v Austin-Fell* [1990] Fam 172, [1990] 2 All ER 455.

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Enforcement of a charging order by sale.

639. Enforcement of a charging order by sale.

Where the asset is owned beneficially by the debtor alone, an application to the court for sale must be made in accordance with the relevant rules of court¹. Where the asset is the debtor's beneficial interest under a trust of land or trust of proceeds of sale of land, application must be made under the Trusts of Land and Appointment of Trustees Act 1996². The chargee is entitled to apply for a sale of the entire property, not merely of the debtor's beneficial interest³.

The court which made the charging order may have imposed conditions as to the time when it might become enforceable⁴; however, the debtor may at any time after the making of a charging order apply to vary or discharge it⁵. It is suggested that the same principles apply to an application for an order for sale whether the application is made under the 1996 Act or otherwise⁶.

Any person who has an interest in a property subject to a trust of land (such as a creditor) may apply to the court for an order⁷, and on such an application the court may make such order relating to the exercise by the trustees of any of their functions as it thinks fit, including the making of an order for sale⁸. The matters to which the court is to have regard in determining an application for such an order include:

- 812 (1) the intentions of the person or persons, if any, who created the trust⁹;
- 813 (2) the purposes for which the property subject to the trust is held¹⁰;
- 814 (3) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home¹¹; and
- 815 (4) the interest of any secured creditor of any beneficiary¹²,

and the circumstances and wishes of adult beneficiaries with an interest in possession are also a factor to be taken into account¹³.

The court now has greater flexibility¹⁴ than formerly as to how it exercises its jurisdiction on an application for an order for sale; it is not simply bound to order a sale in the absence of exceptional circumstances¹⁵.

1 See CPR 73.10; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482.

2 Ie under the Trusts of Land and Appointment of Trustees Act 1996 s 14(1); see **TRUSTS** vol 48 (2007 Reissue) PARA 1038; and as to applications see CPR 2.1; and **TRUSTS** vol 48 (2007 Reissue) PARA 643.

3 *Midland Bank plc v Pike* [1988] 2 All ER 434.

4 See the Charging Orders Act 1979 s 3(1); and PARA 636. As to enforcement of charging orders see further **CIVIL PROCEDURE** vol 12 (2009) PARAS 1480-1483; as to discharge and variation see further **CIVIL PROCEDURE** vol 12 (2009) PARAS 1484-1485.

5 Charging Orders Act 1979 s 3(5). See note 4.

6 Formerly the approach of the court to applications made under the corresponding provisions of the Law of Property Act 1925 (ie s 30, which was effectively replaced by the Trusts of Land and Appointment of Trustees Act 1996 s 14) was to treat the chargee as being in a position similar to that of a trustee in bankruptcy, the effect thereof being that the chargee's interest would prevail over that of a spouse or other interested party, save in exceptional circumstances: see *Lloyds Bank plc v Byrne and Byrne* [1993] 2 FCR 41, [1993] 1 FLR 369,

CA; *Zandfarid v Bank of Credit and Commerce International SA (in liquidation)* [1996] 1 WLR 1420, [1997] 1 FCR 78; *Barclays Bank plc v Hendricks* [1996] 1 FCR 710, [1996] 1 FLR 258; *Bank of Baroda v Dhillon* [1998] 1 FCR 489, [1998] 1 FLR 524, CA; *Re Bremner (a bankrupt)* [1999] 1 FLR 912, [1999] Fam Law 293; *Claughton v Charalambous* [1999] 1 FLR 740, [1999] Fam Law 205; but see *Abbey National plc v Moss* [1994] 2 FCR 587, [1994] 1 FLR 307, CA. See also *Mortgage Corpn v Shaire* [2001] Ch 743, [2000] 2 FCR 222, [2000] 1 FLR 973 (decided under the Trusts of Land and Appointment of Trustees Act 1996; it was held that the court's approach is not now intended to be the same in both bankruptcy and other cases).

7 See the Trusts of Land and Appointment of Trustees Act 1996 s 14(1); and note 2.

8 See the Trusts of Land and Appointment of Trustees Act 1996 s 14(2); and **TRUSTS** vol 48 (2007 Reissue) PARA 1038.

9 See the Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(a); and **TRUSTS** vol 48 (2007 Reissue) PARA 1038.

10 See the Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(b); and **TRUSTS** vol 48 (2007 Reissue) PARA 1038.

11 See the Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(c); and **TRUSTS** vol 48 (2007 Reissue) PARA 1038.

12 See the Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(d); and **TRUSTS** vol 48 (2007 Reissue) PARA 1038.

13 See the Trusts of Land and Appointment of Trustees Act 1996 s 15(3); and **TRUSTS** vol 48 (2007 Reissue) PARA 1038.

14 See as a result of the Trusts of Land and Appointment of Trustees Act 1996 s 15 (see the text and notes 7-13).

15 *Mortgage Corpn v Shaire* [2001] Ch 743, [2000] 2 FCR 222, [2000] 1 FLR 973.

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C. THIRD PARTY DEBT ORDERS

640. Court's power to make a third party debt order.

Provision is made for enabling a person who has obtained or is entitled to enforce an order, including a matrimonial or civil partnership order (the 'judgment creditor') to obtain an order for the payment to him of money which a third party owes to the person against whom the order was made (the 'judgment debtor')¹. Such orders are referred to as 'third party debt orders'², and under such an order the third party may be required to pay, on application by the judgment creditor³:

- 816 (1) the amount of any debt due or accruing due to the judgment debtor from the third party⁴; or
- 817 (2) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application⁵.

1 See CPR 70.1, 72.1; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1226, 1236, 1411 et seq.

2 See **CIVIL PROCEDURE** vol 12 (2009) PARA 1411. These orders were formerly known as 'garnishee orders': see **CIVIL PROCEDURE** vol 12 (2009) PARA 1225.

3 As to applications see CPR 72.3-72.6; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1417-1421.

4 See CPR 72.2(1)(a); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1411.

5 See CPR 72.2(1)(b); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1411.

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D. ORDERS FOR THE EXECUTION OF DOCUMENTS

641. Execution by nominated person.

Where the High Court has given or made a judgment¹ or order directing a person to execute any conveyance, contract or other document, or to indorse any negotiable instrument, then, if that person:

- 818 (1) neglects or refuses² to comply with the judgment or order³; or
- 819 (2) cannot after reasonable inquiry be found⁴,

the High Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document be executed, or that the negotiable instrument be indorsed, by such person as the court may nominate⁵ for that purpose⁶. Likewise, in any proceedings in a county court the court may make such an order for the execution of a document by a nominated person⁷.

Although a party may be in contempt of court in failing to comply with such an order, the order will not be enforced by committal if the same result can be achieved by the court's nominating a third party to execute the document⁸.

A conveyance, contract, document or instrument executed or indorsed in pursuance of such an order operates, and is for all purposes available, as if it has been executed or indorsed by the person originally directed to execute it or indorse it⁹.

1 For these purposes, 'judgment' includes a decree: Supreme Court Act 1981 s 151(1). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

2 The applicant must demonstrate that the respondent has refused, and is likely to continue to refuse, to sign the document in question or that the respondent's whereabouts are unknown at the date of the order and it is unlikely that he will be found: *Savage v Norton* [1908] 1 Ch 290.

3 Supreme Court Act 1981 s 39(1)(a).

4 Supreme Court Act 1981 s 39(1)(b).

5 In practice the person so nominated will usually be a district judge. However, for examples where the court has nominated other persons to execute a deed or document see *Re Edwards, Owen v Edwards* [1885] WN 74 (master); *Howarth v Howarth* (1886) 11 PD 68 (divorce registrar); *Re Cathcart* [1893] 1 Ch 466, CA (Official Solicitor); *Hood Barrs v Cathcart* [1895] 2 Ch 411 (Bank of England).

6 Supreme Court Act 1981 s 39(1); and see further **CIVIL PROCEDURE** vol 12 (2009) PARA 1137. As to the procedure on such an application see PARA 1006. Subject to any limitation on the court's jurisdiction to make the underlying order whose implementation is being frustrated, there is no limitation either on the class of document which may be so executed or on the purpose for which such a document may be used: *Astro Exito Navegacion SA v Chase Manhattan Bank SA* [1983] 2 AC 787, sub nom *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (Chase Manhattan Bank NA intervening)*, *The Messiniaki Tolmi* [1983] 2 All ER 725, HL (where a court had jurisdiction over a letter of credit because it was a contract governed by English law and consequently the court also had jurisdiction to order that the notice of readiness required to operate the letter of credit be executed by a master of the Supreme Court). In financial proceedings, the jurisdiction is most commonly invoked to give effect to orders for sale and property adjustment orders: see eg *Howarth v Howarth* (1886) 11

PD 68; affd (1886) 11 PD 95, CA (deed securing periodical payments); *De Ricci v De Ricci* [1891] P 378 (deed of separation pursuant to terms of settlement); *Beale v Bragg* [1902] 1 IR 99 (contract for sale); *Hunter v Hunter and Waddington* [1962] P 1, [1961] 2 All ER 121 (order for settlement); *Mir v Mir* [1992] Fam 79, [1992] 1 All ER 765 (conveyance pursuant to sequestration order).

If a judgment or order for the specific performance of a contract is not complied with, then, without prejudice to its powers under the Supreme Court Act 1981 s 39 and its powers to punish the disobedient party for contempt, the court may direct that the act required to be done may, so far as practicable, be done by the party by whom the judgment or order was obtained or some other person appointed by the court, at the cost of the disobedient party; and, on the act being done, the expenses incurred may be ascertained in such manner as the court may direct and execution may issue against the disobedient party for the amount so ascertained and for costs: see CPR Sch 1 RSC Ord 45 r 8; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249.

7 County Courts Act 1984 s 38(1) (substituted by the Courts and Legal Services Act 1990 s 3), applying the Supreme Court Act 1981 s 39(1); see further **COURTS** vol 10 (Reissue) PARA 711.

8 See *Danchevsky v Danchevsky* [1975] Fam 17, [1974] 3 All ER 934, CA (dispute over the sale of the former matrimonial home).

9 Supreme Court Act 1981 s 39(2).

UPDATE

641 Execution by nominated person

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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E. JUDGMENT SUMMONSES

642. Orders for examination of means.

A 'judgment summons' is an application to the High Court or a county court issued on the application of the person entitled to enforce a judgment or order under the Debtors Act 1869¹ requiring a person, or, where two or more persons are liable under the judgment or order, requiring any one or more of them, to attend court².

If it is proved to the satisfaction of the court³ that the debtor either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same, he may be committed to prison for a period of up to six weeks or until the prior payment of the sum owing⁴. In family proceedings the jurisdiction so given to commit to prison a person who makes default in payment of a debt, or an instalment of a debt, due from him in pursuance of an order or judgment is exercisable only by the High Court in respect of a High Court maintenance order⁵ and by a county court in respect of a High Court or a county court maintenance order⁶. Such orders are not limited to periodical payments orders but include:

- 820 (1) lump sum orders⁷;
- 821 (2) orders⁸ requiring the payment of a lump sum into court pending determination of an application for financial relief⁹;
- 822 (3) an order for payment of school fees where the obligation is to pay direct to the school a sum equivalent to the fees but not specified in monetary terms¹⁰; and
- 823 (4) a financial undertaking which is an indivisible and integral part of a maintenance order¹¹.

1 le under the Debtors Act 1869 s 5: see the text and notes 1-4.

2 See the County Courts Act 1984 s 147; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1516.

3 As to the standard of proof see PARA 643.

4 See the Debtors Act 1869 s 5; and **CONTRACT** vol 9(1) (Reissue) PARA 486.

5 The 'maintenance orders' within the scope of this title to which these provisions apply include:

133 (1) orders for alimony, maintenance or other payments made, or having effect as if made, under the Matrimonial Causes Act 1965 Pt II (ss 15-32) (repealed) (Administration of Justice Act 1970 Sch 8 para 1);

134 (2) orders for payments to or in respect of a child, being an order made, or having effect as if made, under the Matrimonial Causes Act 1965 Pt III (ss 33-38) (repealed) (Administration of Justice Act 1970 Sch 8 para 2);

135 (3) orders for periodical or other payments made, or having effect as if made, under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) (see PARA 450 et seq) (Administration of Justice Act 1970 Sch 8 para 2A (added by the Matrimonial Causes Act 1973 Sch 2 para 10));

136 (4) orders for maintenance or other payments to or in respect of a spouse or child, being an order made under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) (see

PARA 553 et seq) (Administration of Justice Act 1970 Sch 8 para 3 (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 Sch 2 para 26));

- 137 (5) orders to which the Maintenance Orders Act 1950 s 16 applies by virtue of s 16(2)(b) or (c) (ie certain orders made by courts in Scotland or Northern Ireland: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 293) and which have been registered in a court in England and Wales under Pt II (ss 16-25) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 293-300) (Administration of Justice Act 1970 Sch 8 para 8);
- 138 (6) maintenance orders within the meaning of the Maintenance Orders (Facilities for Enforcement) Act 1920 registered in, or confirmed by, a court in England and Wales under that Act (Commonwealth orders enforceable in the United Kingdom: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 301-309) (Administration of Justice Act 1970 Sch 8 para 9);
- 139 (7) orders for periodical or other payments under the Matrimonial Proceedings and Property Act 1970 Pt I (ss 1-29) (repealed) (Administration of Justice Act 1970 Sch 8 para 10 (added by the Matrimonial Proceedings and Property Act 1970 Sch 2 para 5));
- 140 (8) maintenance orders within the meaning of the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) duly registered in a magistrates' court (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 310-322) (Administration of Justice Act 1970 Sch 8 para 11 (added by the Maintenance Orders (Reciprocal Enforcement) Act 1972 Schedule para 6));
- 141 (9) maintenance orders within the meaning of the Civil Jurisdiction and Judgments Act 1982 Pt I (ss 1-15) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65) which are duly registered in a magistrates' court (Administration of Justice Act 1970 Sch 8 para 13 (added by the Civil Jurisdiction and Judgments Act 1982 Sch 12 Pt I));
- 142 (10) maintenance judgments within the meaning of EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 28) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I' Regulation: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65), which are registered in a magistrates' court under that Regulation (Administration of Justice Act 1970 Sch 8 para 13A (added by SI 2001/3929; amended by SI 2007/1655));
- 143 (11) orders for periodical or other payments made under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (see PARA 530 et seq) (Administration of Justice Act 1970 Sch 8 para 14 (added by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 8));
- 144 (12) orders for periodical or other payments made under the Civil Partnership Act 2004 Sch 5, Sch 6 or Sch 7 (financial relief in the High Court, county court and magistrates' courts) (see PARA 450 et seq) (Administration of Justice Act 1970 Sch 8 para 15 (added by the Civil Partnership Act 2004 Sch 27 para 34)).

'Maintenance order' includes an order which has been discharged: Administration of Justice Act 1970 s 28. 'High Court maintenance order' means a maintenance order enforceable by the High Court: s 28.

6 Administration of Justice Act 1970 s 11(a), (b)(i). 'County court maintenance order' means a maintenance order enforceable by a county court: s 28.

7 *Graham v Graham* [1993] 1 FCR 339, [1992] 2 FLR 406, CA; and see *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA; the Family Proceedings Rules 1991, SI 1991/1247, r 7.4(9)(a).

8 ie orders under the Matrimonial Causes Act 1973 s 37 or the Civil Partnership Act 2004 Sch 5 paras 74, 75, Sch 7 paras 15, 16: see PARA 586.

9 *Graham v Graham* [1993] 1 FCR 339, [1992] 2 FLR 406, CA.

10 *L v L (payment of school fees)* [1997] 3 FCR 520, sub nom *L v L (school fees: maintenance: enforcement)* [1997] 2 FLR 252, CA.

11 *Symmons v Symmons* [1993] 2 FCR 247, [1993] 1 FLR 317; *M v M (enforcement: judgment summons)* [1993] Fam Law 469.

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643. The law relating to judgment summonses.

The terms of the order or undertaking to be enforced must be clear, in that they must require payment within a stated period of time of a specified sum, or at least one which is capable of precise quantification¹, to a named person² or into court³. Arrears may be enforced by judgment summons despite the discharge of the original order⁴. Arrears which accrue during the currency of a suspended committal order may not be added to the original debt when the suspended order is activated: thus, on the committal taking effect, the debtor need pay only the sum, including any costs, for which the suspended committal order was made in order to secure his release (the corollary being that arrears which accrue during the currency of a suspended order may attract a new judgment summons)⁵.

The court must inquire into the debtor's means and ability to pay⁶, and the creditor must prove beyond reasonable doubt that the debtor has, or has had, since the due date the means of paying the debt⁷. Gifts may be 'means'⁸, but assumed future payments to the debtor by way of an allowance, such as voluntary maintenance, are not⁹.

Committal on a judgment summons is discretionary and is thus not the necessary consequence of failure to pay maintenance arrears¹⁰. It can be ordered only where a contumacious debtor has, or has had, the means to pay and his conduct is in the nature of a contempt¹¹. The debtor's conduct other than in relation to his obligation to pay is irrelevant¹². It is wrong to commit a debtor so as to punish him for misleading another court¹³. While committal is a penalty for contempt on the part of a judgment debtor¹⁴, the practical aim of this method of enforcement is to compel the debtor to satisfy his debt in a manner adjudged to be within his capability¹⁵.

The court has the power to commit in respect of arrears which accrued during a period when enforcement of the order is stayed pending appeal, although the existence of the stay may be a relevant circumstance¹⁶. Orders for maintenance pending suit and periodical payments are distinct for enforcement purposes, and arrears under a periodical payments order may, therefore, not activate a suspended committal order made in respect of arrears of a previous order for maintenance pending suit¹⁷.

Committal to prison on a judgment summons does not operate to extinguish the judgment debtor's liability¹⁸. The judgment creditor is thus at liberty to use other methods of enforcement to recover arrears which remain due following the debtor's committal.

A debtor may not be committed to prison more than once in respect of the same arrears¹⁹. He may, however, be committed for default in respect of each instalment under an order, including a 'new order'²⁰. A committal order may be made against a bankrupt if he had the means to pay prior to the vesting of his assets in the trustee in bankruptcy²¹.

Once an attachment of earnings order has been made to secure maintenance payments, no order or warrant of commitment may be issued in consequence of any enforcement proceedings begun before the attachment of earnings order was made²². An attachment of earnings order made to secure maintenance payments ceases to have effect on the making of an order for commitment or the issue of a warrant of commitment for the enforcement of the maintenance order²³.

1 *Jefferson v Jefferson* [1956] P 136, [1956] 1 All ER 31, CA; *Butler v Butler* [1961] P 33, [1961] 1 All ER 810, CA; *L v L (payment of school fees)* [1997] 3 FCR 520, sub nom *L v L (school fees: maintenance: enforcement)*

[1997] 2 FLR 252, CA (school fees order not expressed in monetary terms but clearly capable of ascertainment enforceable by judgment summons).

2 A maintenance order is generally payable by the payer to the payee, and the payer is thus required to comply with the order in this manner.

3 *Graham v Graham* [1993] 1 FCR 339, [1992] 2 FLR 406, CA.

4 See the Administration of Justice Act 1970 s 28; and PARA 642 note 5. As to the principles governing applications to enforce arrears generally see PARAS 679, 949.

5 *Riding v Riding* [1958] P 88, [1958] 1 All ER 65, CA; and see the Family Proceedings Rules 1991, SI 1991/1247, r 7.4(12); and PARA 945.

6 *R v Birmingham County Court Judge* [1902] 2 KB 283.

7 *Woodley v Woodley* [1993] 1 FCR 701, [1992] 2 FLR 417, CA; *Barefoot v Clarke* [1949] 2 KB 97, [1949] 1 All ER 1039, CA.

8 *Re Park, ex p Koster* (1885) 14 QBD 597, CA.

9 *Barefoot v Clarke* [1949] 2 KB 97, [1949] 1 All ER 1039, CA.

10 *Re A Judgment Debtor (No 23 of 1934)* [1935] WN 128; *Jinks v Jinks* [1936] 3 All ER 1051, CA.

11 *Re Edgcome, ex p Edgcome* [1902] 2 KB 403, CA; *Buckley v Crawford* [1893] 1 QB 105.

12 *Abecasis v Brandon* [1947] LJR 325, CA.

13 *Woodley v Woodley* [1993] 1 FCR 701, [1992] 2 FLR 417, CA.

14 *Re Edgcome, ex p Edgcome* [1902] 2 KB 403, CA.

15 *Jinks v Jinks* [1936] 3 All ER 1051, CA; *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA.

16 *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA.

17 *O'Mahoney v O'Mahoney* [1959] P 1, [1959] 1 All ER 163.

18 See the Debtors Act 1869 s 5; *Re Edgcombe, ex p Edgcombe* [1902] 2 KB 403 at 410, CA; and **CONTRACT** vol 9(1) (Reissue) PARAS 485, 486.

19 *Evans v Wills* (1876) 1 CPD 229.

20 *Evans v Wills* (1876) 1 CPD 229.

21 *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA.

22 See the Attachment of Earnings Act 1971 s 8(1); and PARA 631.

23 See the Attachment of Earnings Act 1971 s 8(3); and PARA 631.

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F. MEANS OF PAYMENT ORDERS

644. Enforcement of periodical maintenance payments.

Where the High Court or a county court makes or has made a maintenance order¹ which requires money to be paid periodically by one person (the 'debtor') to another (the 'creditor')² it may also specify the method of payment³; these powers do not, however, prejudice any individual or judicial powers⁴ in relation to the making of attachment of earnings orders⁵. In deciding whether to exercise any of its powers under these provisions⁶ the court in question must, if practicable, give every interested party⁷ an opportunity to make representations and must have regard to any representations so made⁸.

1 For these purposes 'maintenance order' means any order specified in the Administration of Justice Act 1970 Sch 8 (see PARA 642 note 5) and includes any such order which has been discharged if any arrears are recoverable under it: Maintenance Enforcement Act 1991 s 1(10).

2 Such an order is known for these purposes as a 'periodical maintenance order', and it is within the ambit of these provisions (ie is a 'qualifying periodical maintenance order') if, at the time it is made, the debtor is ordinarily resident in England and Wales: Maintenance Enforcement Act 1991 s 1(2). The reference to an order requiring money to be paid periodically by one person to another includes a reference to an order requiring a lump sum to be paid by instalments by one person to another: s 1(10). For the purposes of s 1(3), (7) (see PARAS 645-646), the reference to a qualifying periodical maintenance order is a reference to any such order, whether made before or after 1 April 1992 (ie the date on which these provisions were brought into force by the Maintenance Enforcement Act 1991 (Commencement No 2) Order 1992, SI 1992/455, art 2): Maintenance Enforcement Act 1991 ss 1(10), 12(2).

3 See the Maintenance Enforcement Act 1991 s 1(1), (3), (4); and PARAS 645-646.

4 Ie any power under the Attachment of Earnings Act 1971 (see PARA 627 et seq) which would otherwise be exercisable by the High Court or a county court or any right of any person to make any application under that Act.

5 Maintenance Enforcement Act 1991 s 1(9)(a), (b).

6 Ie under the Maintenance Enforcement Act 1991 s 1: see PARAS 645-646.

7 For these purposes 'interested party' means any of the following: (1) the debtor; (2) the creditor; and (3) in a case where the person who applied for the qualifying periodical maintenance order in question is a person other than the creditor, that other person: Maintenance Enforcement Act 1991 s 1(10).

8 Maintenance Enforcement Act 1991 s 1(8).

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645. Court's powers on making order.

Where the High Court or a county court makes a qualifying periodical maintenance order¹, it may:

- 824 (1) at the same time, whether of its own motion or on an application made by an interested party²; or
- 825 (2) at any later time, on an application by an interested party, or of its own motion in the course of any proceedings concerning the order³,

either make a means of payment order⁴ or an attachment of earnings order⁵ to secure payments under the qualifying periodical maintenance orders in question⁶.

1 As to the meanings of 'maintenance order', 'periodical maintenance order' and 'qualifying periodical maintenance order', and the powers of the High Court and the county court to make means of payment orders generally, see PARA 644.

2 Maintenance Enforcement Act 1991 s 1(1). As to the meaning of 'interested party' see PARA 644 note 7. As to the court's consultation duty in exercising these powers see PARA 644.

3 Maintenance Enforcement Act 1991 s 1(3).

4 As to the meaning of 'means of payment order' see PARA 646.

5 ie under the Attachment of Earnings Act 1971: see PARA 627 et seq.

6 Maintenance Enforcement Act 1991 s 1(4).

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646. Means of payments orders.

A 'means of payment order' is an order requiring payments to be made by the debtor¹ to the creditor² under a qualifying periodical maintenance order³ by either of the following methods of payment⁴:

- 826 (1) payment by standing order⁵; or
- 827 (2) payment by any other method of payment which requires the debtor to give his authority for payments of a specific amount to be made from an account of the creditor's on specific dates during the period for which the authority is in force and without the need for any further authority from the debtor⁶.

In any case where:

- 828 (a) the court proposes to exercise its power to make a means of payment order⁷; and
- 829 (b) having given the debtor an opportunity of opening an account from which payments under the order may be made in accordance with the method of payment proposed to be ordered, the court is satisfied that the debtor has failed, without reasonable excuse to open such an account⁸,

the court, in exercising its powers, may order that the debtor open such an account⁹.

Where the High Court or a county court has made, in relation to a qualifying periodical maintenance order, a means of payment order, it may at any later time on an application by an interested party¹⁰, or of its own motion in the course of any proceedings concerning the order, revoke, suspend, revive or vary the means of payment order¹¹.

1 As to the meaning of 'debtor' see PARA 644.

2 As to the meaning of 'creditor' see PARA 644.

3 As to the meanings of 'maintenance order', 'periodical maintenance order' and 'qualifying periodical maintenance order', and the powers of the High Court and the county court to make means of payment orders generally, see PARA 644.

4 Maintenance Enforcement Act 1991 s 1(4)(a).

5 Maintenance Enforcement Act 1991 s 1(5)(a).

6 Maintenance Enforcement Act 1991 s 1(5)(b).

7 Maintenance Enforcement Act 1991 s 1(6)(a).

8 Maintenance Enforcement Act 1991 s 1(6)(b).

9 Maintenance Enforcement Act 1991 s 1(6).

10 As to the meaning of 'interested party' see PARA 644 note 7. As to the court's consultation duty in exercising these powers see PARA 644.

11 Maintenance Enforcement Act 1991 s 1(7). This power is without prejudice to any other power of the High Court or a county court to revoke, suspend, revive or vary an order: s 1(9).

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G. RECEIVERSHIP AND SEQUESTRATION

647. Appointment of receiver by way of equitable execution.

Both the High Court and county courts have a general jurisdiction to appoint a receiver¹, whether by interlocutory or final order, in all cases where it is just and convenient to do so, on such terms, if any, as the court thinks fit².

Where a receiver has been appointed following judgment as an enforcement process, his essential function as a receiver by way of equitable execution is to collect the rents, profits or moneys receivable in respect of a judgment debtor's interest in specified property, which may be real or personal, and to pay them either into court or direct to the judgment creditor: the effect of the appointment is to prevent the judgment debtor from receiving the money due to him³ or from dealing with it to the judgment creditor's detriment⁴. The property in question does not vest in the receiver. On appointment, the receiver becomes an officer of the court and interference with his execution of the receivership order is a contempt of court⁵. The receiver may be empowered to take legal proceedings to secure payment of the judgment debt⁶.

While, historically, equitable execution, being an equitable remedy, has generally been granted only where ordinary legal enforcement has been shown to be ineffective⁷, or where it would be futile⁸, recent judicial decisions have tended to focus on the adaptability and utility of the remedy rather than on technical obstacles to its use⁹.

1 As to the making of applications for the appointment of a receiver see CPR Pt 69; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1502 et seq. Both the High Court and county courts also have specific powers to appoint a receiver by way of equitable execution against any legal estate or interest in land: see the Supreme Court Act 1981 s 37(4); the County Courts Act 1984 s 107; and **RECEIVERS** vol 39(2) (Reissue) PARAS 315, 330. These specific powers would appear to be additional to, and not by way of limitation of, the court's general power to appoint a receiver.

As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

2 See the Supreme Court Act 1981 s 37(1), (2); the County Courts Act 1984 s 38(1), (2); and **RECEIVERS** vol 39(2) (Reissue) PARAS 313, 315.

3 *Tyrrell v Painton* [1895] 1 QB 202 at 206, CA per Lindley LJ; *Re Sartoris, Sartoris v Sartoris* [1892] 1 Ch 11, CA.

4 *Ideal Bedding Co v Holland* [1907] 2 Ch 157.

5 *Lane v Sterne* (1862) 3 Giff 629.

6 *Levermore v Levermore* [1980] 1 All ER 1, [1979] 1 WLR 1277.

7 See *Wills v Luff* (1888) 38 ChD 197 at 200; *Morgan v Hart* [1914] 2 KB 183, CA.

8 *Re Shephard* (1889) 43 ChD 131 at 136, CA; *Hills v Webber* (1901) 17 TLR 513, CA. The fact that equitable execution would be more convenient has historically been an insufficient ground (*Harris v Beauchamp Bros* [1894] 1 QB 801, CA); but see the cases referred to in note 9.

9 *Bourne v Colodense* [1985] ICR 291, [1985] IRLR 339, CA; *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406, [1997] 3 All ER 523.

UPDATE

647 Appointment of receiver by way of equitable execution

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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648. Scope of receivership.

While the limits, if any, on the types of substantive order which equitable execution may be invoked to enforce are not clear, it is suggested that the jurisdiction extends to any financial order made in family proceedings. Historically, a receiver might only be appointed to collect sums in existence at the date of the order¹ and thus not to collect future instalments of a salary or other earnings². However, a receiver may be appointed to collect future as well as existing debts due under a commercial supply contract³ and it is questionable whether future income of any nature, provided that it is sufficiently certain, should be treated differently. Only costs which have been assessed or otherwise determined may be enforced by equitable execution⁴. The order may not extend to the debtor's property generally, but only to specific assets⁵. A receiver will not be appointed where the value of the debtor's interest in the asset is negligible⁶. A receiver may be appointed of an equitable reversionary interest in personal estate⁷. Payments under insurance policies, life interests under trust funds⁸ and in land, income from trust funds⁹ and legacies can also be the object of equitable execution. A receiver may be appointed to enforce an indemnity given to the judgment debtor by a third party¹⁰ and where the only asset is a cause of action for such an indemnity¹¹. Periodical maintenance payments are immune from equitable execution¹². Funds in court may be attached on application to the court in question¹³.

A receiver by way of equitable execution may be appointed in relation to an estate or interest in land, even though the latter may already be subject to a charging order made to enforce the same order¹⁴. In addition to giving powers to the receiver, the order operates as an injunction preventing the debtor and third parties with notice from dealing with the assets to which it applies¹⁵. It will take priority over stop orders and charging orders obtained subsequently¹⁶. Appointment of a receiver does not, however, make the judgment creditor a secured creditor¹⁷.

Any person adjudged to be fit to hold the office may be appointed receiver; and the creditor himself may be appointed in an appropriate case¹⁸.

1 *Pearce v Johns* (1897) 41 Sol Jo 661, CA (sums recoverable in the event of a disputed insurance claim succeeding held not liable to equitable execution).

2 *Holmes v Millage* [1893] 1 QB 551, CA.

3 *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406, [1997] 3 All ER 523.

4 *Willis v Cooper* (1900) 44 Sol Jo 698.

5 *Hamilton v Brogden* (1891) 35 Sol Jo 206.

6 *J Walls Ltd v Legge* [1923] 2 KB 240 at 245, CA.

7 *Tyrrell v Painton* [1895] 1 QB 202, CA.

8 *Oliver v Lowther* (1880) 42 LT 47.

9 *Webb v Stenton* (1883) 11 QBD 518, CA.

10 *Allied Irish Bank v Ashford Hotels Ltd, Ashford Hotels Ltd v Higgins* [1997] 3 All ER 309, CA.

11 *Bourne v Colodense Ltd* [1985] ICR 291, [1985] IRLR 339, CA.

12 *J Walls Ltd v Legge* [1923] 2 KB 240 at 245, CA.

13 *Westhead v Riley* (1883) 25 ChD 413.

14 See the Supreme Court Act 1981 s 37(4)(a); and **RECEIVERS** vol 39(2) (Reissue) PARA 330. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

15 *Tyrrell v Painton* [1895] 1 QB 202, CA.

16 *Re Marquis of Anglesey, Countess de Galve v Gardner* [1903] 2 Ch 727.

17 *Flegg v Prentis* [1892] 2 Ch 428; *Croshaw v Lyndhurst Ship Co* [1897] 2 Ch 154.

18 *Fuggle v Bland* (1883) 11 QBD 711; *Taylor v Eckersley* (1876) 2 ChD 302, CA; *Tyrrell v Painton* [1895] 1 QB 202, CA.

UPDATE

648 Scope of receivership

NOTE 14--Appointed day is 1 October 2009: SI 2009/1604.

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649. Orders enforceable by sequestration.

A writ of sequestration¹ is a process of contempt² in the High Court³ by proceeding against the property of the contemnor⁴. A writ of sequestration orders sequestrators to take possession of the judgment debtor's assets or property where the person against whom it is sought to be issued is in contempt of court by disobedience to an order of the court⁵. It may be used to enforce an order which requires a person to do an act within a specified time or to abstain from doing an act⁶; and specificity is required⁷.

A writ of sequestration may be made to enforce arrears of periodical payments⁸, a lump sum order, a property adjustment order, an order for the delivery up of chattels which does not give the judgment debtor the alternative of paying the assessed value of the chattels, an order for costs which has been ascertained by assessment or otherwise and an injunction or undertaking requiring an act to be done or not to be done⁹. The order in respect of which enforcement by sequestration is sought must be indorsed with a warning that disobedience to the order would be a contempt of court¹⁰.

1 As to sequestration generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1380 et seq.

2 See eg *Hulbert and Crow v Cathcart* [1894] 1 QB 244 at 246, DC per Wills J (it is contrary to principle to make an order in the nature of an order in contempt, as a writ of sequestration is, when the person against whom it is made is not in contempt); *Meters Ltd v Metropolitan Gas Meters Ltd* (1907) 51 Sol Jo 499. A writ which will primarily enrich no one except the sequestrators is unlikely to be looked on favourably in the Family Division; and it has been held that there is a duty on a party's legal advisers to ensure that the funds available to the parties are not dissipated in the costs of the action pursued: see *Clark v Clark* [1989] FCR 101, [1989] 1 FLR 174; *Clark v Clark (No 2)* [1990] FCR 753, [1991] 1 FLR 179.

3 A county court may grant the same relief as the High Court in appropriate cases: see the County Courts Act 1984 s 38(1); **COURTS** vol 39(2) (Reissue) PARA 711; and *Rose v Laskington Ltd* [1990] 1 QB 562, [1989] 3 All ER 306 (sequestration of assets of company in contempt).

4 *Pratt v Inman* (1889) 43 ChD 175. For procedural provision governing writs of sequestration see PARA 946.

5 The sequestration per se does not give the judgment creditor any charge over the property or assets seized: *Coles v Coles* [1957] P 68, [1957] 3 All ER 542. Such a charge would need to be created by separate order: *Re Pollard, ex p Pollard* [1903] 2 KB 41, CA. Sequestration may be used concurrently with other forms of enforcement (*Crone v O'Dell* (1824) 2 Mol 355), eg against the property of a person already in prison for contempt (*Perryman v Dinham* (1641) 1 Rep Ch 152).

6 See CPR Sch 1 RSC Ord 45 r 5(1)(a), (b); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249.

7 See CPR Sch 1 RSC Ord 45 r 6; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249.

8 This has, however, been doubted in *Linton v Linton* (1885) 15 QBD 239, CA; *Coles v Coles* [1957] P 68, [1957] 3 All ER 542 and *Romilly v Romilly* [1964] P 22, [1963] 3 All ER 607.

9 *London and Birmingham Rly Co v Grand Junction Canal Co* (1835) 1 Ry & Can Cas 224.

10 See CPR Sch 1 RSC Ord 45 r 7(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249.

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650. Property capable of being seized.

The property which may be seized under a writ of sequestration is all real property, freehold¹ or leasehold², chattels in possession³, choses in action⁴, so long as alienable from the contemnor⁵, and pensions, so long as they are alienable⁶. Stocks⁷ and any personal estate, whether legal or equitable⁸ may also be seized. Rights under a contract are capable of being bound by a writ of sequestration⁹. Property which the contemnor holds as trustee may not be seized, although, where a trust is being administered in the Chancery Division, the judge may order that funds to which a beneficiary is entitled be transferred to the sequestrators appointed by the Family Division¹⁰. A fund on which the contemnor's solicitors have a lien in a different set of proceedings is not capable of sequestration¹¹. Sequestration may not issue in respect of money due or accruing from the Crown¹². The sequestrators do not have the right to seize property which has passed into the hands of a bona fide purchaser for value without notice of the writ¹³.

1 *Whitehead v Harrison* (1730) 1 Barn KB 431.

2 *Ellard v Warren* (1681) 3 Rep Ch 87.

3 *Empringham v Short* (1844) 3 Hare 461.

4 *Miller v Huddleston* (1882) 22 ChD 233.

5 *Dixon v Rowe* (1876) 35 LT 548.

6 *Lucas v Harris* (1886) 18 QBD 127, CA.

7 *Cowper v Taylor* (1848) 16 Sim 314.

8 *Bucknell v Bucknell* [1969] 2 All ER 998, [1969] 1 WLR 1204.

9 *Hipkin v Hipkin* [1962] 2 All ER 155, [1962] 1 WLR 491.

10 *Re Slade, Slade v Hulme* (1881) 18 ChD 653.

11 *Munt v Munt* (1862) 2 Sw & Tr 661.

12 See the Crown Proceedings Act 1947 s 27; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 135.

13 *Coulston v Gardiner* (1681) 3 Swan 279n.

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H. EXECUTION AGAINST GOODS

651. Orders enforceable by execution against goods.

A writ of fieri facias¹ and a warrant of execution² are means of enforcing a judgment debt against the goods and chattels³ of the judgment debtor⁴. The writ or, as the case may be, warrant once issued instructs a sheriff in the High Court or, as the case may be, a bailiff in a county court to seize and sell goods to produce sufficient funds to satisfy the sum due under an order, interest (if accruing) and the costs of execution. Seizure places the property in the custody of the law⁵ and the sheriff or, as the case may be, bailiff has power to bring actions for trespass and conversion against any person who takes the property away⁶. The writ or warrant may not be issued without the leave of the district judge if the application is for recovery of sums due under an order for ancillary relief and there is a pending application for variation of the order⁷.

1 As from a day to be appointed writs of fieri facias are renamed 'writs of control' by the Tribunals, Courts and Enforcement Act 2007 s 62(4)(a): at the date at which this volume states the law no such day had been appointed. For an analysis of the jurisdictional background to the power of the Family Division of the High Court to issue writs of fieri facias see *Hyde v Hyde* (1888) 13 PD 166. As to the procedure on an application see **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq.

2 As from a day to be appointed warrants of execution are renamed 'warrants of control' by the Tribunals, Courts and Enforcement Act 2007 s 62(4)(b): at the date at which this volume states the law no such day had been appointed. As to the power of a county court to issue execution generally see the County Courts Act 1984 s 85; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1283. As to the procedure on an application see **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq.

3 As to goods exempt from seizure see PARA 652.

4 Subject to the requirement to obtain leave (see the text and note 7), the judgment creditor may apply for a warrant as soon as the order has been made or, if time for compliance is allowed by the order, as soon as that time has elapsed. Where several creditors issue writs of fieri facias or, as the case may be, warrants of execution against the same judgment debtor for execution, each writ binds the goods from the date of delivery to the sheriff and each warrant binds the goods from the date and time when application is made. As between the creditors, each creditor is entitled to the benefits of such priority. No separate seizure in relation to the multiple writs or warrants is necessary. The order of priority takes effect at the point of distribution of the proceeds of sale: *Re Henderson, ex p Shaw* [1884] WN 60, CA.

5 *Giles v Grover* (1832) 1 Cl & Fin 72, HL.

6 See *Wilbraham v Snow* (1670) 2 Wms Saund 47; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1329.

7 Family Proceedings Rules 1991, SI 1991/1247, r 7.1(2) (amended by SI 2005/2922).

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652. Goods exempt from seizure.

The goods seized and sold under a writ of fieri facias¹ or, as the case may be, a warrant of execution² must be those belonging to the judgment debtor and not to any other person³. Enforcement against a member of the armed forces cannot be executed against his military equipment or uniform⁴. When the property of the judgment debtor has become subject to the control of the Court of Protection by the appointment of a receiver, it cannot be seized⁵. No goods will be bound as against the Crown⁶, a bona fide purchaser for value without notice of the writ⁷ or a judgment debtor's trustee in bankruptcy, so long as the bankruptcy pre-dated the delivery of the writ⁸.

1 As from a day to be appointed writs of fieri facias are renamed 'writs of control': see PARA 651 note 1.

2 As from a day to be appointed warrants of execution are renamed 'warrants of control': see PARA 651 note 2.

3 *Glasspoole v Young* (1829) 9 B & C 696.

4 See the Army Act 1955 s 185; the Air Force Act 1955 s 185; the Naval Discipline Act 1957 s 102; and **ARMED FORCES** vol 2(2) (Reissue) PARA 74.

5 *Re Winkle* [1894] 2 Ch 519, CA.

6 *Jeanes v Wilkins* (1749) 1 Ves Sen 195.

7 See the Supreme Court Act 1981 s 138(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1294.

8 See the Insolvency Act 1986 s 285(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

UPDATE

652 Goods exempt from seizure

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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653. Orders in respect of which a writ or warrant of delivery may be obtained.

A writ of delivery in the High Court or, as the case may be, a warrant of delivery in a county court is an order to the sheriff in the High Court or, as the case may be, a bailiff in a county court physically to take¹ goods from the judgment debtor in order to enforce a property adjustment order or a declaration of title to and possession of personal property and to deliver them up to the judgment creditor².

1 The rules concerning rights of seizure in relation to writs of fieri facias and warrants of execution apply to the delivery of goods: see PARAS 651-652; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq.

2 An order for the delivery of property cannot be made in proceedings against the Crown, but the court can make an order as against the Crown that a party is entitled to goods or possession thereof: see the Crown Proceedings Act 1947 s 27; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 135. There are also restrictions on the goods of persons serving in the armed forces: see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2, 3; and **ARMED FORCES** vol 2(2) (Reissue) PARA 81 et seq.

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I. ORDERS FOR POSSESSION OF LAND

654. Orders enforceable by a writ or warrant of possession.

If the judgment creditor has obtained an order that provides for his possession of land¹, he may apply to the High Court or, as the case may be, a county court to enforce that right of possession². A writ of possession in the High Court³ or, as the case may be, a warrant of possession in a county court⁴ requires the sheriff in the High Court or, as the case may be, the bailiff in a county court to take possession of the land and give it to the judgment creditor⁵.

1 The essential element in an order which is to be enforced by a writ or warrant of possession is that it provides for the judgment creditor to possess the land. A property adjustment order may include a term that one party has the right to occupy the house to the exclusion of the other: *Allen v Allen* [1974] 3 All ER 385, [1974] 1 WLR 1171, CA. Consideration should also be given to occupation orders: see PARAS 289-309. In *Larkman v Lindsell* [1989] Fam Law 229, CA, the wife was ordered to vacate property by a specified date but refused to do so; and it was held that after that date she was in adverse possession; even though the actual terms of the order provided for the wife to vacate, the substance and effect of the order was to return possession of the house to the husband. In such circumstances the use of a warrant of possession was specifically approved. The court has power in financial relief proceedings to order vacant possession under the Family Proceedings Rules 1991, SI 1991/1247, r 2.64(3): see PARA 933. An order made in proceedings under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 (see PARA 224 et seq) may likewise include a provision that one party give to the other possession of property which is the subject matter of the application.

2 A writ or warrant of possession may be used in conjunction with a writ of fieri facias or, as the case may be, a warrant of execution: see CPR Sch 1 RSC Ord 45 r 3(4); CPR Sch 2 CCR Ord 26 r 17(3), (3A); and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1267, 1292 (noting that as from a day to be appointed writs of fieri facias are renamed 'writs of control' and warrants of execution are renamed 'warrants of control': see PARA 651 notes 1, 2). A writ or warrant of possession cannot be issued in interlocutory proceedings: *Manchester Corp'n v Connolly* [1970] Ch 420, [1970] 1 All ER 961, CA.

3 In the High Court an order for the possession of land may be enforced by a writ of possession as well as, in certain circumstances, by an order of committal and/or a writ of sequestration (see CPR Sch 1 RSC Ord 45 rr 3(1), 5; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1247, 1249), although committal is to be considered a remedy of last resort (*Danchevsky v Danchevsky* [1975] Fam 17, [1974] 3 All ER 934, CA).

4 In a county court a request for a warrant of possession does not prejudice the court's power to enforce an order for the recovery of land by an order for committal: CPR Sch 2 CCR Ord 26 r 18.

5 An order for possession and any writ or warrant thereunder may be set aside, even after execution, if the order on which it is based is set aside (*Peabody Donation Fund Governors v Hay* (1986) 19 HLR 145, CA); and it may also be set aside if the warrant or writ has been obtained by fraud, or if there has been an abuse of the process or a fraud in its execution (*Hammersmith and Fulham London Borough Council v Hill* (1994) 27 HLR 368, CA).

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J. ENFORCEMENT IN MAGISTRATES' COURTS

655. Orders enforceable in a magistrates' court.

A maintenance order which is enforceable in the magistrates' court is known as a 'magistrates' court maintenance order'¹. In general, a magistrates' court maintenance order falls into one of two categories:

- 830 (1) orders for financial provision made in a magistrates' court under the Domestic Proceedings and Magistrates' Courts Act 1978² or, as the case may be, the Children Act 1989³; and
- 831 (2) High Court and county court maintenance orders registered in a magistrates' court under the Maintenance Orders Act 1958⁴.

The payment of maintenance under a magistrates' court order may be provided for in one of five ways:

- 832 (a) directly by the judgment debtor to the judgment creditor⁵;
- 833 (b) to the designated officer for the court⁶;
- 834 (c) by standing order or any other form of automatic transfer directly to the judgment creditor⁷;
- 835 (d) in accordance with arrangements made by the Secretary of State⁸; and
- 836 (e) secured by an attachment of earnings order⁹.

On hearing of a complaint for arrears, a magistrates' court may remit the arrears¹⁰, make an order for payment of the arrears on such terms as it may specify¹¹ or exercise one of its powers available on default¹². On hearing a complaint for enforcement, a magistrates' court may not refuse to enforce on the basis that the previous order was improperly made. A magistrates' court has no jurisdiction to review the validity of the order giving rise to the complaint and, should it refuse to enforce in such circumstances, it may be forced to do so by mandatory order¹³.

1 Magistrates' Courts Act 1980 s 150(1) (definition added by the Family Law Act 1987 Sch 2 para 88).

2 See PARA 553 et seq.

3 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 539 et seq.

4 See PARA 666 et seq.

5 See the Magistrates' Courts Act 1980 s 59(3)(a); and **MAGISTRATES** vol 29(2) (Reissue) PARA 820.

6 See the Magistrates' Courts Act 1980 s 59(3)(b); and **MAGISTRATES** vol 29(2) (Reissue) PARA 820.

7 See the Magistrates' Courts Act 1980 s 59(3)(c), (6); and **MAGISTRATES** vol 29(2) (Reissue) PARA 820.

8 See the Magistrates' Courts Act 1980 s 59(3)(d); and **MAGISTRATES** vol 29(2) (Reissue) PARA 820.

9 See the Magistrates' Courts Act 1980 s 59(3)(e); and **MAGISTRATES** vol 29(2) (Reissue) PARA 820. As to attachment of earnings orders see PARA 627 et seq.

10 A magistrates' court should follow the practice in the High Court and county courts of not enforcing arrears of maintenance which have accrued more than 12 months before the date of application for enforcement unless there are special circumstances: see eg *Ross v Pearson* [1976] 1 All ER 790, sub nom *Ross v Pearson (formerly Ross)* [1976] 1 WLR 224; *Bernstein v O'Neill* [1989] FCR 79, [1989] 2 FLR 1; *C v S (maintenance order: enforcement)* [1997] 3 FCR 423, [1997] 1 FLR 298; *R v Cardiff Magistrates, ex p Czech* [1999] 1 FCR 721, [1999] 1 FLR 95.

11 Arrears of maintenance are not recoverable as a civil debt in the magistrates' court (see the Magistrates' Courts Act 1980 s 58(2)(a); and **MAGISTRATES** vol 29(2) (Reissue) PARA 826), nor are they provable in the bankruptcy of the judgment debtor (*James v James* [1964] P 303, [1963] 2 All ER 465).

12 See PARA 656.

13 *R v Lancashire Justices, ex p Tyrer* [1925] 1 KB 200 (the writ will be refused only if there is undisputed evidence that the previous order should not have been made).

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656. Methods of enforcement.

Maintenance orders may be enforced in a magistrates' court by the following methods of enforcement:

- 837 (1) warrant of distress¹;
- 838 (2) committal²; and
- 839 (3) attachment of earnings³.

A warrant of distress⁴ is an order of a magistrates' court directed to the police or other agent to seize goods belonging to the judgment debtor and to sell them to raise the sum by which the debtor is in default⁵.

'Committal' means sending the judgment debtor to prison for a specified period, and a warrant for committal to prison is the ultimate sanction for non-payment of a maintenance order⁶. The court has a statutory duty⁷ to consider whether there is any alternative to committal, and failure to do so may lead to the quashing of an order for committal⁸. The maximum period of committal is six weeks⁹. A magistrates' court has power to postpone the issue of the warrant of committal until such time and on such conditions as it thinks just¹⁰.

Attachment of earnings is a method of enforcement which enables the court to order the employer of the judgment debtor to divert part of the latter's earnings¹¹ to the judgment creditor on a regular basis to satisfy the terms of the maintenance order¹². Attachment of earnings orders, once made, may be varied or discharged¹³.

1 See the Magistrates' Courts Act 1980 s 76(1); and **MAGISTRATES** vol 29(2) (Reissue) PARA 860. As from a day to be appointed warrants of distress are renamed, unless the power they confer is exercisable only against specific goods, 'warrants of control' by the Tribunals, Courts and Enforcement Act 2007 s 62(4)(c): at the date at which this volume states the law no such day had been appointed.

2 See the Magistrates' Courts Act 1980 s 76(1)-(3); and **MAGISTRATES** vol 29(2) (Reissue) PARA 860.

3 See the Attachment of Earnings Act 1971 s 1(3)(a); and PARA 628.

4 See note 1.

5 It has been held that, if there is a reasonable likelihood that the judgment debtor has assets of sufficient value to satisfy the debt, distress should be preferred to committal: *R v Birmingham Justices, ex p Bennett* [1983] 1 WLR 114.

6 The court must be satisfied, after inquiry in the presence of the judgment debtor, that the default has been caused by his wilful refusal or culpable neglect: see the Magistrates' Courts Act 1980 s 93(6); and **MAGISTRATES** vol 29(2) (Reissue) PARA 831. The court is entitled to disbelieve the evidence of the judgment debtor, but it must still inquire whether the true facts as found amount to wilful refusal or culpable neglect: *R v Cardiff Magistrates, ex p Czech* [1999] 1 FCR 721, [1999] 1 FLR 95. The debtor may also apply to the magistrates' court in the prescribed manner at any time for the cancellation of the warrant: see the Maintenance Orders Act 1958 s 18.

7 See under the Magistrates' Courts Act 1980 s 93(6)(b): see **MAGISTRATES** vol 29(2) (Reissue) PARA 831.

8 *R v Slough Justices, ex p Lindsay* [1997] 2 FCR 636, [1997] 1 FLR 695.

9 See the Magistrates' Courts Act 1980 s 93(7); and **MAGISTRATES** vol 29(2) (Reissue) PARA 831.

- 10 See the Magistrates' Courts Act 1980 s 77(2); and **MAGISTRATES** vol 29(2) (Reissue) PARA 860.
- 11 As to the meaning of 'earnings' see PARA 630.
- 12 As to attachment of earnings generally see PARA 627 et seq.
- 13 See the Attachment of Earnings Act 1971 s 9; and PARA 634.

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657. Enforcement etc of orders for payment of money.

An order for the payment of money made by a magistrates' court¹ is enforceable as a magistrates' court maintenance order².

A magistrates' court making an order³ for the making of a periodical payment by one person to another may⁴ direct that it is to be made to some third party on that other person's behalf instead of directly to that other person⁵.

Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money⁶ must give notice of any change of address to such person, if any, as may be specified in the order⁷.

A person is not entitled to enforce through the High Court or any county court the payment of any arrears due under an order for financial provision⁸ without the leave of that court if those arrears became due more than 12 months before proceedings to enforce the payment of them are begun⁹. An application for the grant of such leave must be made in such manner as may be prescribed by rules of court¹⁰. The court hearing an application for the grant of such leave may refuse leave, or may grant leave subject to such restrictions and conditions, including conditions as to the allowing of time for payment or the making of payment by instalments, as that court thinks proper, or may remit the payment of such arrears or any part thereof¹¹.

1 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or under the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

2 Domestic Proceedings and Magistrates' Courts Act 1978 s 32(1) (substituted by the Family Law Reform Act 1987 Sch 2 para 70); Civil Partnership Act 2004 Sch 6 para 43. As to the meaning of 'magistrates' court maintenance order' see PARA 655 (definition applied by the Domestic Proceedings and Magistrates' Courts Act 1978 s 88(1) (amended by the Family Law Reform Act 1987 Sch 2 para 71)). As to the enforcement of magistrates' courts' maintenance orders see PARAS 655-656.

3 See note 1.

4 Ie without prejudice to the Magistrates' Courts Act 1980 s 59 (means of payment of orders for periodical payment): see **MAGISTRATES** vol 29(2) (Reissue) PARA 820.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 32(2) (amended by the Magistrates' Courts Act 1980 Sch 7 para 164; the Maintenance Enforcement Act 1991 Sch 2 para 3; the Courts Act 2003 Sch 8 para 195). For the purposes of any order made under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I or the Civil Partnership Act 2004 Sch 6, the Magistrates' Courts Act 1980 s 59 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 820) has effect as if, in s 59(7) for the words 'the person who applied for the maintenance order' there were substituted the words 'the person to whom the payments under the order fall to be made': Domestic Proceedings and Magistrates' Courts Act 1978 s 32(2) (as so amended).

6 See note 1.

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 32(3) (amended by the Criminal Justice Act 1982 s 46). Any person who without reasonable excuse fails to give such a notice is liable on summary conviction to a fine not exceeding level 2 on the standard scale: Domestic Proceedings and Magistrates' Courts Act 1978 s 32(3) (as so amended). As to the standard scale see PARA 84 note 3.

8 Ie an order made by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I or the Civil Partnership Act 2004 Sch 6.

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 32(4). As to the registration and enforcement in the High Court of orders under Pt I and the Civil Partnership Act 2004 Sch 6 see PARA 664 et seq.

10 Domestic Proceedings and Magistrates' Courts Act 1978 s 32(6) (amended by the Courts Act 2003 Sch 8 para 195).

11 Domestic Proceedings and Magistrates' Courts Act 1978 s 32(5).

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658. Effect on certain orders of parties living together.

Where periodical payments are required to be made to one of the parties to a marriage or civil partnership (including payments to or for the benefit of a child of the family¹) where the respondent has failed to maintain the applicant², the applicant or the respondent has agreed to make such financial provision³ or by virtue of an interim maintenance order⁴ (but not where the parties are living apart by agreement⁵), the order is enforceable notwithstanding that the parties to the marriage or civil partnership are living with each other⁶ at the date of the making of the order or that, although they are not living with each other at that date, they subsequently resume living with each other; although the order ceases to have effect if after that date the parties continue to live with each other, or resume living with each other, for a continuous period exceeding six months⁷.

Where any of the following orders is made:

- 840 (1) an order which requires periodical payments to be made to a child of the family⁸; or
- 841 (2) an interim maintenance order which requires periodical payments to be made to a child of the family⁹,

then, unless the court otherwise directs, the order continues to have effect and is enforceable notwithstanding that the parties to the marriage or civil partnership in question are living with each other at the date of the making of the order or that, although they are not living with each other at that date, they subsequently resume living with each other¹⁰.

Any order made where the parties are living apart by agreement¹¹, and any interim maintenance order made on an application for an order in those circumstances¹², ceases to have effect if the parties to the marriage or civil partnership resume living with each other¹³.

Where an order¹⁴ ceases to have effect¹⁵, a magistrates' court may, on an application made by either party to the marriage or civil partnership, make an order declaring that the first mentioned order ceased to have effect from such date as the court may specify¹⁶.

1 As to the meanings of 'child of the family' and (for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978) 'child' see PARA 553 note 4.

2 I.e. where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8): see PARA 553.

3 I.e. where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14): see PARA 554.

4 I.e. where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 19 or the Civil Partnership Act 2004 Sch 6 Pt 4 (paras 15-19): see PARAS 563-564.

5 I.e. where the court has made an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (paras 15-19): see PARA 556. See the text and notes 11-13.

6 For these purposes references to the parties living with each other are to be construed as references to their living with each other in the same household: Domestic Proceedings and Magistrates' Courts Act 1978 s 88(2). Cf *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246, CA; *Piper v Piper* (1978) 8 Fam Law 243, CA.

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 25(1) (s 25(1), (2) amended by the Children Act 1989 Sch 13 para 41, Sch 15); Civil Partnership Act 2004 Sch 6 para 29(1), (2).

8 Ie an order pursuant to the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or s 6 or the Civil Partnership Act 2004 Sch 6 Pt 1 or Sch 6 Pt 2: see PARAS 553-554.

9 Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 19 or the Civil Partnership Act 2004 Sch 6 Pt 4 (see PARAS 563-564), otherwise than on an application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (see PARA 556).

10 Domestic Proceedings and Magistrates' Courts Act 1978 s 25(2) (as amended: see note 7); Civil Partnership Act 2004 Sch 6 para 29(3), (4).

11 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (see PARA 556).

12 See note 11.

13 Domestic Proceedings and Magistrates' Courts Act 1978 s 25(3); Civil Partnership Act 2004 Sch 6 para 29(5).

14 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I or under the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

15 Ie by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 s 25(1) or (3) or the Civil Partnership Act 2004 Sch 6 para 29(2) or (5) or by virtue of a direction given under the Domestic Proceedings and Magistrates' Courts Act 1978 s 25(2) or the Civil Partnership Act 2004 Sch 6 para 29(4) (see the text and notes 1-14).

16 Domestic Proceedings and Magistrates' Courts Act 1978 s 25(4); Civil Partnership Act 2004 Sch 6 para 29(6).

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(iii) Aids to Enforcement

A. INJUNCTIONS

659. Injunctions and orders available.

In proceedings to enforce financial relief it may be necessary to consider:

- 842 (1) injunctions to prevent the defeating of claims¹;
- 843 (2) injunctions to preserve assets under the court's inherent jurisdiction²;
- 844 (3) Mareva injunctions³;
- 845 (4) Anton Piller orders⁴;
- 846 (5) orders to prevent a party leaving the jurisdiction (writs ne exeat regno)⁵.

In deciding whether to grant an injunction the court has to balance the hardship that would arise if the order is made against that which will arise if it is not⁶. If an interim injunction is to continue in force, it is essential that there is an explicit order stating that it is so to continue; in the absence of any such express continuation, an interim order that omitted to provide for its continuation cannot be amended under the slip rule⁷.

1 See the Matrimonial Causes Act 1973 s 37; the Matrimonial and Family Proceedings Act 1984 s 23; the Civil Partnership Act 2004 Sch 5 paras 74, 75, Sch 7 paras 15, 16; and PARA 586 et seq.

2 See PARA 660.

3 See PARA 661.

4 See PARA 662.

5 See PARA 663.

6 See *Sherry v Sherry* [1991] 1 FLR 307, [1991] Fam Law 180, CA; *Nikitenko v Leboeuf Lambe Greene & Macrae (a firm)* (1999) Times, 26 January.

7 See *Langley v Langley* [1994] 2 FCR 294, [1994] 1 FLR 383, CA.

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660. Inherent jurisdiction to preserve assets.

A party may¹ need to have recourse to the court's inherent jurisdiction to preserve assets pending the determination of the application for financial relief. The court has such an inherent jurisdiction².

1 le where the anticipated action of the intended respondent might not fall within the strict wording of the Matrimonial Causes Act 1973 s 37, the Matrimonial and Family Proceedings Act 1984 s 23, or the Civil Partnership Act 2004 Sch 5 paras 74, 75, Sch 7 paras 15, 16 (see PARA 586 et seq).

2 See *Roche v Roche* (1981) 11 Fam Law 243; *Shipman v Shipman* [1991] FCR 628, [1991] 1 FLR 250. As to the jurisdiction of the county court to make such injunctions see the County Court Remedies Regulations 1991, SI 1991/1222, reg 3(3)(c); and **COURTS** vol 10 (Reissue) PARA 711.

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661. Mareva injunctions.

Mareva injunctions¹ are orders restraining a respondent from disposing of or dealing with assets pending the substantive hearing of an application. Their origins are derived from statute². The following points are of particular significance:

- 847 (1) standard forms of injunction are provided³;
- 848 (2) an applicant who seeks a Mareva injunction without notice must make full disclosure of all material facts, including any facts that he might reasonably discover⁴;
- 849 (3) a Mareva injunction should normally be limited to assets within the jurisdiction⁵ but in exceptional circumstances a court may make a Mareva injunction in relation to worldwide assets⁶;
- 850 (4) a Mareva injunction should be limited to the maximum amount that the applicant might realistically expect to receive in the proceedings⁷ and should generally allow the respondent to carry on his business and meet his reasonable living and legal expenses and ordinary debts⁸;
- 851 (5) the court should consider the position of third parties and any prejudice that might be caused to them and, in making the order, it must be borne in mind that a third party may be guilty of contempt of court if he acts in a way contrary to the order having acquired knowledge of it⁹;
- 852 (6) the court may order a defendant to disclose his assets within or outside the jurisdiction¹⁰ and may subject the respondent to cross-examination on his affidavit as to his assets¹¹ but there may be circumstances in which the respondent may be entitled to claim privilege against disclosure of assets or response to cross-examination¹²;
- 853 (7) the applicant must show a good arguable case¹³ and there is a real risk that assets will be rendered inaccessible to the court if an order is not made¹⁴;

Even if there are no substantive proceedings in this country, a Mareva injunction may be granted to assist in foreign proceedings, but only in exceptional circumstances¹⁵.

1 The so named after *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* (1975) [1980] 1 All ER 213n, CA. As to Mareva injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 396 et seq.

2 The Supreme Court Act 1981 s 37: see **CIVIL PROCEDURE** vol 11 (2009) PARA 347. As to the jurisdiction of the county court to make such injunctions see the County Court's Remedies Regulations 1991, SI 1991/1222, regs 2, 3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 345.

3 See *Practice Direction* [1997] 1 All ER 288, sub nom *Practice Direction (Mareva Injunctions and Anton Piller Orders: Forms)* [1996] 1 WLR 1552.

4 See *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178, [1988] 1 WLR 1337, CA; *Brink's MAT Ltd v Elcombe* [1988] 3 All ER 188, [1988] 1 WLR 1350, CA.

5 *Allied Arab Bank Ltd v Hajjar* [1988] QB 787, [1987] 3 All ER 739.

6 See *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, sub nom *Derby & Co Ltd v Weldon (No 2)* [1989] 1 All ER 1002, CA; *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA.

7 See *Ghosh v Ghosh* [1992] 2 All ER 920, [1993] 1 FCR 177, CA.

- 8 *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, CA.
- 9 *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA.
- 10 *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA.
- 11 *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1996] 2 Lloyd's Rep 604, CA.
- 12 See *Arab Monetary Fund v Hashim* [1989] 3 All ER 466, [1989] 1 WLR 565.
- 13 See eg *Derby & Co v Weldon* [1990] Ch 48, [1990] 1 All ER 469, CA.
- 14 See *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG, The Niedersachsen* [1984] 1 All ER 398, [1983] 1 WLR 1412, CA.
- 15 See *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

UPDATE

661 Mareva injunctions

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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662. Anton Piller orders.

An Anton Piller order¹ allows the applicant's representative to enter the respondent's premises and search for, inspect and remove relevant documents that might otherwise be destroyed or rendered inaccessible. Such orders require exceptional circumstances². In order to justify such an order the applicant must demonstrate that:

- 854 (1) there is an extremely strong prima facie case³;
- 855 (2) the potential or actual damage must be very serious for the applicant⁴;
- 856 (3) there must be clear evidence that the respondent to the application has in his possession incriminating documents or things and that there is a real possibility that he may destroy that material before any application can be heard on notice⁵.

As with Mareva injunctions⁶, the applicant must give full and frank disclosure of all material facts known or reasonably accessible to him⁷. If an order is obtained without merit, the applicant may be liable for costs⁸.

¹ It is so named after *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA. As to Anton Piller orders generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 402 et seq.

² See *Burgess v Burgess* [1997] 1 FCR 89, [1996] 2 FLR 34, CA; *Araghchinchí v Araghchinchí* [1997] 3 FCR 567, [1997] 2 FLR 142, CA.

³ See *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA; *Araghchinchí v Araghchinchí* [1997] 3 FCR 567, [1997] 2 FLR 142, CA.

⁴ See note 3.

⁵ See note 3.

⁶ See PARA 661.

⁷ See *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178, [1988] 1 WLR 1337, CA; *Brink's MAT Ltd v Elcombe* [1988] 3 All ER 188, [1988] 1 WLR 1350, CA.

⁸ See *Burgess v Burgess* [1997] 1 FCR 89, [1996] 2 FLR 34, CA (husband ordered to pay the wife's costs of an ill-judged application for an Anton Piller order which yielded nothing).

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663. Writ ne exeat regno.

In exceptional circumstances a court may make an order preventing a party from leaving the jurisdiction and directing him to deliver up his passport so as to secure compliance with an order¹. In order for such an order to be made the following conditions must be satisfied:

- 857 (1) the action is one in which the respondent would have been liable to arrest at law²;
- 858 (2) there is a good cause of action for at least £50³;
- 859 (3) there is probable cause for believing that the respondent is about to leave the jurisdiction unless apprehended⁴; and
- 860 (4) the absence of the respondent from the jurisdiction will materially prejudice the applicant in the prosecution of the action⁵.

Such an order may be made in support of a judgment summons⁶.

1 *Bayer AG v Winter* [1986] 1 All ER 733, [1986] 1 WLR 497, CA. As to writs ne exeat regno generally see **EQUITY** vol 16(2) (Reissue) PARA 495.

2 See the Debtors Act 1869 s 6; and *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673. The power to detain in the United Kingdom a judgment debtor who is a foreign national by ordering him to surrender his passport is available only as an aid to the court's established procedures for enforcement of a judgment; it is not available as a free-standing enforcement procedure: *B v B (injunction: restraint on leaving jurisdiction)* [1997] 3 All ER 258, sub nom *B v B (injunction: jurisdiction)* [1998] 1 WLR 329.

3 See the Debtors Act 1869 s 6; and *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673.

4 See the Debtors Act 1869 s 6; and *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673.

5 See the Debtors Act 1869 s 6; and *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673.

6 See *Thaha v Thaha* [1987] 2 FLR 142, [1987] Fam Law 234.

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B. REGISTRATION OF MAINTENANCE ORDERS

(A) REGISTRATION GENERALLY

664. Enforcement of maintenance orders by registration.

Provision is made¹ for the purpose of enabling maintenance orders² to be registered³ and, subject to the provision so made, while so registered to be enforced in like manner as an order made by the court of registration⁴ and, in the case of an order registered in a magistrates' court, to be varied by a magistrates' court⁵. The orders to which these provisions apply are:

- 861 (1) maintenance orders made by the High Court or a county court or a magistrates' court⁶, other than orders registered⁷ in Scotland or Northern Ireland⁸; and
- 862 (2) maintenance orders made by a court in Scotland or Northern Ireland and registered⁹ in England¹⁰.

1 Ie under the Maintenance Orders Act 1958 Pt I (ss 1-5): see PARA 666 et seq.

2 For these purposes 'maintenance order' means any order specified in the Administration of Justice Act 1970 Sch 8 (see PARA 642 note 5) (Maintenance Orders Act 1958 s 1(1A) (added by the Administration of Justice Act 1970 s 27(3))); and unless the context otherwise requires 'order' means a maintenance order to which the Maintenance Orders Act 1958 Pt I applies (s 1(3)).

3 Ie in the case of an order made by the High Court or a county court, in a magistrates' court (Maintenance Orders Act 1958 s 1(1)(a)) and in the case of an order made by a magistrates' court, in the High Court (s 1(1)(b)). For these purposes, unless the context otherwise requires, 'registered' means registered in accordance with the provisions of Pt I; and 'registration' is to be construed accordingly: s 1(3). As to the meaning of 'magistrates' court' see (unless the context otherwise requires) the Magistrates' Courts Act 1980 s 148; and **MAGISTRATES** vol 29(2) (Reissue) PARA 583 (definition applied by the Maintenance Orders Act 1958 s 21(1) (amended by the Magistrates' Courts Act 1980 Sch 7 para 24)). As to registration in a magistrates' court of High Court and county court orders see PARA 666 et seq; as to registration in the High Court of magistrates' court orders see PARA 671 et seq.

4 For these purposes, unless the context otherwise requires, 'court of registration', in relation to an order, means the court in which the order is registered: Maintenance Orders Act 1958 s 1(3).

5 Maintenance Orders Act 1958 s 1(1).

6 For these purposes a maintenance order which is registered in a magistrates' court under the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 310-322) or the Civil Jurisdiction and Judgments Act 1982 Pt I (ss 1-15) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65) or EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 28) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I' Regulation: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65) is deemed to be a maintenance order made by that court: Maintenance Orders Act 1958 s 1(4) (added by the Maintenance Orders (Reciprocal Enforcement) Act 1972 Schedule para 4; and amended by the Civil Jurisdiction and Judgments Act 1982 Sch 12 Pt I para 3; SI 2001/3929; SI 2007/1655).

7 Ie registered under the Maintenance Orders Act 1950 Pt II (ss 16-25) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 293-300).

8 Maintenance Orders Act 1958 s 1(2A)(a) (s 1(2) substituted, s 1(2A) added, by the Administration of Justice Act 1977 Sch 3 para 1).

9 le registered under the Maintenance Orders Act 1950 Pt II (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 293-300).

10 Maintenance Orders Act 1958 s 1(2A)(b) (as added: see note 8). For these purposes a maintenance order made by a court in Scotland or Northern Ireland and registered in England under the Maintenance Orders Act 1950 Pt II is deemed to have been made by the court in England in which it is so registered: Maintenance Orders Act 1958 s 1(2) (as so substituted).

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665. Enforcement of registered orders.

A registered¹ order² is enforceable in all respects³ as if it had been made by the court of registration⁴ and as if that court had had jurisdiction to make it; and proceedings for or with respect to the enforcement of a registered order may be taken accordingly⁵. An order registered in a magistrates' court⁶ is⁷ enforceable as a magistrates' court maintenance order⁸.

Where an order remains or becomes registered after the discharge of the order, no proceedings may be taken by virtue of that registration except in respect of arrears which were due under the order at the time of the discharge and have not been remitted⁹.

Except as provided by these provisions, no proceedings may be taken for or with respect to the enforcement of a registered order¹⁰.

1 As to the meaning of 'registered' see PARA 664 note 3.

2 As to the meaning of 'order' see PARA 664 note 2.

3 Ie subject to the provisions of the Maintenance Orders Act 1958 s 2A (see PARA 673).

4 As to the meaning of 'court of registration' see PARA 664 note 4.

5 Maintenance Orders Act 1958 s 3(1) (amended by the Civil Jurisdiction and Judgments Act 1982 Sch 11 para 6(1), (3)).

6 As to the meaning of 'magistrates' court' see PARA 664 note 3.

7 Ie subject to the provisions of the Maintenance Orders Act 1958 s 3(2A), (2B), (3) (see the text and notes 8-9).

8 Maintenance Orders Act 1958 s 3(2) (substituted by the Family Law Reform Act 1987 Sch 2 para 18; amended by the Maintenance Enforcement Act 1991 Sch 1 para 8(1)). 'Magistrates' court maintenance order' means a maintenance order enforceable by a magistrates' court: Magistrates' Courts Act 1980 s 150(1) (definition added by the Family Law Reform Act 1987 Sch 2 para 88); Maintenance Orders Act 1958 s 3(2) (as so substituted). For provisions as to the variation of orders see the Maintenance Orders Act 1958 s 3(2A), (2B) (added by the Maintenance Enforcement Act 1991 Sch 1 para 8(2)); and PARAS 669, 674.

9 Maintenance Orders Act 1958 s 3(3).

10 Maintenance Orders Act 1958 s 3(4).

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(B) REGISTRATION OF HIGH COURT AND COUNTY COURT ORDERS IN MAGISTRATES' COURTS

666. Orders that may be registered.

A person entitled to receive payments under a High Court order¹ or a county court order² may apply to the original court³ for the registration of the order in a magistrates' court⁴; and the court may, if it thinks fit, grant the application⁵.

1 For these purposes, unless the context otherwise requires, 'High Court order' means an order made by the High Court (Maintenance Orders Act 1958 s 1(3)); and, for the purposes of the Maintenance Orders Act 1958 s 2 includes a maintenance order deemed to be made by the High Court by virtue of s 1(2) (see the text and notes 2-5): s 2(6A) (added by the Administration of Justice Act 1977 Sch 3 para 2). As to the meaning of 'maintenance order' see PARA 664 note 2.

2 For these purposes, unless the context otherwise requires, 'county court order' means an order made by the county court: Maintenance Orders Act 1958 s 1(3).

3 For these purposes, 'original court', in relation to an order, means the court by which the order was made: Maintenance Orders Act 1958 s 1(3).

4 As to the meaning of 'magistrates' court' see PARA 664 note 3. Interim maintenance orders and orders for nominal amounts should not be registered in a magistrates' court; and orders for maintenance pending suit or the outcome of proceedings and interim periodical payments orders should be registered only in exceptional circumstances: *Practice Direction* [1980] 1 All ER 1007, sub nom *Practice Direction (maintenance: registration of orders)* [1980] 1 WLR 354.

5 Maintenance Orders Act 1958 s 2(1). The fee payable on an application for a maintenance order to be registered under the Maintenance Orders Act 1958 is £35: Family Proceedings Fees Order 2008, SI 2008/1054, art 2, Sch 1, Fee 9.1.

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667. Application for registration.

An application for the registration of a High Court order¹ or a county court order² in a magistrates' court³ must be made by lodging with the proper officer⁴ a certified copy of the maintenance order and two copies of the application in the prescribed form⁵. The court has a discretion whether to grant the application⁶.

Where an application for the registration of a High Court order or a county court order is granted:

- 863 (1) no proceedings may be begun, and no writ, warrant or other process may be issued, for the enforcement of the order before the registration⁷ of the order or the expiration of 14 days from the grant of the application, whichever first occurs⁸; and
- 864 (2) the original court⁹ must, on being satisfied within the period so specified by the person who made the application that no such proceedings or process begun or issued before the grant of the application remain pending or in force, cause a certified copy¹⁰ of the order to be sent to the designated officer for the magistrates' court acting for the petty sessions area in which the defendant¹¹ appears to be¹²,

but, if at the expiration of the 14-day period the original court has not been so satisfied, the grant of the application becomes void¹³.

1 As to the meaning of 'High Court order' see PARA 666 note 1.

2 As to the meaning of 'county court order' see PARA 666 note 2.

3 Ie under the Maintenance Orders Act 1958 s 2(1): see PARA 666. As to the meaning of 'magistrates' court' see PARA 664 note 3.

4 As to the meaning of 'proper officer' see PARA 461 note 5.

5 Family Proceedings Rules 1991, SI 1991/1247, r 7.23(1) (amended by SI 1992/2067). For the prescribed form of application see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M33 (added by SI 1992/2067).

6 See the Maintenance Orders Act 1958 s 2(1); and PARA 666.

7 As to the meaning of 'registration' see PARA 664 note 3.

8 Maintenance Orders Act 1958 s 2(2)(a); Family Proceedings Rules 1991, SI 1991/1247, r 7.23(2).

9 As to the meaning of 'original court' see PARA 666 note 3.

10 For these purposes, 'certified copy', in relation to an order of a court, means a copy certified by the proper officer of the court to be a true copy of the order or of the official record thereof: Maintenance Orders Act 1958 s 2(7). The proper officer must cause the certified copy to be endorsed with a note that the application for registration of the order has been granted and to be accompanied by a copy of the application lodged under the Family Proceedings Rules 1991, SI 1991/1247, r 7.23(1) (see the text and notes 1-5): r 7.23(3) (amended by SI 2001/821; SI 2005/617).

11 For these purposes, unless the context otherwise requires, 'defendant', in relation to a maintenance order, means the person liable to make payments under the maintenance order: Maintenance Orders Act 1958 s 21(1).

12 Maintenance Orders Act 1958 s 2(2)(b) (s 2(2)(b), (5) amended by the Courts Act 2003 Sch 8 para 98). The officer of or for the court who receives a certified copy of an order so sent to him must cause the order to be registered in the magistrates' court: Maintenance Orders Act 1958 s 2(5) (as so amended); Family Proceedings Rules 1991, SI 1991/1247, r 7.23(4). On receipt of notice that a maintenance order registered in the High Court in accordance with the Maintenance Orders Act 1950 s 17(4) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 294) has been registered in a magistrates' court in accordance with the Maintenance Orders Act 1958 s 2(5), the proper officer must cause particulars to be entered in Part II of the register: Family Proceedings Rules 1991, SI 1991/1247, r 7.24. For these purposes, the 'register' means any register kept for the purposes of the Maintenance Orders Act 1958 (as to which see PARA 664 et seq): Family Proceedings Rules 1991, SI 1991/1247, r 7.22. In addition, the designated officer must send notice to the proper officer of the original court that the order has been duly registered: see the Magistrates' Courts (Maintenance Orders Act 1958) Rules 1959, SI 1959/3, r 4 (amended by SI 2001/615; SI 2005/617).

13 Maintenance Orders Act 1958 s 2(2).

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668. Effect of registration.

Where a High Court order¹ or a county court order² is registered³ in a magistrates' court⁴:

- 865 (1) if a means of payment order⁵ has effect in relation to the order in question, it continues to have effect after registration⁶; and
- 866 (2) in any other case, the magistrates' court must order that all payments to be made under the order in question, including any arrears accrued before registration, are to be made to the designated officer for the court or for any other magistrates' court⁷.

Any such order as to payment as is referred to in head (1) or (2) above may⁸ be varied or revoked⁹.

Any person under an obligation to make payments under an order registered in a magistrates' court must give notice of any change of address to the designated officer for the court¹⁰.

1 As to the meaning of 'High Court order' see PARA 666 note 1.

2 As to the meaning of 'county court order' see PARA 666 note 2.

3 Ie under the Maintenance Orders Act 1958 Pt I (ss 1-5): see PARA 664 et seq.

4 As to the meaning of 'magistrates' court' see PARA 664 note 3.

5 Ie within the meaning of the Maintenance Enforcement Act 1991 s 1(7): see PARA 646.

6 Maintenance Orders Act 1958 s 2(6ZA)(a) (s 2(6ZA)-(6ZC) added by the Maintenance Enforcement Act 1991 Sch 1 para 7; Maintenance Orders Act 1958 s 2(6ZA)(b), (6ZC) amended by the Courts Act 2003 Sch 8 para 98(1), (5), (6)).

7 Maintenance Orders Act 1958 s 2(6ZA)(b) (as added and amended: see note 6). Where by virtue of any order under s 2(6ZA)(b) payments under an order cease to be or become payable to the designated officer for a magistrates' court, the person liable to make the payments is, until he is given the prescribed notice to that effect, deemed to comply with the order if he makes payments in accordance with the order and any order under s 2(6ZA)(b) of which he has received such notice: s 2(6ZC) (as so added and amended).

8 Ie by an exercise of the powers conferred by the Maintenance Orders Act 1958 s 3(2A) or (2B) (see PARA 665) or s 4(2A), (5A) or (5B) (see PARA 669).

9 Maintenance Orders Act 1958 s 2(6ZB)(b) (as added: see note 6).

10 Maintenance Orders Act 1958 s 3(3A) (added by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 4; amended by the Courts Act 2003 Sch 8 para 99). Any person who without reasonable excuse fails to give such a notice is liable on summary conviction to a fine not exceeding level 2 on the standard scale: Maintenance Orders Act 1958 s 3(3A) (as so added). As to the standard scale see PARA 84 note 3.

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669. Variation of rate of payments.

Where an order¹ is registered² in a magistrates' court³ the court of registration⁴ may exercise the same domestic jurisdiction⁵ to vary any rate of payments specified by the order as is otherwise exercisable by the original court⁶. The power of a magistrates' court to vary a registered order under these provisions includes power, if the court is satisfied that payment has not been made in accordance with the order:

- 867 (1) to order that payments under the order be made directly by the debtor to the creditor⁷;
- 868 (2) to order that payments under the order be made to the designated officer for the court or for any other magistrates' court⁸;
- 869 (3) to order that payments under the order be made by the debtor to the creditor by standing order or such similar method of payment⁹ as may be specified¹⁰;
- 870 (4) to order that payments under the order be made in accordance with arrangements made by the Secretary of State for their collection¹¹; and
- 871 (5) to make an attachment of earnings order¹² to secure payments under the order¹³,

and in deciding which of these powers it is to exercise, the court must have regard to any representations made by the debtor and the creditor¹⁴.

If it appears to the court to which an application is so made for the variation of a rate of payments specified by a registered order that it is for any reason appropriate to remit the application to the original court, the first-mentioned court must so remit the application; and the original court must thereupon deal with the application as if the order were not registered¹⁵.

No application for any variation of a registered order may:

- 872 (a) be made to any court while proceedings for any variation of the order are pending in any other court¹⁶;
- 873 (b) be made¹⁷ to any court in respect of an order made by the Court of Session or the High Court in Northern Ireland and duly registered¹⁸ in that court¹⁹;
- 874 (c) be made to any court in respect of an order for periodical or other payments made²⁰ following an overseas divorce, dissolution, separation or annulment²¹.

Where a magistrates' court, in exercise of the jurisdiction conferred by these provisions, varies or refuses to vary a registered order, an appeal from the variation or refusal lies to a Divisional Court of the Family Division of the High Court²².

The means of payment, where specified in an order, may also be varied²³.

1 As to the meaning of 'order' see PARA 664 note 2.

2 Ie under the Maintenance Orders Act 1958 Pt I (ss 1-5): see PARA 664 et seq.

3 As to the meaning of 'magistrates' court' see PARA 664 note 3.

4 As to the meaning of 'court of registration' see PARA 664 note 4.

5 le other than jurisdiction in a case where a party to the order is not present in England or Wales when the application for variation is made: Maintenance Orders Act 1958 s 4(1), (2)(a).

6 Maintenance Orders Act 1958 s 4(2)(a). As to the meaning of 'original court' see PARA 666 note 3. A rate of payments specified by a registered order may not be varied except by the court of registration or any other magistrates' court to which the jurisdiction so conferred is extended by rules of court: s 4(2)(b). Nothing in s 4(2) affects the jurisdiction of the original court to vary a rate of payments specified by a registered order if an application for the variation of that rate is made to that court in proceedings for a variation of provisions of the order which do not specify a rate of payments or at a time when a party to the order is not present in England or Wales: s 4(5). As to the variation of means of payment see PARA 670.

On an application under the Maintenance Orders Act 1958 s 4(2) to vary an order for periodical payments which has been made in the High Court or a county court and registered in a magistrates' court the magistrates are not required to state their reasons prior to refusing that application nor to state them when doing so: magistrates are, however, required to provide written reasons after the hearing at the request of the person who is considering whether or not to appeal to the Family Division under s 4(7) (see the text and note 22), the reason therefor being that an appeal to the Family Division is not a hearing of the matter afresh but an inquiry into whether the magistrates have erred in principle or whether their decision is plainly wrong and thus the focus is on their reasoning: *Hackshaw v Hackshaw* [1999] 3 FCR 451, [1999] 2 FLR 876 (magistrates failed to provide written reasons for their decision).

7 Maintenance Orders Act 1958 s 4(2A) (s 4(2A)-(2C) added by the Maintenance Enforcement Act 1991 Sch 1 para 9); Magistrates' Courts Act 1980 s 59(3)(a) (s 59 substituted by the Maintenance Enforcement Act 1991 s 2).

8 Magistrates' Courts Act 1980 s 59(3)(b) (as substituted (see note 7); amended by the Courts Act 2003 Sch 8 para 208).

9 le falling within the Magistrates' Courts Act 1980 s 59(6) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 820).

10 Magistrates' Courts Act 1980 s 59(3)(c) (as substituted: see note 7). In any case where the court proposes to exercise the power to order the making of payments by standing or similar order and having given the debtor an opportunity of opening an account from which payments under the order may be made in accordance with the method of payment proposed to be ordered the court is satisfied that the debtor has failed, without reasonable excuse, to open such an account, the court in exercising this power may order that the debtor open such an account: Maintenance Orders Act 1958 s 4(2B) (as so added); Magistrates' Courts Act 1980 s 59(4).

11 Magistrates' Courts Act 1980 s 59(3)(cc) (as substituted (see note 7); added by SI 1994/731).

12 le under the Attachment of Earnings Act 1971 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1431 et seq).

13 Magistrates' Courts Act 1980 s 59(3)(d) (as substituted: see note 7).

14 Maintenance Orders Act 1958 s 4(2C) (as added: see note 7). As to the meanings of 'debtor' and 'creditor' for these purposes see the Magistrates' Courts Act 1980 s 59; and **MAGISTRATES** vol 29(2) (Reissue) PARA 820 (definitions applied by the Maintenance Orders Act 1958 s 4(2C) (as so added)).

15 Maintenance Orders Act 1958 s 4(4) (amended by the Administration of Justice Act 1970 s 48(3)). As to the matters which a magistrates' court should take into account when deciding to remit see *Gsell v Gsell* [1971] 1 All ER 559n, [1971] 1 WLR 225n; *Goodall v Jolly* [1984] FLR 143, [1984] Fam Law 23.

16 Maintenance Orders Act 1958 s 4(6).

17 le except as provided by the Maintenance Orders Act 1958 s 4(5B) (see PARA 670).

18 le in accordance with the provisions of the Maintenance Orders Act 1958 Pt I.

19 Maintenance Orders Act 1958 s 4(6A) (added by the Administration of Justice Act 1977 Sch 3 para 3; amended by the Maintenance Enforcement Act 1991 Sch 1 para 9(3)).

20 le under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) or the Civil Partnership Act 2004 Sch 7: see PARA 530 et seq.

21 Maintenance Orders Act 1958 s 4(6B) (added by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 5; amended by the Civil Partnership Act 2004 Sch 27 para 22(1), (3)).

22 Maintenance Orders Act 1958 s 4(7) (amended by the Administration of Justice Act 1977 Sch 5); Family Proceedings Rules 1991, SI 1991/1247, r 7.28. Rule 8.2 (see PARA 900) applies as it applies in relation to an appeal from a magistrates' court under the Domestic Proceedings and Magistrates' Courts Act 1978: Family Proceedings Rules 1991, SI 1991/1247, r 7.28. See also *Hackshaw v Hackshaw* [1999] 3 FCR 451, [1999] 2 FLR 876 (cited in note 6).

23 See PARA 670.

UPDATE

669 Variation of rate of payments

TEXT AND NOTE 22--1958 Act s 4(7) amended: SI 2009/871. SI 1991/1247 r 7.28 revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and PARA 900.

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670. Variation of means of payment on application by interested parties.

Where an order¹ (other than a Scottish or Northern Irish order deemed² to have been made by the High Court) has been registered³ in a magistrates' court⁴ and payments under it are required to be made by standing or similar order⁵, an interested party⁶ may apply in writing to the court for the order to be varied⁷. Where such an application has been made, a justices' clerk, after giving written notice (by post or otherwise) of the application to any other interested party⁸ and allowing that party⁹ an opportunity to make written representations, may vary the order to provide that payments under the order be made to the designated officer for the court¹⁰.

Where such an application has been made, the clerk may, if he considers it inappropriate to exercise these powers, refer the matter to the court which may vary the order by exercising one of the following powers¹¹:

- 875 (1) to order that payments under the order be made directly by the debtor to the creditor¹²;
- 876 (2) to order that payments under the order be made to the designated officer for the court or for any other magistrates' court¹³;
- 877 (3) to order that payments under the order be made by the debtor to the creditor by standing order or such similar method of payment¹⁴ as may be specified¹⁵;
- 878 (4) to order that payments under the order be made in accordance with arrangements made by the Secretary of State for their collection¹⁶; and
- 879 (5) to make an attachment of earnings order¹⁷ to secure payments under the order¹⁸.

In deciding which of these powers it is to exercise, the court must have regard to any representations made by the debtor and the creditor¹⁹.

These provisions also apply, in a modified form, in relation to Scottish and Northern Irish orders deemed²⁰ to have been made by the High Court²¹.

1 As to the meaning of 'order' see PARA 664 note 2.

2 Ie by virtue of the Maintenance Orders Act 1958 s 1(2) (see PARA 664). See the text and notes 20-21.

3 Ie under the Maintenance Orders Act 1958 Pt I (ss 1-5): see PARA 664 et seq.

4 As to the meaning of 'magistrates' court' see PARA 664 note 3.

5 Ie by any method of payment falling within the Magistrates' Courts Act 1980 s 59(6) (payment by standing or similar order: see **MAGISTRATES** vol 29(2) (Reissue) PARA 820).

6 Ie the debtor, the creditor or, if the person who applied for the maintenance order is a person other than the creditor, that other person: Maintenance Orders Act 1958 s 4(5A) (s 4(5A), (5B) added by the Maintenance Enforcement Act 1991 Sch 1 para 9; amended by the Access to Justice Act 1999 Sch 13 paras 25, 28, Sch 15 Pt V; the Courts Act 2003 Sch 8 para 100; the Civil Partnership Act 2004 Sch 27 para 22(1), (2)); Magistrates' Courts Act 1980 s 60(7) (ss 59, 60 substituted by the Maintenance Enforcement Act 1991 ss 2, 4; Magistrates' Courts Act 1980 s 60(4) amended by the Courts Act 2003 Sch 8 para 211(1), (2), Sch 10). For these purposes

the Domestic Proceedings and Magistrates' Courts Act 1978 s 23(2) (see PARA 576) the Children Act 1989 s 15(2) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 542) and the Civil Partnership Act 2004 Sch 6 para 42 (see PARA 576), are to be disregarded: Maintenance Orders Act 1958 s 4(5A) (as so added and amended). As to the meanings of 'debtor' and 'creditor' for these purposes see the Magistrates' Courts Act 1980 s 59; and **MAGISTRATES** vol 29(2) (Reissue) PARA 820 (definitions applied by s 60(11)(a) (as so substituted)).

7 Magistrates Courts Act 1980 s 60(4) (as substituted: see note 6). For procedure on variation see the Family Proceedings Rules 1991, SI 1991/1247, r 7.27.

8 The clerk may, however, proceed with an application under the Magistrates' Courts Act 1980 s 60(4) notwithstanding that any such interested party has not received written notice of the application: s 60(6) (as substituted: see note 6).

9 Ie within the period of 14 days beginning with the date of the giving of the notice: Magistrates' Courts Act 1980 s 60(5) (as substituted: see note 6; amended by the Access to Justice Act 1999 Sch 13 paras 95, 101; the Courts Act 2003 Sch 8 para 211(3)).

10 Magistrates' Courts Act 1980 s 60(5) (as substituted and amended: see notes 6, 9).

11 Maintenance Orders Act 1958 s 4(5A) (as added and amended: see note 6); Magistrates Courts Act 1980 s 60(8) (as so substituted).

12 Magistrates' Courts Act 1980 ss 59(3)(a), 60(8) (as substituted: see note 6).

13 Magistrates' Courts Act 1980 s 59(3)(b) (as substituted (see note 6); amended by the Courts Act 2003 Sch 8 para 208).

14 See note 5.

15 Magistrates' Courts Act 1980 s 59(3)(c) (as substituted: see note 6). In any case where the court proposes to exercise the power to order the making of payments by standing or similar order and having given the debtor an opportunity of opening an account from which payments under the order may be made in accordance with the method of payment proposed to be ordered the court is satisfied that the debtor has failed, without reasonable excuse, to open such an account, the court in exercising this power may order that the debtor open such an account: Maintenance Orders Act 1958 s 4(5A) (as so added and amended); Magistrates' Courts Act 1980 ss 59(4), 60(9).

16 Magistrates' Courts Act 1980 s 59(3)(cc) (as substituted (see note 6); added by SI 1994/731).

17 Ie under the Attachment of Earnings Act 1971 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1431 et seq).

18 Magistrates' Courts Act 1980 s 59(3)(d) (as substituted: see note 6).

19 Maintenance Orders Act 1958 s 4(5A) (as so added and amended: see note 6); Magistrates' Courts Act 1980 s 60(10).

20 Ie by virtue of the Maintenance Orders Act 1958 s 1(2) (see PARA 664).

21 Maintenance Orders Act 1958 s 4(5B) (as added and amended: see note 6).

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(C) REGISTRATION OF MAGISTRATES' COURT ORDERS IN THE HIGH COURT

671. Orders that may be registered.

A person entitled to receive payments under a magistrates' court order¹ who considers that it could more effectively be enforced if it were registered² in the High Court may apply for the registration of the order in the High Court; and the court may, if it thinks fit, grant the application³.

Where a magistrates' court order provides both for the payment of a lump sum and for the making of periodical payments, a person entitled to receive a lump sum under the order who considers that, so far as it relates to that sum, the order could be more effectively enforced if it were registered in the High Court may⁴ apply to the court which made the order for the registration in the High Court so far as it so relates, and the court may, if it thinks fit, grant the application⁵.

1 For these purposes 'magistrates' court order' means an order made by a magistrates' court (Maintenance Orders Act 1958 s 1(3)) and, for the purposes of s 2, includes a maintenance order deemed to be made by a magistrates' court by virtue of s 1(2) (see PARA 664): s 2(6A) (added by the Administration of Justice Act 1977 Sch 3 para 3).

2 As to the meaning of 'registered' see PARA 664 note 3.

3 Maintenance Orders Act 1958 s 2(3) (s 2(3) amended, s 2(3A), (3B) added, by the Civil Jurisdiction and Judgments Act 1982 Sch 11 para 2).

4 Ie without prejudice to the Maintenance Orders Act 1958 s 2(3) (see the text and notes 1-3).

5 Maintenance Orders Act 1958 s 2(3A) (as added: see note 3). Where such an application is granted in the case of a magistrates' court order, the provisions of Pt I (ss 1-5) (see PARA 664 et seq) have effect in relation to that order as if, so far as it relates to the payment of a lump sum, it were a separate order: s 2(3B) (as so added).

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672. Effect of registration.

Where a magistrates' court order¹ is registered² in the High Court:

- 880 (1) if payments under the magistrates' court order are required to be made, otherwise than to the designated officer for a magistrates' court, by any authorised method of payment³, any order requiring payment by that method continues to have effect after registration⁴; and
- 881 (2) any order by virtue of which sums payable under the magistrates' court order are required to be paid to the designated officer for a magistrates' court, whether or not by any authorised method of payment⁵, on behalf of the person entitled thereto ceases to have effect⁶.

Where⁷ payments under an order cease to be or to become payable to the designated officer for a magistrates' court the person liable to make the payments is deemed, until he is given the prescribed notice to that effect, to comply with the order if he duly⁸ makes payments⁹.

1 As to the meaning of 'magistrates' court order' see PARA 671 note 1.

2 Ie under the Maintenance Orders Act 1958 Pt I (ss 1-5) (see PARA 664 et seq).

3 Ie any method of payment falling within the Magistrates' Courts Act 1980 s 59(6) (standing orders etc) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 820).

4 Maintenance Orders Act 1958 s 2(6)(a) (s 2(6) substituted, s 2(6ZB), (6ZC) added, by the Maintenance Enforcement Act 1991 Sch 1 para 7; Maintenance Orders Act 1958 s 2(6), (6ZC) amended by the Courts Act 2003 Sch 8 para 98(1), (4), (6)). Any such order may be revoked, suspended, revived or varied by an exercise of the powers conferred by the Maintenance Orders Act 1958 s 4A (see PARA 674): s 2(6ZB)(a) (as so added).

5 See note 3.

6 Maintenance Orders Act 1958 s 2(6)(b) (as substituted and amended: see note 4).

7 Ie by virtue of the provisions of the Maintenance Orders Act 1958 s 2 or any order under s 2(6ZA)(b) (see PARA 668).

8 Ie in accordance with the order and any order under the Maintenance Orders Act 1958 s 2(6ZA)(b) (see PARA 668).

9 Maintenance Orders Act 1958 s 2(6ZC) (as added and amended: see note 4).

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673. Interest on sums recoverable under certain orders registered in the High Court.

Where, in connection with an application for the registration¹ of a magistrates' court order² in the High Court, the applicant shows:

- 882 (1) that the order, though deemed³ to have been made by a magistrates' court⁴ in England or Wales, was in fact made in another part of the United Kingdom or in a country or territory outside the United Kingdom⁵; and
- 883 (2) that, as regards any sum for whose payment the order provides, interest on that sum at a particular rate is, by the law of that part or of that country or territory, recoverable under the order from a particular date or time⁶,

then, if the original court⁷ grants the application and causes a certified copy of the order to be sent to the prescribed officer of the High Court⁸, it must also cause to be sent to him a certificate in the prescribed form showing, as regards that sum, the rate of interest so recoverable and the date or time from which it is so recoverable⁹. The officer of the court who receives such a certificate sent to him must cause the certificate to be registered in that court together with the order to which it relates¹⁰.

Where an order is so registered together with a certificate, sums payable under the order carry interest at the rate specified in the certificate from the date or time so specified¹¹.

Except as provided by these provisions, sums payable under registered orders do not carry interest¹².

1 Ie under the Maintenance Orders Act 1958 s 2(3): see PARA 671.

2 As to the meaning of 'magistrates' court order' see PARA 671 note 1.

3 Ie for the purposes of the Maintenance Orders Act 1958 s 1: see PARA 664.

4 As to the meaning of 'magistrates' court' see (unless the context otherwise requires) the Magistrates' Courts Act 1980 s 148; and **MAGISTRATES** vol 29(2) (Reissue) PARA 583 (definition applied by the Maintenance Orders Act 1958 s 21(1) (amended by the Magistrates' Courts Act 1980 Sch 7 para 24)).

5 Maintenance Orders Act 1958 s 2A(1)(a) (s 2A added by the Civil Jurisdiction and Judgments Act 1982 Sch 11 para 6(1), (2)).

6 Maintenance Orders Act 1958 s 2A(1)(b) (as added: see note 5).

7 As to the meaning of 'original court' see PARA 666 note 3.

8 Ie under the Maintenance Orders Act 1958 s 2(4)(c) (see PARA 948).

9 Maintenance Orders Act 1958 s 2A(1) (as added: see note 5).

10 Maintenance Orders Act 1958 s 2A(2) (as added: see note 5).

11 Maintenance Orders Act 1958 s 2A(3) (as added: see note 5). Provision may, however, be made by rules of court as to the manner in which, and the periods by reference to which, any interest payable by virtue of the

Maintenance Orders Act 1958 s 2A(3) is to be calculated, including provision for such interest to cease to accrue as from a prescribed date: s 2A(4) (as so added).

12 Maintenance Orders Act 1958 s 2A(5) (as added: see note 5).

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674. Variation etc of orders registered in the High Court.

The High Court may¹ exercise the same powers in relation to a registered order as are exercisable by the High Court under the Maintenance Enforcement Act 1991² in relation to a qualifying periodical maintenance order³ which has been made by the High Court, including the power⁴ to revoke, suspend, revive or vary an order⁵ requiring payment and any means of payment order⁶ made by virtue of the above provisions⁷.

1 Ie in the case of orders registered in the High Court, other than maintenance orders deemed to be made by a magistrates' court by virtue of the Maintenance Orders Act 1958 s 1(4) (see PARA 664).

2 Ie under the Maintenance Enforcement Act 1991 s 1: see PARA 644 et seq.

3 Ie within the meaning of the Maintenance Enforcement Act 1991 s 1: see PARA 644.

4 Ie under the Maintenance Enforcement Act 1991 s 1(7): see PARA 646.

5 Ie any such order as is referred to in the Maintenance Orders Act 1958 s 2(6)(a) (see PARA 672).

6 Ie within the meaning of the Maintenance Enforcement Act 1991 s 1(7): see PARA 646.

7 Maintenance Orders Act 1958 s 4A(1), (2) (added by the Maintenance Enforcement Act 1991 Sch 1 para 10).

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(D) CANCELLATION OF REGISTRATION

675. Cancellation of registration.

Notice of cancellation of the registration¹ of an order² may be given where a person entitled to receive payments under a registered order desires the registration to be cancelled³ or where the original court⁴ thinks fit to do so on varying or discharging an order registered in a magistrates' court⁵. Notice of cancellation must be given where the original court discharges an order registered in the High Court and it appears to the original court, whether by reason of the remission of arrears by that court or otherwise, that no arrears under the order remain to be recovered⁶.

Notice of cancellation must be given to the court of registration⁷; and, where such notice is given:

- 884 (1) no proceedings for the enforcement of the registered order may be begun before the cancellation of the registration and no writ, warrant or other process for the enforcement thereof may be issued in consequence of any such proceedings begun before the giving of the notice⁸; and
- 885 (2) the court of registration must cancel the registration on being satisfied in the prescribed manner that no process for the enforcement of the registered order issued before the giving of the notice remains in force⁹ and, in the case of an order registered in a magistrates' court, that no proceedings for the variation of the order are pending in a magistrates' court¹⁰.

On the cancellation of the registration of a High Court order¹¹ or county court order¹²:

- 886 (a) any order which requires payments under the order in question to be made, otherwise than to the designated officer for a magistrates' court, by any approved method of payment¹³ continues to have effect¹⁴; and
- 887 (b) any order¹⁵ which requires payments under the order in question to be made to the designated officer for a magistrates' court, whether or not by an approved method of payment, ceases to have effect¹⁶,

but, in a case falling within head (b) above, until the defendant¹⁷ receives the prescribed notice of the cancellation, he is deemed to comply with the High Court or county court order if he makes payment in accordance with any such order as is referred to in head (b) above which was in force immediately before the cancellation and of which he has notice¹⁸.

On the cancellation of the registration of a magistrates' court order¹⁹:

- 888 (i) any order which requires payments under the magistrates' court order to be made by any approved method of payment²⁰ continues to have effect²¹; and
- 889 (ii) in any other case, payments become payable to the designated officer for the original court²²,

but, in a case falling within head (ii) above, until the defendant receives the prescribed notice of the cancellation, he is deemed to comply with the magistrates' court order if he makes payments in accordance with any order which was in force immediately before the cancellation and of which he has notice²³.

1 As to the meaning of 'registration' see PARA 664 note 3.

2 As to the meaning of 'order' see PARA 666 note 1.

3 Maintenance Orders Act 1958 s 5(1).

4 As to the meaning of 'original court' see PARA 666 note 3.

5 Maintenance Orders Act 1958 s 5(2). As to the meaning of 'magistrates' court' see (unless the context otherwise requires) the Magistrates' Courts Act 1980 s 148; and **MAGISTRATES** vol 29(2) (Reissue) PARA 583 (definition applied by the Maintenance Orders Act 1958 s 21(1) (amended by the Magistrates' Courts Act 1980 Sch 7 para 24)).

6 Maintenance Orders Act 1958 s 5(3) (amended by the Administration of Justice Act 1977 Sch 3 para 4(a)).

7 As to the meaning of 'court of registration' see PARA 664 note 4. For these purposes, 'court of registration' includes any court in which an order is registered under the Maintenance Orders Act 1950 Pt II (ss 16-25) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 293-300) and 'registration' includes registration under that Act: Maintenance Orders Act 1958 s 5(4A) (added by the Administration of Justice Act 1977 Sch 3 para 4(b)). A notice under the Maintenance Orders Act 1958 s 5 by a person entitled to receive payments under an order registered in the High Court must be given to the proper officer: Family Proceedings Rules 1991, SI 1991/1247, r 7.29(1). Where the High Court gives notice under the Maintenance Orders Act 1958 s 5, the proper officer must indorse the notice on the certified copy mentioned in the Family Proceedings Rules 1991, SI 1991/1247, r 7.27(1) (see PARA 669): r 7.29(2). Where notice under the Maintenance Orders Act 1958 s 5 is given in respect of an order registered in the High Court, the proper officer, on being satisfied by an affidavit by the person entitled to receive payments under the order that no process for the enforcement of the order issued before the giving of the notice remains in force, must: (1) cancel the registration by entering particulars of the notice in the register or cause book, as the case may be; and (2) send notice of the cancellation to the designated officer for the court by which the order was made and, where applicable, to the designated officer for the magistrates' court in which the order was registered in accordance with the Maintenance Orders Act 1950 s 17(4) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 294) stating, if such be the case, that the cancellation is in consequence of a notice given under the Maintenance Orders Act 1958 s 5(1): Family Proceedings Rules 1991, SI 1991/1247, r 7.29(3) (amended by SI 2001/821; SI 2005/617). On receipt of notice from the designated officer for a magistrates' court that the registration in that court under the Maintenance Orders Act 1958 of an order made by the High Court or a county court has been cancelled, the proper officer must enter particulars of the cancellation on the same documents or in the same records as particulars of registration are required by the Family Proceedings Rules 1991, SI 1991/1247, r 7.23(4) (see PARA 667) to be entered: r 7.29(4) (amended by SI 2001/821; SI 2005/617). On receipt of notice from the designated officer for a magistrates' court that the registration in that court under the Maintenance Orders Act 1958 of an order registered in the High Court in accordance with the Maintenance Orders Act 1950 s 17(4) has been cancelled, the proper officer must note the cancellation in Pt II of the register: Family Proceedings Rules 1991, SI 1991/1247, r 7.29(5) (amended by SI 2005/617). As to the meaning of 'proper officer' see PARA 461 note 4; and as to the meaning of 'register' see PARA 25.

8 Maintenance Orders Act 1958 s 5(4)(a).

9 Maintenance Orders Act 1958 s 5(4)(c)(i).

10 Maintenance Orders Act 1958 s 5(4)(c)(ii).

11 As to the meaning of 'High Court order' see PARA 666 note 1 (definition applied by the Maintenance Orders Act 1958 s 5(7) (s 5(5) substituted, s 5(6), (7) added, by the Maintenance Enforcement Act 1991 Sch 1 para 11)).

12 As to the meaning of 'county court order' cf PARA 666 note 2.

13 Is any method of payment falling within the Magistrates' Courts Act 1980 s 59(6) (standing orders etc) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 820) or the Maintenance Enforcement Act 1991 s 1(5) (see PARA 646).

14 Maintenance Orders Act 1958 s 5(5)(a) (as substituted (see note 11); Maintenance Orders Act 1958 s 5(5), (6) amended by the Courts Act 2003 Sch 8 para 101).

15 le any order made under the Maintenance Orders Act 1958 s 2(6ZA)(b) (see PARA 668) or by virtue of the powers conferred by s 3(2A) or (2B) (see PARA 665) or s 4(2A), (5A) or (5B) (see PARAS 669-670).

16 Maintenance Orders Act 1958 s 5(5)(b) (as substituted and amended: see notes 11, 14).

17 As to the meaning of 'defendant' see PARA 667 note 11.

18 Maintenance Orders Act 1958 s 5(5) (as substituted and amended: see notes 11, 14).

19 As to the meaning of 'magistrates' court order' see PARA 671 note 1 (definition applied by the Maintenance Orders Act 1958 s 5(7) (as added: see note 11)).

20 See note 13.

21 Maintenance Orders Act 1958 s 5(6)(a) (as added: see note 11).

22 Maintenance Orders Act 1958 s 5(6)(b) (as added and amended: see notes 11, 14).

23 Maintenance Orders Act 1958 s 5(6) (as added and amended: see notes 11, 14).

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C. REGISTRATION OF INTERESTS IN LAND

676. Home rights and other property rights.

A spouse or civil partner's home rights are a charge on the estate or interest of the other spouse or civil partner or, as the case may be, on the estate or interest of the trustees for the other spouse or civil partner and are registrable as such¹.

In respect of judgment creditors, interests in land may arise by virtue of unexecuted transfers of property which are capable of protection by way of registration in the land charges register, in the case of unregistered land, or on the land register, in the case of registered land. Such an interest in the land may arise because of the pending action for enforcement of the transfer². Alternatively, it has been held that an unexecuted transfer of property vests beneficial title in the transferee forthwith on the order being made and that the property is thereafter held by the transferor as trustee for the transferee³.

In the case of unregistered land, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, and any order appointing a receiver or sequestrator of land may be registered in the register of writs and orders affecting land⁴. The Land Charges Act 1972 and the Land Registration Act 2002 apply in relation to charging orders as they apply in relation to other orders or writs issued or made for the purpose of enforcing judgments⁵.

¹ See the Family Law Act 1996 ss 31, 32, Sch 4; and PARA 285 et seq.

² *Whittingham v Whittingham (National Westminster Bank Ltd intervening)* [1979] Fam 9, [1978] 3 All ER 805, CA.

³ *Re Harper (a bankrupt), Harper v O'Reilly* [1998] 3 FCR 475, sub nom *Harper v O'Reilly* [1997] 2 FLR 816 (when the order is to be construed as a variation of settlement, but not as a property adjustment order).

⁴ See the Land Charges Act 1972 s 6(1)(a), (b); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 654 et seq.

⁵ See the Charging Orders Act 1979 s 3(2); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 655. As to charging orders generally see PARA 636 et seq.

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(iv) Reciprocal Enforcement

677. Reciprocal enforcement of maintenance orders.

The order of a competent foreign court for periodical payments by way of maintenance will be enforceable in England and Wales by an action in personam on the judgment debt if the foreign order is final and conclusive¹. If, as is often the case, the order is subject to variation in the light of changing circumstances, it will not be final and conclusive². An action may still lie in England and Wales for accrued arrears, provided that variation by the foreign court cannot operate retrospectively³.

Statutory provision has been made for reciprocal enforcement of orders between different parts of the United Kingdom⁴ and between the United Kingdom and overseas countries⁵. Maintenance orders may also be enforced under the Brussels and Lugano Conventions⁶; but maintenance orders do not fall within the ambit of the Foreign Judgments (Reciprocal Enforcement) Act 1953⁷.

1 As to 'final and conclusive' see *Nouvion v Freeman* (1889) 15 App Cas 1, HL; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 158.

2 *Harrop v Harrop* [1920] 3 KB 386; *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522.

3 *Beatty v Beatty* [1924] 1 KB 807, CA.

4 See the Maintenance Orders Act 1950 Pt II (ss 16-25); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 293-300.

5 See the Maintenance Orders (Facilities for Enforcement) Act 1920; the Maintenance Orders (Reciprocal Enforcement) Act 1972; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 301-334.

6 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65 et seq.

7 See the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 11(2); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 177.

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(v) Limitation of Actions

678. The rules of limitation.

The right to take enforcement proceedings is unaffected by the rules of limitation¹ which prevent a fresh action being taken on a judgment once six years have elapsed from the date on which the judgment became enforceable². The right to apply for leave to issue a writ of fieri facias³ or warrant of execution⁴ has been held to be a matter of procedure and not a fresh action⁵. Since applications for third party debt orders⁶ and charging orders⁷ may be made notwithstanding the expiry of six years from the date of judgment⁸, the same principle would appear to apply to all other forms of enforcement not governed by specific limitation rules⁹.

1 The Limitation Act 1980 s 24(1); see **LIMITATION PERIODS** vol 68 (2008) PARA 1010.

2 *Lowsley v Forbes (t/a LE Design Services)* [1999] 1 AC 329, [1998] 3 All ER 897, HL.

3 As from a day to be appointed writs of fieri facias are renamed 'writs of control': see PARA 651 note 1.

4 As from a day to be appointed warrants of execution are renamed 'warrants of control': see PARA 651 note 2.

5 *National Westminster Bank plc v Powney* [1991] Ch 339, [1990] 2 All ER 416, CA; *Lowsley v Forbes* [1999] 1 AC 329, [1998] 3 All ER 897, HL.

6 As to third party debt orders see **CIVIL PROCEDURE** vol 12 (2009) PARA 1411. These orders were formerly known as 'garnishee orders': see **CIVIL PROCEDURE** vol 12 (2009) PARA 1225.

7 As to charging orders see PARA 636 et seq.

8 See *Lowsley v Forbes (t/a LE Design Services)* [1999] 1 AC 329, [1998] 3 All ER 897, HL.

9 It should be noted, however, that, while this is the strict position in law, many forms of enforcement process are discretionary and the court is unlikely to be sympathetic towards a judgment creditor who has delayed without good cause in enforcing his order. Moreover, where the order to be enforced is for the payment of a lump sum or periodical payments, the creditor will usually need leave to enforce arrears which are more than 12 months old; and even if leave is not required, the starting point will be that such arrears should be remitted: see generally PARA 679.

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679. Enforcement of arrears more than 12 months old.

A person is not entitled to enforce through the High Court or any county court the payment of any arrears due under an order for financial provision in connection with proceedings for divorce, dissolution, nullity or separation¹, an order for maintenance pending suit or the outcome of proceedings², or an order for financial provision in cases of failure to maintain during the subsistence of a marriage or civil partnership³, without the leave of that court if those arrears became due more than 12 months before proceedings to enforce the payment of them are begun⁴.

The court hearing such an application for the grant of leave may refuse leave, or may grant leave subject to such restrictions and conditions, including conditions as to the allowing of time for payment or the making of payment by instalments, as that court thinks proper, or may remit the payment of the arrears or of any part thereof⁵.

An application for the grant of such leave must be made in such manner as may be prescribed by rules of court⁶.

1 Ie an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-7) (see PARA 450 et seq).

2 Ie an order under the Matrimonial Causes Act 1973 s 22 or the Civil Partnership Act 2004 Sch 5 Pt 8 (para 38) (see PARA 456).

3 Ie an order under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 Pt 9 (paras 39-45) (see PARA 542 et seq).

4 Matrimonial Causes Act 1973 s 32(1); Civil Partnership Act 2004 Sch 5 para 63(1), (2). Although the strict requirement to obtain leave to enforce arrears applies only in the limited cases referred to in the text, the court as a general rule of practice, rather than of law, will remit or decline to enforce arrears of maintenance and lump sum payments which accrued more than 12 months before the application to enforce was commenced, unless there are special circumstances: see *B v C (maintenance: enforcement of arrears)* [1995] 2 FCR 678, sub nom *B v C (enforcement: arrears)* [1995] 1 FLR 467; *C v S (maintenance order: enforcement)* [1997] 3 FCR 423, [1997] 1 FLR 298; *R v Cardiff Magistrates, ex p Czech* [1999] 1 FCR 721, [1999] 1 FLR 95. In practice, therefore, the onus is on the judgment creditor to show why the 'stale' arrears should be enforced rather than on the judgment debtor to show why they should be remitted: *Pilcher v Pilcher (No 2)* [1956] 1 All ER 463, [1956] 1 WLR 298; *Ross v Pearson* [1976] 1 All ER 790, [1976] 1 WLR 224; *Fowler v Fowler* (1979) 2 FLR 141, 10 Fam Law 119; *Dickens v Pattison* [1985] FLR 610, [1985] Fam Law 163; *Russell v Russell* [1986] 1 FLR 465, [1986] Fam Law 156, CA; *Bernstein v O'Neill* [1989] FCR 79, [1989] 2 FLR 1; *Horsman v Horsman* [1993] 2 FCR 357, sub nom *H v H (financial provision)* [1993] 2 FLR 35; *B v C (maintenance: enforcement of arrears)*. It has been said that the court should consider whether to exercise a discretion to enforce rather than whether to exercise a discretion to remit: *Russell v Russell*. The court will take into account all the circumstances in exercising its discretion: an important consideration is the extent to which the creditor has sought to assert his rights by enforcing the order and the reasons for the delay: *Russell v Russell*. The mere fact that the judgment debtor is an irregular or reluctant payer is not an unusual circumstance justifying a departure from the general rule: *Russell v Russell*; *Dickens v Pattison*. The payer's flagrant defiance of or disregard for the order may, however, be a factor justifying departure from the ordinary rule: *Purba v Purba* [2000] 1 FCR 652, [2000] 1 FLR 444, CA. Even if the debtor is at fault in allowing arrears to accrue, the court should make an order for payment of arrears in addition to the amount due under the order only if there is evidence that he has the means to pay the additional sum: *B v C (maintenance: enforcement of arrears)*. In such circumstances, however, the court may decline to remit the arrears, thereby allowing the possibility of future enforcement proceedings; but see *Purba v Purba*.

An order for repayment under the Matrimonial Causes Act 1973 s 33 or the Civil Partnership Act 2004 Sch 5 para 64 (see PARA 573) may be applied for in proceedings under the Matrimonial Causes Act 1973 s 32 or the

Civil Partnership Act 2004 Sch 5 para 63: see the Matrimonial Causes Act 1973 s 33(4); the Civil Partnership Act 2004 Sch 5 para 64(7); and PARA 573. As to procedure on an application see PARA 949. As to the restrictions on the enforcement of arrears due under an order for the payment of money in a magistrates' court see the Domestic Proceedings and Magistrates' Courts Act 1978 s 32(4); and PARA 657. See also PARA 537.

5 Matrimonial Causes Act 1973 s 32(2); Civil Partnership Act 2004 Sch 5 para 63(3).

6 Matrimonial Causes Act 1973 s 32(3); Civil Partnership Act 2004 Sch 5 para 63(4).

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(vi) Interest

680. Enforcement of interest on judgments and orders.

In both the High Court and county courts the payment of accrued interest is enforceable in the same manner as the sum or sums due under the substantive judgment or order¹. However, interest may not be recovered after six years have expired from the date on which it became due².

Where the High Court or a county court makes a financial provision order for the payment of a lump sum and directs that payment of that sum or any part of it is to be deferred or that that sum or any part of it is to be paid by instalments, the court may order that the amount deferred or the instalments are to carry interest at such rate as may be specified by the order from such date, not earlier than the date of the order, as may be so specified, until the date when payment of it is due³.

1 See *Lowsley v Forbes (t/a LE Design Services)* [1999] 1 AC 329, [1998] 3 All ER 897, HL. However, once a judgment debt is secured by a charging order, interest continues to accrue and is recoverable on an application to enforce the charging order irrespective of the running of any limitation period: *Ezekiel v Orakpo* [1997] 1 WLR 340, CA. In both the High Court and county courts interest on lump sum orders accrues from the time stipulated for payment and not from the date of judgment: see *Preston v Preston* [1982] Fam 17, [1982] 1 All ER 41, CA.

2 See the Limitation Act 1980 s 24(2); *Lowsley v Forbes (t/a LE Design Services)* [1999] 1 AC 329, [1998] 3 All ER 897, HL; and **LIMITATION PERIODS** vol 68 (2008) PARA 1010.

3 See the Matrimonial Causes Act 1973 s 23(6); the Civil Partnership Act 2004 Sch 5 para 3(5)-(7); and PARA 479. This power may only be exercised at the time when the substantive order is made and not subsequently: *L v L (lump sum: interest)* [1995] 1 FCR 60, [1994] 2 FLR 324.

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681. Effect of enforcement proceedings on interest.

In the High Court, interest continues to run, notwithstanding that enforcement proceedings have been commenced, until the order has been satisfied in full¹. Where, however, a judgment creditor takes proceedings in a county court to enforce payment under the judgment, including any proceeding for examining or summoning a judgment debtor or attaching a debt owed to him but excluding proceedings under the Charging Orders Act 1979², the judgment debt ceases to carry interest thereafter, except where those proceedings fail to produce any payment from the debtor, in which case interest accrues as if those proceedings had never taken place³. Where an attachment of earnings order is made, interest does not accrue during the time the order is made⁴.

1 See the Judgments Act 1838 ss 17, 18; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

2 As to the Charging Orders Act 1979 see PARA 636 et seq.

3 See the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 4(1), (2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

4 See the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 4(3); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

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682. Enforcement of orders between the High Court and county court.

Where a High Court order is enforced in a county court, interest continues to accrue in accordance with High Court rules¹. Where a county court order for costs or a lump sum is transferred to the High Court, interest accrues following transfer as though it were a High Court order².

1 The County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1149), applies to relevant judgments, which includes a judgment or order of a county court for the payment of a sum of money of not less than £5,000: see the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 1(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149. If this analysis is correct, the initiation of enforcement proceedings will not cause the order to cease to carry interest. However, it is suggested that, if the entire High Court proceedings are transferred to a county court, the order becomes a county court order for all purposes and the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, will apply from the date of transfer.

2 See the Family Proceedings Rules 1991, SI 1991/1247, r 7.3; and PARA 952.

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683. Limitation on the recovery of interest.

Interest on a judgment debt is not recoverable after six years have expired from the date when the interest became due¹, even though there is no such limitation on the enforcement of the judgment itself².

1 See the Limitation Act 1980 s 24(2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1010.

2 See *Lowsley v Forbes (t/a LE Design Services)* [1999] 1 AC 329, [1998] 3 All ER 897, HL.

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(vii) Death of Party

684. Lapse of claims, applications and orders on death.

There is no general rule that, where one of the parties to a divorce or dissolution dies, the proceedings abate so that no further steps may be taken, and whether proceedings may be taken after the death of either party depends in each case on the answers to the following three questions:

- 890 (1) the nature of the further proceedings sought to be taken¹;
- 891 (2) the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both²; and
- 892 (3) the applicability of the statutory provisions³ which abolished the common law rule that personal actions died with the person⁴.

With the exception of orders for secured provision, orders entailing a continuing obligation lapse on death⁵.

1 *Barder v Barder (Caluori intervening)* [1988] AC 20 at 37, [1987] 2 All ER 440 at 449, HL per Lord Brandon of Oakbrook. See also PARA 538.

2 See note 1.

3 I.e. the Law Reform (Miscellaneous Provisions) Act 1934 s 1: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814.

4 See note 1. A right to apply for financial provision in family proceedings is not a cause of action within the meaning of the Law Reform (Miscellaneous Provisions) Act 1934 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814); if, therefore, either party dies before an application for financial provision or a property adjustment order has been determined, the court's jurisdiction will lapse: see *Dipple v Dipple* [1942] P 65, [1942] 1 All ER 234, HL (wife's right to apply for secured maintenance did not survive the husband's death); *D'Este v D'Este* [1973] Fam 55, sub nom *D(J) v D(S)* [1973] 1 All ER 349 (no jurisdiction to entertain an application by the husband's personal representatives against the wife for variation of a post-nuptial settlement). See also *Thomson v Thomson and Rodschinka* [1896] P 263, CA (no jurisdiction to entertain an application by the personal representatives of the husband to vary a post-nuptial settlement). In *Re Bramwell, Campbell v Tobin* [1988] 2 FLR 263 at 267, Sheldon J stated: 'In these circumstances, in my judgment, it is clear -- as has been recognised and acknowledged without recorded dissent for over 40 years -- that in matrimonial proceedings a claim for financial provision neither gives rise to nor becomes a 'cause of action' within [the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1)] unless an order has been made in respect of it before the death of the deceased: until such an order has been made, therefore, it remains a mere hope or contingency which survives neither against nor for the benefit of the deceased's estate'.

5 See *Sugden v Sugden* [1957] P 120, [1957] 1 All ER 300, CA (future payments under an order for child maintenance could not be enforced against the payer's personal representatives after his death); *Hinde v Hinde* [1953] 1 All ER 171, [1953] 1 WLR 175, CA (wife could not compel the personal representatives of the husband to continue to pay maintenance to her after his death). An order for maintenance pending suit lapses automatically on the death of either party: *Scott v Scott* [1952] 2 All ER 890; *Hinde v Hinde*. The Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 (under which none of the cases referred to above was decided) makes it quite plain that a periodical payments order may not extend beyond the death of either party: see the Matrimonial Causes Act 1973 ss 28(1)(a), 29(4); the Civil Partnership Act 2004 Sch 5 paras 47(1)-(4), 49(6); and PARAS 460, 496, 546, 550. By contrast, it is of the essence of an order for secured periodical payments that it survives the death of the debtor: see *Hyde v Hyde* [1948] P 198, [1948] 1 All ER 362 (order for secured maintenance, the husband dying before he had executed the necessary deed; it was held that the

court had jurisdiction to entertain an application by the wife against the husband's personal representative for an order that he should execute the deed). In *Mosey v Mosey and Barker* [1956] P 26, [1955] 2 All ER 391 the husband died after the order was made but before the property to be used as security had been agreed or decided; and it was held that the order was enforceable against his personal representatives. An order for secured provision may not, however, continue beyond the death of the creditor: see the Matrimonial Causes Act 1973 s 28(1)(b); the Civil Partnership Act 2004 Sch 5 para 47(1), (3), (4); and PARA 469.

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685. Enforceability of orders generally following death.

It is suggested that¹, as a general rule, if an unfulfilled financial obligation in existence at the date of death could have been enforced during the lifetime of the deceased, such an obligation is a cause of action within the meaning of the Law Reform (Miscellaneous Provisions) Act 1934². Accordingly, the death of either party will not act as a bar to enforcement proceedings being taken to enforce such an obligation which has crystallised at the date of death³, although any obligation of a continuing nature will cease⁴. It is further suggested that the judicial principles laid down by the court⁵ are not limited to orders made in divorce or dissolution proceedings but are of equal application to all financial orders and agreements, and possibly undertakings, in family proceedings. If these two propositions are correct, such obligations may be enforced both by the creditor against the estate of the debtor and by the estate of the creditor against the debtor⁶.

1 In contrast to the propositions stated in PARA 684.

2 In within the meaning of the Law Reform (Miscellaneous Provisions) Act 1934 s 1: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814.

3 In *Sugden v Sugden* [1957] P 120 at 134, 135, [1957] 1 All ER 300 at 302, CA, Denning LJ stated: 'Causes of action are not, however, confined to rights enforceable by action, strictly so called, that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the divorce court, provided that they really are rights and not mere hopes or contingencies. They include, for instance, a sum payable for costs under an order of the divorce court, or a right to a secured provision under an order already made against a man before his death: see *Hyde v Hyde* [1948] P 198, [1948] 1 All ER 362 and *Mosey v Mosey and Barker* [1956] P 26, [1955] 2 All ER 391. It must be noticed, however, that [the Law Reform (Miscellaneous Provisions) Act 1934 s 1] only applies to causes of action 'subsisting against' the deceased on his death. This means that the right or liability must have accrued due at the time of his death . . . I would add that, in divorce proceedings, in order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. Thus a cause of action subsists against a husband for arrears of maintenance due at his death, but not for later payments'. Although only an obiter dictum, this passage must carry great weight: see *Kelly v Kelly and Brown* [1961] P 94 at 100, [1960] 3 All ER 232 at 235. In *Re Lane, Lane v Lane* [1986] 1 FLR 283, [1986] Fam Law 74 (where it was held that a consent order requiring the wife to transfer property to him could be enforced by the husband's executors after his death), Sheldon J applied the tests propounded by Sachs J in *Mosey v Mosey and Barker* [1956] P 26 at 40, [1955] 2 All ER 391 at 393, 394, namely, that the essential question is whether the order created an 'enforceable claim', as it would do if 'within its four corners it lays down what is to be done and how it is to be done' or 'if the court can and will exercise its powers to ensure the order is enforced' during the lifetime of the deceased. See also *Re Bramwell, Campbell v Tobin* [1988] 2 FLR 263 at 267 per Sheldon J; *Whyte v Ticehurst* [1986] Fam 64, sub nom *Whyte v Ticehurst* [1986] 2 All ER 158. The decisions in *Stanhope v Stanhope* (1886) 11 PD 103, CA; *Walpole v Walpole* [1901] P 86; *Schenk v Schenk* (1908) 24 TLR 739; *Brydges v Brydges* [1909] P 187, CA; *Coleman v Coleman* [1920] P 71; *Re Hedderwick, Morton (or Morten) v Brinsley* [1933] Ch 669; *Re Woolgar, Woolgar v Hopkins* [1942] Ch 318, [1942] 1 All ER 583; *Re Bidie, Bidie v General Accident Fire and Life Assurance Corp'n Ltd* [1948] Ch 697, [1948] 1 All ER 885 (on appeal [1949] Ch 121, [1949] 2 All ER 995, CA), sometimes cited as authority for the proposition that orders for payment made in divorce or dissolution proceedings, including maintenance arrears, cannot be enforced in those proceedings against the debtor's executor, were either decided before the Law Reform (Miscellaneous Provisions) Act 1934 s 1 or, while decided after that Act, contain no reference to it. They must for this reason be considered to be of doubtful authority on this point. *Re Woolgar, Woolgar v Hopkins* was doubted in *W v W* [1961] P 113, [1961] 2 All ER 56, CA.

4 See PARA 684 text and note 4.

5 In *Barder v Barder (Caluori intervening)* [1988] AC 20 at 37, [1987] 2 All ER 440 at 449, HL per Lord Brandon of Oakbrook: see PARA 684.

6 le because the Law Reform (Miscellaneous Provisions) Act 1934 s 1 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814) refers to 'causes of action subsisting against or vested in [the deceased]': see *Whyte v Ticehurst* [1986] 2 FLR 83 at 86.

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686. Enforceability of particular orders following death.

It is suggested that arrears of periodical payments and a lump sum may be enforced notwithstanding the death of the debtor or the creditor¹.

A consent order requiring a spouse or civil partner to transfer property to the other spouse or civil partner may be enforced by the second spouse or civil partner's executors after his or her death².

A costs order, even if the amount payable has not been assessed at the date of death, may be enforced against the estate of the deceased³.

By analogy with orders, it is suggested that arrears which have accrued under a financial undertaking may be enforced against the estate of the debtor⁴.

A right under a contract is a cause of action which survives death⁵. The court has declined to rescind a concluded agreement which the parties intended should be enshrined in a consent order, where one party died soon afterwards⁶. The remedy of specific performance should, therefore, be available to the personal representatives of the creditor seeking to uphold an agreement concluded before death⁷.

1 See PARA 685. Arrears of periodical payments for the benefit of children arising under an order made under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004 are expressly provided to be enforceable despite the death of the debtor (see the Matrimonial Causes Act 1973 s 29(4); the Civil Partnership Act 2004 Sch 5 para 49(6); and PARAS 496, 550); but there is no corresponding provision relating to arrears of maintenance for a spouse or civil partner.

2 *Re Lane, Lane v Lane* [1986] 1 FLR 283 at 286 per Sheldon J ('In my judgment, there can be no doubt in the present instance that the deceased, prior to his death, could have applied to the court for an order which would have had the effect of compelling the respondent to comply with the terms of the order . . . That being so, in my opinion, there was vested in him at the date of his death a 'cause of action' within the meaning of [the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1)]').

3 *Kelly v Kelly and Brown* [1961] P 94, [1960] 3 All ER 232 (husband's personal representatives could apply for assessment of a costs order made against the co-respondent, and subsequent enforcement of the order); see also *Rysak v Rysak and Bugejaski* [1967] P 179, [1966] 2 All ER 1036 (an award of damages against a co-respondent could be enforced against his estate) and *Richards v Richards and Flockton* (1940) 58 TLR 142n (assessment of costs allowed to proceed against the personal representative of a co-respondent who had died after decree, as the order for costs had been made in the lifetime of the deceased and thus there was an enforceable claim under the Law Reform (Miscellaneous Provisions) Act 1934 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814 et seq)).

4 It has been held that financial undertakings may be enforced by judgment summons if they are an integral and indivisible part of the order: *Symmons v Symmons* [1993] 2 FCR 247, [1993] 1 FLR 317. See also *M v M (enforcement: judgment summons)* [1993] Fam Law 469.

5 *Ie* under the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1): see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814.

6 *Ie* as in *Amey v Amey* [1992] 1 FCR 289, [1992] 2 FLR 89.

7 See PARA 685.

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(viii) Bankruptcy of Party

687. Enforcement proceedings against bankrupt.

A financial obligation arising in family proceedings is capable of being a bankruptcy debt¹, and thus of founding a bankruptcy petition². However, since it may not be proved in the bankruptcy, the judgment creditor will have no entitlement to a distribution from the bankrupt's estate in respect of the debt³.

The judgment debtor will not on his discharge from bankruptcy be released from any bankruptcy debt arising from any order made in family proceedings (as defined for insolvency purposes), except to such extent and on such conditions as the court may direct⁴. The judgment creditor will thus be at liberty to take enforcement proceedings against the debtor's assets acquired following his discharge.

The judgment creditor is not in principle debarred from taking proceedings to enforce the debt during the currency of the bankruptcy⁵.

While the court has the power to make a bankruptcy order based on a debt arising within family proceedings, it will exercise such a power only in a wholly exceptional case⁶.

¹ Ie, essentially, any debt or liability to which the bankrupt is subject at the commencement of the bankruptcy or to which he may become subject after the commencement of the bankruptcy, including after his discharge from bankruptcy, by reason of any obligation incurred before the commencement of the bankruptcy: see the Insolvency Act 1986 s 382(1)(a), (b); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491. The bankruptcy of a judgment debtor against whom a bankruptcy order has been made commences with the day on which the order is made: see s 278(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 830.

² Ie the judgment creditor being a creditor for the purpose of the Insolvency Act 1986 ss 264(1)(a), 383(1) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 560, 826); see *Russell v Russell* [1999] 2 FCR 137, [1998] 1 FLR 936.

³ See the Insolvency Rules 1986, SI 1986/1925, r 12.3(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491. In *Woodley v Woodley* [1993] 1 FCR 701, [1992] 2 FLR 417, CA, Ewbank J questioned whether the Insolvency Rules 1986, SI 1986/1925, r 12.3 was intra vires, given that the Insolvency Act 1986 s 382 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491) specifies the nature of bankruptcy debts; but in *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA, Balcombe LJ held that the Insolvency Rules 1986, SI 1986/1925, r 12.3 was intra vires, there being no inconsistency between its provisions and those of the Insolvency Act 1986. Nevertheless, he queried whether the change to the previous law effected by the rule had been intended by the Insolvency Rules Committee. See also *Russell v Russell* [1999] 2 FCR 137, [1998] 1 FLR 936. An order for costs made in ancillary relief proceedings is an order to which Insolvency Rules 1986, SI 1986/1925, r 12.3(2)(a) applies: *Levy v Legal Services Commission* [2001] 1 All ER 895, [2001] 1 FCR 178, CA. See also *Wehmeyer v Wehmeyer* [2001] 2 FLR 84.

⁴ See the Insolvency Act 1986 s 281(5), (8); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 643. The onus is on the judgment debtor to demonstrate that his release is justified: *Re Schumacher* (1907) 23 TLR 336. There are no reported cases on the application of the Insolvency Act 1986 s 281(5) to family proceedings.

⁵ The prohibition on other remedies provided by the Insolvency Act 1986 s 285(3) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218) applies only to debts which are provable in the

bankruptcy: see PARA 688. Such enforcement proceedings may be stayed or permitted to continue on terms:
see PARA 688.

6 See PARA 692.

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688. Restrictions on enforcement proceedings against bankrupt.

The general protection against enforcement process enjoyed by a bankrupt judgment debtor does not apply where the bankruptcy debt has arisen in family proceedings¹. However, at any time when proceedings on a bankruptcy petition are pending or a judgment debtor has been adjudged bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, the bankrupt². Furthermore, any court in which an application for enforcement is pending against any judgment debtor may, on proof that a bankruptcy petition has been presented in respect of that debtor or that he is an undischarged bankrupt, either stay the application or allow it to continue on such terms as it thinks fit³.

Specific provision is made for certain forms of enforcement process issued before the commencement of the bankruptcy⁴. Where execution has been issued against the judgment debtor's goods or land or a third party debt order⁵ has been obtained attaching debts due to him, the judgment creditor will not be entitled, as against the official receiver or the trustee in bankruptcy, to retain the benefit of such proceedings unless they were completed, or any sums paid to avoid the proceedings were paid, before the commencement of the bankruptcy⁶. An execution against goods⁷ is completed by seizure and sale or by the making of a charging order⁸; an execution against land is completed by seizure, by the appointment of a receiver or the making of a charging order⁹; and an attachment of a debt is completed by the actual receipt¹⁰ of the debt by the judgment creditor¹¹. The court does, however, have a discretion to set aside, to such extent and on such terms as it thinks fit, the rights so conferred on the trustee or the official receiver in favour of the judgment creditor¹².

1 le because the protection applies only where the debts are provable in the bankruptcy: see the Insolvency Act 1986 s 285(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218. Debts arising from family proceedings are not provable in the bankruptcy: see the Insolvency Rules 1986, SI 1986/1925, r 12.3(2)(a); PARA 687 note 3; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491.

2 See the Insolvency Act 1986 s 285(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

3 See the Insolvency Act 1986 s 285(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

4 The bankruptcy of a judgment debtor against whom a bankruptcy order has been made commences with the day on which the order is made: see the Insolvency Act 1986 s 278(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 830. As to the general powers of the court see s 285; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

5 As to third party debt orders see **CIVIL PROCEDURE** vol 12 (2009) PARA 1411. These orders were formerly known as 'garnishee orders': see **CIVIL PROCEDURE** vol 12 (2009) PARA 1225.

6 See the Insolvency Act 1986 s 346(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 678.

7 As to execution against goods see PARA 651 et seq.

8 See the Insolvency Act 1986 s 346(5)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 683. As to charging orders see PARA 636 et seq. As to the obligations of sheriffs and others charged with execution against goods in the event that execution has not been completed prior to the

bankruptcy, and as to rights of third parties and property which has been acquired by or has devolved on a judgment debtor since the commencement of the bankruptcy, see s 346(2)-(4), (7), (8); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 678-679, 682.

9 See the Insolvency Act 1986 s 346(5)(b); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 684.

10 Constructive receipt is not sufficient: see eg *Butler v Wearing* (1885) 17 QBD 182.

11 See the Insolvency Act 1986 s 346(5)(c); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 685.

12 See the Insolvency Act 1986 s 346(6); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 678-679, 681.

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689. Enforcing orders for financial provision.

There is no automatic bar on enforcement proceedings against a bankrupt, although it is open to the trustee to apply for a stay of such proceedings¹.

A secured provision order is unaffected by the judgment debtor's bankruptcy and may be enforced if necessary by application to realise the security². It is in principle open to the judgment creditor to enforce a lump sum order against the bankrupt's income³.

The judgment debtor's bankruptcy will not operate so as to release him from a financial undertaking. Such an undertaking is in principle enforceable against the bankrupt's income in the same way as a maintenance order. A costs order made in family proceedings will not be provable in the bankruptcy and will survive it⁴.

The court may commit a judgment debtor as punishment for his past contempt in failing to pay a judgment debt which has become due before the date of the bankruptcy order if he had the means to pay before being adjudicated bankrupt⁵.

An attachment of earnings order⁶ is unaffected by a bankruptcy order: moreover, the court has the jurisdiction to make an order attaching the debtor's earnings even after his bankruptcy⁷. However, the court may, if it thinks fit, vary or discharge any attachment of earnings order that is for the time being in force to secure payments by the judgment debtor⁸. Money paid into court under an attachment order prior to a judgment debtor's bankruptcy vests in the judgment creditor, and not the trustee in bankruptcy. Money deducted by the employer but not yet paid into court vests in the bankrupt's estate⁹.

1 See PARA 688.

2 See *Shearn v Shearn* [1931] P 1 at 5; *Platt v Platt* (1976) 6 Fam Law 107, CA; the Insolvency Act 1986 s 285(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 490.

3 As was contemplated in *E v G (lump sum order: bankruptcy)* [1997] 1 FCR 261, sub nom *Re G (Children Act 1989, Schedule 1)* [1996] 2 FLR 171.

4 See the Insolvency Act 1986 s 281(5), (8); the Insolvency Rules 1986, SI 1986/1925, r 12.3(2)(a); *Levy v Legal Services Commission* [2001] 1 All ER 895, [2001] 1 FCR 178, CA; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 491, 643. See also *Re a Debtor, JP v Debtor* [1999] 2 FCR 637, [1999] 1 FLR 926; *Wehmeyer v Wehmeyer* [2001] 2 FLR 84.

5 *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA. Moreover, if the bankrupt has sufficient income, it may in addition or in the alternative be possible to prove that he has the current means to pay: *Woodley v Woodley (No 2)*.

6 As to attachment of earnings orders see PARA 627 et seq.

7 As subject to the court's powers to stay the application: see the Insolvency Act 1986 s 285(1), (2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

8 See the Insolvency Act 1986 s 310(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 451.

9 *Re Green (a bankrupt), ex p Official Receiver v Cutting* [1979] 1 All ER 832, [1979] 1 WLR 1211.

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690. Enforcement by bankrupt judgment creditor.

A judgment creditor who has himself been adjudged bankrupt is not thereby prevented from taking steps to enforce financial orders already made in his favour¹.

¹ Any capital which he receives as a result will, however, be vulnerable as an after-acquired asset to a claim by his trustee in bankruptcy: see the Insolvency Act 1986 s 307; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 445-446.

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691. Individual voluntary arrangements.

In the case of a debtor, being an individual, the court may make an interim order which has the effect that, during the period for which it is in force, no bankruptcy petition relating to the debtor may be presented or proceeded with and no other proceedings, and no execution or other legal process, may be commenced or continued against the debtor or his property except with the leave of the court¹.

At any time when an application for an interim order is pending, the court may stay any action, execution or other legal process against the property or person of the debtor². On proof that an application has been so made in respect of that individual, the court may either stay the proceedings or allow them to continue on such terms as it thinks fit³.

1 See the Insolvency Act 1986 s 252(1), (2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 83.

2 See the Insolvency Act 1986 s 254(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 85.

3 See the Insolvency Act 1986 s 254(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 85.

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692. Bankruptcy as means of enforcement.

Although a debt arising under an order made in family proceedings may found a bankruptcy petition, the debt itself will not be provable in the bankruptcy¹. It is appropriate to use the bankruptcy process as a means of enforcement of orders made in family proceedings only if wholly exceptional circumstances exist².

¹ See PARA 687 text and notes 1, 2.

² *Levy v Legal Services Commission* [2001] 1 All ER 895, [2001] 1 FCR 178, CA (where it was held that an order for costs made in proceedings for ancillary relief is an order to which the Insolvency Rules 1986, SI 1986/1925, r 12.3(2)(a) (see PARA 687 note 3; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491) applies). See also *Russell v Russell* [1999] 2 FCR 137, [1998] 1 FLR 936; *Re a Debtor (No 68/SD/97)* [1998] 4 All ER 779; *Wheatley v Wheatley* [1999] 2 FLR 205.

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(ix) Armed Forces Personnel

693. Prohibition on assignment of or charge on forces' pay etc.

Every assignment of or charge on, and every agreement to assign or charge, any pay, military award, grant, pension or allowance payable to any person in respect of his or any other person's service in Her Majesty's military forces is void¹.

No order may be made² by any court the effect of which would be to restrain any person from receiving anything which³ he is precluded from assigning and to direct payment thereof to another person⁴.

Nothing in these above provisions prejudices any enactment providing for the payment of any sum to a bankrupt's trustee in bankruptcy for distribution among creditors⁵.

1 See the Army Act 1955 s 203(1); the Air Force Act 1955 s 203(1); the Naval Discipline Act 1957 s 128G(1); and **ARMED FORCES** vol 2(2) (Reissue) PARAS 166, 271. As from a day to be appointed the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 are repealed and replaced by the Armed Forces Act 2006, whereupon these provisions will take effect under s 356; until that day, the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 are continued in force by annual Order in Council under the Armed Forces Act 2006 s 382. At the date at which this volume states the law no such day had been appointed, and the Army Act 1955, the Air Force Act 1955 and the Navy Discipline Act 1957 are continued in force until 8 November 2009 by the Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2008, SI 2008/1780.

Nothing in these provisions applies to a court exercising its powers under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 paras 1, 2 (see PARA 458 et seq) in respect of any benefits under a pension arrangement within the meaning of the Matrimonial Causes Act 1973 s 25B(1) or the Civil Partnership Act 2004 Sch 5 para 24(1) (see PARAS 590, 597) which a party to a marriage or civil partnership has, or is likely to have: see the Pensions Act 1995 s 166(4), (5)(a); and **ARMED FORCES** vol 2(2) (Reissue) PARA 166. See also *Legrove v Legrove* [1995] 1 FCR 102, [1995] 2 FLR 119, CA. Service pensions may also be attached under the Attachment of Earnings Act 1971: see s 24(1)(b); and PARA 630.

2 The same as expressly provided by the Army Act 1955, the Air Force Act 1955, the Naval Discipline Act 1957 or, as from a day to be appointed (see note 1), the Armed Forces Act 2006.

3 The same as by virtue of the Army Act 1955 s 203(1); the Air Force Act 1955 s 203(1); the Naval Discipline Act 1957 s 128G(1) or, as from a day to be appointed (see note 1), the Armed Forces Act 2006 s 356(1).

4 See the Army Act 1955 s 203(2); the Air Force Act 1955 s 203(2); the Navy Discipline Act 1957 s 128G(2); and **ARMED FORCES** vol 2(2) (Reissue) PARAS 166, 271. As from a day to be appointed these provisions will take effect under the Armed Forces Act 2006 s 356(3): see note 1. An order requiring payment into court is a payment to another person for these purposes: *Walker v Walker* [1983] Fam 68, [1983] 2 All ER 909, CA.

Consequently, so far as enforcement proceedings are concerned, a serviceman's pay and allowances, other than pensions, may not be attached under an attachment of earnings order: see the Attachment of Earnings Act 1971 s 24(2)(b); and PARA 630.

5 See the Army Act 1955 s 203(3); the Air Force Act 1955 s 203(3); the Navy Discipline Act 1957 s 128G(3); and **ARMED FORCES** vol 2(2) (Reissue) PARAS 166, 271. As from a day to be appointed these provisions will take effect under the Armed Forces Act 2006 s 356(4): see note 1.

UPDATE

693 Prohibition on assignment of or charge on forces' pay etc

NOTE 1--Appointed day for the repeal of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 is 31 October 2009: SI 2009/1167.

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694. Execution against arms and equipment.

No judgment or order given or made against a member of any of Her Majesty's military forces, air forces or, as the case may be, naval forces by any court in the United Kingdom or a colony may be enforced by the levying of execution on any property of the person against whom it is given or made, being arms, ammunition, equipment, instruments or clothing used by him for military, air force or, as the case may be, naval purposes¹.

¹ Army Act 1955 s 185; Air Force Act 1955 s 185; Naval Discipline Act 1957 s 102. As from a day to be appointed the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 are repealed and replaced by the Armed Forces Act 2006, whereupon these provisions will take effect under s 350; until that day, the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 are continued in force by annual Order in Council under the Armed Forces Act 2006 s 382. At the date at which this volume states the law no such day had been appointed, and the Army Act 1955, the Air Force Act 1955 and the Navy Discipline Act 1957 are continued in force until 8 November 2009 by the Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2008, SI 2008/1780.

UPDATE

694 Execution against arms and equipment

NOTE 1--Appointed day for the repeal of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 is 31 October 2009: SI 2009/1167.

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695. Deductions of maintenance payments from pay of services personnel by court order.

A member of the regular forces¹ or regular air force² (and, in some cases, the reserve forces) is liable to suffer deductions from his pay of such sums as the Defence Council³, or an officer authorised by it, may think fit to order in respect of any order made, registered or confirmed against him by any court in the United Kingdom for the maintenance of his wife or civil partner or any child of his or his wife or civil partner or of any other child who has been treated by them both as a child of their family, together with any costs incurred in obtaining the order or in proceedings on appeal against it, or for its variation, revocation or revival⁴. Such an order made by any court in Her Majesty's dominions⁵ outside the United Kingdom is enforceable in like manner, provided that the Defence Council or authorised officer is satisfied that the defendant has had a reasonable opportunity of appearing in person or has appeared by a duly authorised legal representative to defend the proceedings⁶. Similar provision is made in relation to members of Her Majesty's naval or marine forces⁷.

1 As to the regular forces see **ARMED FORCES** vol 2(2) (Reissue) PARA 191 et seq.

2 As to the regular air force see **ARMED FORCES** vol 2(2) (Reissue) PARA 206 et seq.

3 As to the Defence Council see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 443 et seq.

4 See the Army Act 1955 ss 150(1), (1A), (4), (5), 211(4), (4A); the Air Force Act 1955 ss 150(1), (1A), (4), (5), 210(4), (4A); and **ARMED FORCES** vol 2(2) (Reissue) PARA 74.

5 As to 'Her Majesty's dominions' see **COMMONWEALTH** vol 13 (2009) PARA 707.

6 See the Army Act 1955 s 150(3); the Air Force Act 1955 ss 150(3); and **ARMED FORCES** vol 2(2) (Reissue) PARA 74.

7 See the Naval and Marine Pay and Pensions Act 1865 s 3; the Naval Forces (Enforcement of Maintenance Liabilities) Act 1947 s 1; and **ARMED FORCES** vol 2(2) (Reissue) PARA 76.

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(7) SETTLEMENTS AND AGREEMENTS

(i) Maintenance Agreements

A. STATUS AND VALIDITY

696. Meaning of 'maintenance agreement'.

A maintenance agreement is any agreement in writing¹ made between the parties² to a marriage or civil partnership which is:

- 893 (1) an agreement containing financial arrangements³, whether made during the continuance or after the dissolution or annulment of the marriage or civil partnership⁴; or
- 894 (2) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements⁵.

¹ As to oral maintenance agreements see PARA 427.

² See *Young v Young* (1973) 117 Sol Jo 204 (agreement made between a husband and wife and a third party held not to be a maintenance agreement for these purposes).

³ For these purposes 'financial arrangements' means provisions governing the rights and liabilities towards one another when living separately of the parties to a marriage or civil partnership, including a marriage or civil partnership which has been dissolved or annulled, in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education (which includes training) of any child, whether or not a child of the family: Matrimonial Causes Act 1973 ss 34(2), 52(1); Civil Partnership Act 2004 Sch 5 para 67(2), (3). As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

⁴ Matrimonial Causes Act 1973 s 34(2); Civil Partnership Act 2004 Sch 5 para 67(1)(a).

⁵ Matrimonial Causes Act 1973 s 34(2); Civil Partnership Act 2004 Sch 5 para 67(1)(b).

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697. Validity of maintenance agreements.

If a maintenance agreement¹ includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements², that provision is void; but any other financial arrangements contained in the agreement are not thereby rendered void or unenforceable and are, unless they are void or unenforceable for any other reason and subject to the court's powers³ to vary or revoke financial arrangements, binding on the parties to the agreement⁴.

1 As to the meaning of 'maintenance agreement' see PARA 696.

2 As to the meaning of 'financial arrangements' see PARA 696 note 3.

3 Ie under the Matrimonial Causes Act 1973 ss 35, 36 and the Civil Partnership Act 2004 Sch 5 paras 69, 73: see PARA 700 et seq.

4 Matrimonial Causes Act 1973 s 34(1); Civil Partnership Act 2004 Sch 5 para 68.

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698. Covenants in maintenance agreements.

It has been held that apart from statute, a wife¹ who covenanted by a deed of separation not to take proceedings against her husband to allow her provision beyond that made for her by the deed, and thereafter obtained a decree for the dissolution of the marriage having alleged her husband's adultery, was not precluded by her covenant from applying to the court for financial relief², since such covenant was made for no consideration and was unenforceable³. Similarly, it has been held to be against public policy for a wife to promise, in consideration of provision in a deed of maintenance for a child, not to take proceedings for maintenance on behalf of that child⁴. If, however, the parties do not oust the jurisdiction of the court, but preserve it, where appropriate, by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid⁵. At one time, that sanction could not be given before decree nisi⁶, but reference should now be made to the provision for the approval of arrangements both before and after the commencement of proceedings⁷, and to the enactment that a provision purporting to restrict any right to apply to a court for an order containing financial arrangements is void⁸. Even when sanctioned by the court, the agreement or arrangement as to maintenance remains open to review by the court⁹.

1 The provisions described in this paragraph derive from common law decisions specifically dealing only with marriage and with husbands and wives and pre-dating the concept of civil partnerships, and their continuing significance should be considered in the light of this.

2 *Welch v Welch* (1916) 115 LT 1, CA.

3 *Hyman v Hyman* [1929] AC 601, HL; *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767, CA (no proof of request in return for maintenance wife should not sue; it was held, distinguishing *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n, that there was no consideration for husband's promise; further, even if there was such a promise by the wife, in view of *Hyman v Hyman* [1929] AC 601, HL, and *Gaisberg v Storr* [1950] 1 KB 107, [1949] 2 All ER 411, CA, it would not have bound her, and so did not amount to consideration); *Wright v Wright* [1970] 3 All ER 209, [1970] 1 WLR 1219, CA.

4 *Gaisberg v Storr* [1950] 1 KB 107, [1949] 2 All ER 411, CA; *Massey v Massey* [1949] WN 422.

5 *Bennett v Bennett* [1952] 1 KB 249 at 262, [1953] 1 All ER 413 at 422, CA.

6 *Bennett v Bennett* [1952] 1 KB 249, [1952] 1 All ER 413, CA, applying *Hyman v Hyman* [1929] AC 601, HL. A covenant not to sue in respect of maintenance may, however, be severable from the rest of the agreement: *Goodinson v Goodinson* [1954] 2 QB 118, [1954] 2 All ER 255, CA; applied in *Williams v Williams* [1957] 1 All ER 305, [1957] 1 WLR 148, CA. See now the Matrimonial Causes Act 1973 ss 34-36; the Civil Partnership Act 2004 Sch 5 paras 67-73; and PARAS 696-697, 700 et seq.

7 See PARA 859.

8 See the Matrimonial Causes Act 1973 s 34(1); the Civil Partnership Act 2004 Sch 5 para 68; and PARA 697.

9 *Wright v Wright* [1970] 3 All ER 209, [1970] 1 WLR 1219, CA.

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699. When covenants are ineffective.

Covenants in a deed are ineffective where the consent of one of the parties to the deed has been obtained by fraud or coercion¹; and, where one of the parties has repudiated his or her obligations under the deed and elected to treat it as a nullity, the other party is not bound by the covenants². Moreover, where a mutual covenant in a deed of separation gives rise to no question of public policy or of statutory bar to proceedings, but is such that either party may take advantage of it, or both may set it aside, the court is not bound to take notice of the covenant in a suit seeking a remedy which may be contrary to the covenant, if the respondent in the suit does not appear or set up the covenant³. Where any question of public policy is involved, the court will necessarily have to consider covenants under a deed⁴. It has been held that where a wife lived in enemy territory during time of war, public policy did not require that an agreement by her husband to pay her maintenance should terminate on the outbreak of war⁵.

¹ *Crabb v Crabb* (1868) LR 1 P & D 601; *Piper v Piper* [1902] P 198 at 199; *Adamson v Adamson* (1907) 23 TLR 434; *Holroyd v Holroyd* (1920) 36 TLR 479; *B (MAL) v B (NE)* [1968] 1 WLR 1109.

² *Balcombe v Balcombe* [1908] P 176 (covenant not to sue for past offences; husband ceased payments under deed, tore up his copy, and went to Australia); *Waller v Waller* (1910) 26 TLR 223 (covenant not to sue for restitution; husband said he did not intend to continue payments); *McQuiban v McQuiban* [1913] P 208 (husband's liability under deed discharged by his bankruptcy). A slight default in paying an allowance under a deed may not, however, be sufficient to establish a repudiation: *Kunski v Kunski* (1898) 68 LJP 18; *Smith v Smith* [1915] P 288. If one party fails to pay the allowance, and the other, relying on the deed, takes steps to enforce payment thereunder, the latter cannot afterwards allege that he or she is at liberty to disregard the deed: *Roe v Roe* [1916] P 163. As to the effect on a deed of separation of reconciliation by occasional sexual intercourse see *Rowell v Rowell* [1900] 1 QB 9, CA; *Randle v Gould* (1857) 8 E & B 457; *Nicol v Nicol* (1886) 31 ChD 524, CA; *Eaves v Eaves* [1939] P 361, [1939] 2 All ER 789.

³ *Phillips v Phillips* [1917] P 90, following *Tress v Tress* (1887) 12 PD 128, in preference to *Kennedy v Kennedy* [1907] P 49. See also *Beauclerk v Beauclerk* [1895] P 220; *Dowling v Dowling* [1898] P 228; *Hardie v Hardie* (1901) 17 TLR 190; *Gleig v Gleig* (1906) 22 TLR 716; *Adamson v Adamson* (1907) 23 TLR 434. *Phillips v Phillips* has since been uniformly followed: see *Lacey v Lacey* [1919] WN 304; *Pugh v Pugh* (1920) 37 TLR 105; *Williams v Williams* [1921] P 131; *Mann v Mann* [1922] P 238; *Palmer v Palmer* [1923] P 180, CA. See also *Fengl v Fengl* [1914] P 274 (court's refusal to look at unstamped agreement).

⁴ *Pardy v Pardy* [1939] P 288, [1939] 3 All ER 779, CA.

⁵ *Bevan v Bevan* [1955] 2 QB 227, [1955] 2 All ER 206 (wife entitled to sums due under an agreement, so long as the agreement otherwise subsisted).

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B. ALTERATION

700. Alterations of agreements by court during lives of parties.

Where a maintenance agreement¹ is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled² or resident in England and Wales, either party may apply to the court or to a magistrates' court³ for an order altering the terms of the agreement⁴. However, a magistrates' court must not entertain such an application unless both the parties to the agreement are resident in England and Wales and the court acts in, or is authorised by the Lord Chancellor to act for, a local justice area in which at least one of the parties is resident⁵.

Where an order is made altering a maintenance agreement during the lifetime of the parties the agreement has effect thereafter⁶ as if any alteration made by the order had been made by agreement between the parties and for valuable consideration⁷.

1 As to the meaning of 'maintenance agreement' see PARA 696.

2 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

3 See, however, the text and notes 5-7.

4 Matrimonial Causes Act 1973 s 35(1); Civil Partnership Act 2004 Sch 5 para 69(1). As to the procedure on such an application see PARA 706.

5 Matrimonial Causes Act 1973 s 35(3) (amended by the Courts Act 2003 Sch 8 para 169); Civil Partnership Act 2004 Sch 5 paras 69(6), 70(1). A magistrates' court's powers to make an order are similarly restricted: see the Matrimonial Causes Act 1973 s 35(3); the Civil Partnership Act 2004 Sch 5 para 70(2); and PARA 703.

6 'Thereafter' is to be read as meaning 'then' and accordingly, on their true construction, these provision give the court power to backdate the variation of a maintenance agreement to the point at which in justice the variation should be made: see *Warden v Warden* [1982] Fam 10, [1981] 3 All ER 193, CA, overruling *Carr v Carr* [1974] Fam 65, [1974] 3 All ER 366.

7 Matrimonial Causes Act 1973 s 35(2); Civil Partnership Act 2004 Sch 5 para 69(5).

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701. Alteration of agreements by court after death of one party.

Where a maintenance agreement¹ provides for the continuation of payments under the agreement after the death of one of the parties and that party dies domiciled² in England and Wales, the surviving party or the personal representatives of the deceased may³ apply to the High Court or a county court for an order⁴ altering the terms of the agreement⁵.

Where an application for an order for financial provision from a deceased's estate⁶ is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a maintenance agreement⁷ which provided for the continuation of payments under the agreement after the death of the deceased, then, in the proceedings on that application, the court has power, on an application by that person or by the deceased's personal representative, to vary or revoke that agreement⁸. In exercising these powers the court must have regard to all the circumstances of the case, including any interim order⁹ or order for financial provision¹⁰ which the court proposes to make, and any change (whether resulting from the death of the deceased or otherwise) in any of the circumstances in the light of which the agreement was made¹¹.

If a maintenance agreement is varied by the court under these provisions the like consequences ensue as if the variation had been made immediately before the death of the deceased by agreement between the parties and for valuable consideration¹².

1 As to the meaning of 'maintenance agreement' see PARA 696.

2 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

3 See, however, the text and notes 6-8. Such an application may not, except with the permission of the High Court or a county court, be made after the end of the period of six months from the date on which representation in regard to the estate of the deceased is first taken out: Matrimonial Causes Act 1973 s 36(2); Civil Partnership Act 2004 Sch 5 para 73(4).

4 I.e. an order under the Matrimonial Causes Act 1973 s 35 or the Civil Partnership Act 2004 Sch 5 para 69: see PARA 700.

5 Matrimonial Causes Act 1973 s 36(1); Civil Partnership Act 2004 Sch 5 para 73(1), (2). As to the procedure on such an application see PARA 707. Where a party to a maintenance agreement has died, the agreement being one which provides for the continuation of payments thereunder after the death of one of the parties, and an application is made under these provisions for the alteration of the agreement, the court has power to direct that the application is to be deemed to have been accompanied by an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692): see ss 18(1)(b), 18A(1)(b) (s 17(4) amended, s 18A added by the Civil Partnership Act 2004 Sch 4 paras 24, 25); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 695. Where the court gives such a direction, it has power, in the proceedings on the application under the Matrimonial Causes Act 1973 s 36(1) or the Civil Partnership Act 2004 Sch 5 para 73(1), (2), to make any order which the court would have had power to make under the provisions of the Inheritance (Provision for Family and Dependents) Act 1975 if the application under the Matrimonial Causes Act 1973 s 36(1) or the Civil Partnership Act 2004 Sch 5 para 73(1), (2) had been made jointly with an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2; and the court has power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under the Inheritance (Provision for Family and Dependents) Act 1975 in the case of an application under s 2: ss 18(2), 18A(2) (as so added). Where an order made under s 15(1) or s 15ZA(1) (see PARA 882) is in force with respect to a party to a marriage or civil partnership, the court may not give a direction under s 18(1) or s 18A(1) with respect to any application under the Matrimonial Causes Act 1973 s 36(1) or the Civil Partnership Act 2004 Sch 5 para 73(1),

(2) by that party on the death of the other party: Inheritance (Provision for Family and Dependants) Act 1975 ss 18(3), 18A(3) (as so added).

6 Ie an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692).

7 For these purposes 'maintenance agreement', in relation to a deceased person, means any agreement made, whether in writing or not, by the deceased with any person with whom he formed a marriage or civil partnership, being an agreement which contained provisions governing the rights and liabilities towards one another when living separately of the parties to that marriage or of the civil partners (whether or not the marriage or civil partnership has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the deceased or a person who was treated by the deceased as a child of the family in relation to that marriage or civil partnership: Inheritance (Provision for Family and Dependants) Act 1975 s 17(4) (as amended: see note 5). As to a 'child', and 'property', for the purposes of the Inheritance (Provision for Family and Dependants) Act 1975 see s 25(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 667, 682.

8 Inheritance (Provision for Family and Dependants) Act 1975 s 17(1).

9 Ie under the Inheritance (Provision for Family and Dependants) Act 1975 s 5 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 703).

10 See note 6.

11 Inheritance (Provision for Family and Dependants) Act 1975 s 17(2).

12 Matrimonial Causes Act 1973 s 36(4); Inheritance (Provision for Family and Dependants) Act 1975 s 17(3); Civil Partnership Act 2004 Sch 5 para 73(3). As to 'valuable consideration' for these purposes see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 667. The personal representatives of the deceased are not to be liable for having distributed any part of the estate after the expiration of six months (see note 3) from the date when representation was first taken out on the ground that they ought to have taken into account the possibility that a court might permit an application for alteration of the agreement to be made by the surviving party after the six months' period had expired; but this does not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order altering a maintenance agreement: Matrimonial Causes Act 1973 s 36(5); Civil Partnership Act 2004 Sch 5 para 73(5), (6).

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702. Grounds for alteration.

If the court to which an application for the alteration of a maintenance agreement¹ is made² is satisfied either:

- 895 (1) that by reason of a change in the circumstances in the light of which any financial arrangements³ contained in the maintenance agreement were made or, as the case may be, financial arrangements were omitted from it, including a change foreseen by the parties when making the agreement, the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements⁴; or
- 896 (2) that the agreement does not contain proper financial arrangements with respect to any child of the family⁵,

that court may⁶ by order make alterations in the agreement⁷.

Before the court can decide whether or not to vary an agreement, it must find that there has been a change in the circumstances in the light of which the financial arrangements were made, whether or not foreseen at the time that the agreement was made⁸. If it finds that there has been a change in the material circumstances, it must then be satisfied, before varying the agreement, that the agreement has become unjust by reason of the change of circumstances⁹. Whether a particular change is enough to justify the alteration of an agreement is a question of fact and degree¹⁰.

1 As to the meaning of 'maintenance agreement' see PARA 696.

2 Ie under the Matrimonial Causes Act 1973 s 35(1) or the Civil Partnership Act 2004 Sch 5 para 69(1): see PARA 700.

3 As to the meaning of 'financial arrangements' see PARA 696 note 3.

4 Matrimonial Causes Act 1973 s 35(2)(a); Civil Partnership Act 2004 Sch 5 para 69(2)(a), (3).

5 Matrimonial Causes Act 1973 s 35(2)(b); Civil Partnership Act 2004 Sch 5 para 69(2)(b). As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

6 Ie subject to the Matrimonial Causes Act 1973 s 35(3)-(5) and the Civil Partnership Act 2004 Sch 5 paras 70, 71 (see PARAS 700-704).

7 Matrimonial Causes Act 1973 s 35(2); Civil Partnership Act 2004 Sch 5 para 69(2). As to the nature of the alterations which may be made see PARA 703.

8 *Gorman v Gorman* [1964] 3 All ER 739, [1964] 1 WLR 1440, CA. In *K v K* [1961] 2 All ER 266, [1961] 1 WLR 802, CA, revsg [1961] 1 All ER 130, [1961] 1 WLR 802, Holroyd Pearce LJ expressed the view that the court had one question to decide, namely, whether by reason of a change in the circumstances in the light of which the financial arrangements were made the agreement should be altered so as to make different financial arrangements. Commenting on this in *Gorman v Gorman* at 743 and at 1445, Willmer LJ repeated what he had said in *Ratcliffe v Ratcliffe* [1962] 3 All ER 993 at 996, [1962] 1 WLR 1455 at 1459, CA, namely that he did not find this observation helpful; no doubt in the end it was a single question, but, before it could be decided, the court first had to decide whether it had jurisdiction and whether there had been a change of circumstances in the light of which the financial arrangements had been made; the question arose whether that phrase was to be

interpreted objectively or subjectively; in *K v K* the subjective approach had been taken, but in *Ratcliffe v Ratcliffe* the objective approach had been taken; it might well be that there was room for both approaches to the problem; while it might be proper to have regard to circumstances which did in fact influence the parties, it would not be right to exclude circumstances which, as reasonable people, they must have had in mind.

9 *Gorman v Gorman* [1964] 3 All ER 739, [1964] 1 WLR 1440, CA (where the wife applied to vary the terms of a separation deed made in 1958; under the deed the wife received no maintenance but had the right to live separate from the husband and had the custody of the two younger children; the husband paid maintenance for each child to the age of 21 and provided a house rent-free and paid rates and repairs until the youngest child should attain that age; the wife agreed to support herself and not to compel the husband to allow her maintenance; the husband alleged that the wife had pressed him to enter into this deed, and that he agreed only after making it abundantly clear that in no circumstances would he pay maintenance for the wife; since the deed was entered into, there had been two important changes in circumstances, ie the husband's income had increased and the wife had had to give up her work due to ill health; the wife's covenant not to apply for maintenance was void, and she applied to vary the deed to include a provision for maintenance; on the basis of the husband's evidence that he had entered into the agreement only on the express understanding that he made no provision for the wife, it was held that it would be unjust to add a provision for maintenance, and the agreement should not be varied). Cf *B (V) v B (J)* [1966] 3 All ER 768, sub nom *Boyd v Boyd* [1967] 1 WLR 122, CA.

10 *K v K* [1961] 2 All ER 266, [1961] 1 WLR 802. In *Ratcliffe v Ratcliffe* [1962] 3 All ER 993, [1962] 1 WLR 1455, CA, a husband, having entered into an agreement to pay maintenance at a certain sum to his wife, had voluntarily given up his work with the result that he had no resources to make the payments due from him, but the court refused to vary the agreement, holding that what was just or unjust could only be determined by considering the position of both parties, and that it would be wholly unjust to allow the husband by his unilateral act to deprive his wife of the benefits covenanted for. Where a wife, who had agreed on separation to transfer her half-share in the matrimonial home to the husband for a certain sum to be paid by instalments, claimed that the property had increased in value partly due to inflation, the court refused to vary the agreement: *D v D* (1974) 118 Sol Jo 715. Cf *Lord Lilford v Glynn* [1979] 1 All ER 441, [1979] 1 WLR 78, CA.

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703. Alterations which may be made.

On an application for alteration of a maintenance agreement¹ the court may² by order make such alterations in the agreement either by varying or revoking any financial arrangements³ contained in it⁴ or by inserting in it financial arrangements for the benefit of one of the parties to the agreement or a child of the family⁵, as may appear to the court to be just having regard to all the circumstances⁶. However, a magistrates' court does not have power to make any order on such an application except:

- 897 (1) in a case where the agreement includes no provision for periodical payments by either of the parties, an order inserting provision for the making by one of the parties of periodical payments for the maintenance of the other party or for the maintenance of any child of the family⁷; and
- 898 (2) in a case where the agreement includes provision for the making of periodical payments by one of the parties, an order increasing or reducing the rate of, or terminating, any of those payments⁸.

Provision is made as to the duration of specified alterations⁹.

1 le under the Matrimonial Causes Act 1973 s 35(1) or the Civil Partnership Act 2004 Sch 5 para 69(1): see PARA 700. As to the meaning of 'maintenance agreement' see PARA 696.

2 le if satisfied of the grounds referred to in PARA 702 and subject to the Matrimonial Causes Act 1973 s 35(3)-(5) and the Civil Partnership Act 2004 Sch 5 paras 70, 71 (see the text and notes 1-8; and PARAS 700-702, 704).

3 As to the meaning of 'financial arrangements' see PARA 696 note 3.

4 Matrimonial Causes Act 1973 s 35(2)(i); Civil Partnership Act 2004 Sch 5 para 69(4)(a).

5 Matrimonial Causes Act 1973 s 35(2)(ii); Civil Partnership Act 2004 Sch 5 para 69(4)(b). As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

6 Matrimonial Causes Act 1973 s 35(2); Civil Partnership Act 2004 Sch 5 para 69(4). The circumstances to which the court is to have regard include, if relevant:

- 145 (1) whether the party in question assumed any responsibility for the child's maintenance, and, if so, the extent to which, and the basis on which, that party assumed such responsibility and the length of time for which that party discharged such responsibility (Matrimonial Causes Act 1973 ss 25(4)(a), 35(2) (s 25 substituted, s 35(2) amended, by the Matrimonial and Family Proceedings Act 1984 s 3, Sch 1 para 13); Civil Partnership Act 2004 Sch 5 paras 22(1), (3)(a), (b), 69(4));
- 146 (2) whether, in assuming and discharging such responsibility, that party did so knowing that the child was not his or her own (Matrimonial Causes Act 1973 s 25(4)(b) (as so substituted); Civil Partnership Act 2004 Sch 5 para 22(3)(c)); and
- 147 (3) the liability of any other person to maintain the child (Matrimonial Causes Act 1973 s 25(4) (c) (as so substituted); Civil Partnership Act 2004 Sch 5 para 22(3)(d)).

See further *Pace (formerly Doe) v Doe* [1977] Fam 18, [1977] 1 All ER 176 (maintenance agreement will not be varied so as to provide for a lump sum payment on the application of a wife who has remarried); and *Furneaux v Furneaux* (1973) 118 Sol Jo 204. A variation order may be backdated: see PARA 701.

7 Matrimonial Causes Act 1973 s 35(3)(a); Civil Partnership Act 2004 Sch 5 para 70(2)(a). As to the jurisdiction of magistrates' courts see PARA 701.

8 Matrimonial Causes Act 1973 s 35(3)(b); Civil Partnership Act 2004 Sch 5 para 70(2)(b).

9 See PARA 704.

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704. Duration of alterations.

Where a court decides to alter a maintenance agreement¹ by inserting provision for the making or securing by one of the parties of periodical payments for the maintenance of the other party, or by increasing the rate of the periodical payments which the agreement provides are to be made by one of the parties for the maintenance of the other², the term for which the payments or, as the case may be, the additional payments attributable to the increase are to be made under the agreement as altered is to be such term as the court may specify, subject to the following limits:

- 899 (1) where the payments will not be secured, the term must be so defined as not to extend beyond the death of either of the parties to the agreement or the marriage or remarriage of, or formation of a subsequent civil partnership by³, the party to whom the payments are to be made⁴; and
- 900 (2) where the payments will be secured, the term must be so defined as not to extend beyond the death, marriage or remarriage of, or formation of a subsequent civil partnership by, that party⁵.

Where a court decides to alter an agreement by inserting provision for the making or securing by one of the parties of periodical payments for the maintenance of a child of the family⁶, or by increasing the rate of the periodical payments which the agreement provides are to be made or secured by one of the parties for the maintenance of such a child, then, in deciding the term for which under the agreement as altered the payments, or as the case may be, the additional payments attributable to the increase are to be made or secured for the benefit of the child, the court must apply the statutory provisions as to age limits⁷ as if the order in question were a periodical payments or secured periodical payments order in favour of the child⁸.

1 Ie pursuant to an application under the Matrimonial Causes Act 1973 s 35(1) or the Civil Partnership Act 2004 Sch 5 para 69(1): see PARA 700. As to the meaning of 'maintenance agreement' see PARA 696.

2 As to the alterations which the court may order to be made see PARA 703.

3 As to references to remarriage, to a subsequent marriage and to the formation of a subsequent civil partnership see PARA 452 note 1.

4 Matrimonial Causes Act 1973 s 35(4)(a) (s 35(4) amended by the Civil Partnership Act 2004 Sch 27 para 44); Civil Partnership Act 2004 Sch 5 paras 69(6), 71(1), (2).

5 Matrimonial Causes Act 1973 s 35(4)(b) (as amended: see note 4); Civil Partnership Act 2004 Sch 5 para 71(1), (3).

6 As to the meanings of 'child of the family' and (for the purposes of the Matrimonial Causes Act 1973) 'child' see PARA 477 note 3.

7 Ie the Matrimonial Causes Act 1973 s 29(2), (3) and the Civil Partnership Act 2004 Sch 5 para 49(2)-(5): see PARA 495.

8 Matrimonial Causes Act 1973 s 35(5); Civil Partnership Act 2004 Sch 5 para 71(4), (5).

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705. Subsequent proceedings.

Although the statutory provisions relating to the alteration of maintenance agreements by the court contain no express reference to subsequent alterations to an agreement should there be a further change of circumstances, it would seem that such alterations are possible¹. Whether revision of the deed on each such occasion will be necessary must be a matter for future judicial decision.

¹ In *Orton v Orton* (1958) unreported, but noted at (1959) 109 L Jo 50, Davies J said that the Maintenance Agreements Act 1957 (repealed: see now the Matrimonial Causes Act 1973 ss 34-36; the Civil Partnership Act 2004 Sch 5 paras 67-76; and PARA 700 et seq) was not really meant to encourage constant applications to vary the amount under the deed, either upwards or downwards, and that there should be some degree of permanency about any order that is made.

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C. PROCEDURE

706. Application in lifetime of parties.

An application for variation of a maintenance agreement during the lifetime of the parties¹ must be made by originating application². The application may be made to any divorce or civil partnership proceedings county court³ and may be heard and determined by the district judge⁴. There must be filed with the application an affidavit by the applicant exhibiting a copy of the agreement and verifying the statements in the application and also a copy of the affidavit for service on the respondent⁵. A copy of the application, and of the affidavit, must be served on the respondent, together with a notice of application⁶ and a form of acknowledgment of service⁷ attached⁸. The respondent must, within 14 days after the time for giving notice of intention to defend, file an affidavit in answer to the application containing full particulars of his property and income and, if he does not do so, the court may order him to file an affidavit containing such particulars⁹; and a respondent who so files an affidavit must at the same time file a copy which the proper officer¹⁰ must serve on the applicant¹¹.

¹ See PARA 700.

² Family Proceedings Rules 1991, SI 1991/1247, r 3.2(1) (amended by SI 2005/2922). The originating application must contain, unless otherwise directed, the information required by Form M21 (amended by SI 1993/295; SI 2003/184; SI 2005/2922): Family Proceedings Rules 1991, SI 1991/1247, r 3.2(1). Rule 10.10, Appendix 4 paras 4, 7-9 (see PARA 747) apply, with the necessary modifications, to an application under these provisions: see the Family Proceedings Rules 1991, SI 1991/1247, r 3.5 (amended by SI 2005/2922).

³ As to the meanings of 'divorce county court' and 'civil partnership proceedings county courts' see PARA 732.

⁴ Family Proceedings Rules 1991, SI 1991/1247, r 3.2(2) (substituted by SI 2005/2922). As to the meaning of 'district judge' see PARA 737 note 3.

⁵ Family Proceedings Rules 1991, SI 1991/1247, r 3.2(3). Where a person files an affidavit in support of an application under the Matrimonial Causes Act 1973 s 35 or the Civil Partnership Act 2004 Sch 5 para 69 (see PARA 700 et seq) he must at the same time serve a copy on the opposite party: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 4(1), (3) (Appendix 4 added by SI 2005/2922).

⁶ For the prescribed form of notice of application see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M20 (substituted by SI 2005/559; amended by SI 2005/2922).

⁷ For the prescribed form of acknowledgment of service see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M23A (added by SI 2005/559; amended by SI 2005/2922).

⁸ Family Proceedings Rules 1991, SI 1991/1247, r 3.2(4) (amended by SI 2005/559).

⁹ Family Proceedings Rules 1991, SI 1991/1247, r 3.2(5) (amended by SI 2005/559).

¹⁰ As to the meaning of 'proper officer' see PARA 461 note 5.

¹¹ Family Proceedings Rules 1991, SI 1991/1247, r 3.2(6).

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707. Application after death of party.

An application for the alteration of a maintenance agreement after the death of one of the parties¹ must be made in the High Court, by originating summons out of the principal registry² or any district registry³, or in a county court, by originating application⁴.

There must be filed in support of the application an affidavit⁵ by the applicant exhibiting a copy of the agreement and an official copy of the grant of representation to the deceased's⁶ estate and of every testamentary document admitted to proof and stating:

- 901 (1) whether the deceased died domiciled⁷ in England and Wales⁸;
- 902 (2) the place and date of the marriage between the parties to the agreement or the place at and date on which they formed their civil partnership, as the case may be⁹;
- 903 (3) the name of every child of the family and of any other child for whom the agreement makes financial arrangements¹⁰;
- 904 (4) the date of birth of each such child who is still living (or, if it be the case, that he has attained 18) and the place where and the person with whom any such minor child is residing¹¹;
- 905 (5) the date of death of any such child who has died since the agreement was made¹²;
- 906 (6) whether there have been in any court any, and if so what, previous proceedings with reference to the agreement or to the marriage or civil partnership or to the children of the family or any other children for whom the agreement makes financial arrangements, and the date and effect of any order or decree made in such proceedings¹³;
- 907 (7) whether there have been in any court any proceedings by the applicant against the deceased's estate¹⁴ and the date and effect of any order made in such proceedings¹⁵;
- 908 (8) in the case of an application by the surviving party, the applicant's means¹⁶;
- 909 (9) in the case of an application by the personal representatives of the deceased, the surviving party's means, so far as they are known to the applicant, and the information mentioned heads (a) to (c) below¹⁷;
- 910 (10) the facts alleged by the applicant as justifying an alteration in the agreement and the nature of the alteration sought¹⁸;
- 911 (11) if the application is made after the end of the period of six months from the date on which representation in regard to the deceased's estate was first taken out, the grounds on which the court's permission to entertain the application is sought¹⁹.

The district judge²⁰ may²¹ at any stage of the proceedings direct that any person be added as a respondent to such an application²².

A respondent who is a personal representative of the deceased must, within 14 days after the time limited for giving notice of intention to defend, file an affidavit in answer to the application stating:

- 912 (a) full particulars of the value of the deceased's estate for probate, after providing for the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout, including the amount of the inheritance tax or any other tax replaced by that tax and interest thereon²³;
- 913 (b) the person or classes of persons beneficially interested in the estate, giving the names and addresses of all living beneficiaries, and the value of their interests so far as ascertained²⁴; and
- 914 (c) if such be the case, that any living beneficiary, naming him, is²⁵ a child or a protected party²⁶.

If a respondent who is a personal representative of the deceased does not file an affidavit stating the matters mentioned in heads (a) to (c) above, the district judge may order him to do so²⁷.

A respondent who is not a personal representative of the deceased may, within 14 days after the time limited for giving notice of intention to defend, file an affidavit in answer to the application²⁸.

Every respondent who files an affidavit in answer to the application must at the same time lodge a copy, which the proper officer²⁹ must serve on the applicant³⁰.

1 See PARA 701.

2 As to the meaning of 'principal registry' see PARA 737 note 3.

3 As to the meaning of 'district registry' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(1) (amended by SI 2005/2922). For the prescribed form see Appendix 1, Form M22. CCR Ord 48 rr 3(1), 7, 9 apply to an originating application under the Matrimonial Causes Act 1973 s 36: Family Proceedings Rules 1991, SI 1991/1247, r 3.3(3). As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005. Family Proceedings Rules 1991, SI 1991/1247, r 10.10, Appendix 4 paras 4, 7-9 (see PARA 747) apply, with the necessary modifications, to an application under these provisions: see r 3.5 (amended by SI 2005/2922).

5 Where a person files an affidavit in support of an application under these provisions he must at the same time serve a copy on the opposite party: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 4(1), (3) (Appendix 4 added by SI 2005/2922).

6 For these purposes 'the deceased' means the deceased party to the agreement to which the application relates: Family Proceedings Rules 1991, SI 1991/1247, r 3.3(4).

7 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(a).

9 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(b) (substituted by SI 2005/2922).

10 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(c). 'Child of the family' has the meaning assigned to it by the Children Act 1989 s 105(1) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 248): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(c).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(c).

13 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(b) (amended by SI 2005/2922).

14 Ie under the Inheritance (Provision for Family and Dependents) Act 1975: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 665 et seq.

15 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(e).

16 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(f).

17 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(g).

18 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(h).

19 Family Proceedings Rules 1991, SI 1991/1247, r 3.3(2)(i).

20 As to the meaning of 'district judge' see PARA 737 note 3.

21 He without prejudice to his powers under CPR Sch 1 RSC Ord 15 (parties and other matters). As to the continuing application of specific provisions of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005. See further the Family Proceedings Rules 1991, SI 1991/1247, r 3.4(2), (3).

22 Family Proceedings Rules 1991, SI 1991/1247, r 3.4(1).

23 Family Proceedings Rules 1991, SI 1991/1247, r 3.4(4)(a).

24 Family Proceedings Rules 1991, SI 1991/1247, r 3.4(4)(b).

25 He for the purposes of the Family Proceedings Rules 1991, SI 1991/1247, r 9.1 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 225).

26 Family Proceedings Rules 1991, SI 1991/1247, r 3.4(4)(c).

27 Family Proceedings Rules 1991, SI 1991/1247, r 3.4(5).

28 Family Proceedings Rules 1991, SI 1991/1247, r 3.4(6).

29 As to the meaning of 'proper officer' see PARA 461 note 5.

30 Family Proceedings Rules 1991, SI 1991/1247, r 3.4(7).

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708. Hearing the application and making the order.

At the hearing of an application for the variation of a maintenance agreement¹ the district judge² must³ investigate the allegations made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined and order the disclosure and inspection of any document or require further affidavits⁴. The district judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings⁵.

Subject to any directions given by the court⁶, any party to an application for the variation of a maintenance agreement may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to provide a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the district judge for directions⁷.

Pending the final determination of the application, the district judge may make an interim order upon such terms as he thinks just⁸, and after completing his investigation under these provisions he must⁹ make such order as he thinks just¹⁰.

1 Ie an application under the Matrimonial Causes Act 1973 s 35 or s 36 or the Civil Partnership Act 2004 Sch 5 para 69 or para 73 (see PARA 700 et seq).

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 8, 9(5) (see the text and note 8; and PARA 709) and r 10.10 (see PARA 747).

4 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(1)(b), (3) (Appendix 4 added by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(4) (as added: see note 4).

6 Where any party to such an application intends on the day appointed for the hearing to apply for directions, he must file and serve on every other party a notice to that effect: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(5) (as added: see note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(6) (as added: see note 4).

8 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(1)(b), (3) (as added: see note 4).

9 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 r 9(5) (see PARA 709).

10 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(2) (as added: see note 4). RSC Order 31 r 1 (power to order sale of land) applies to applications to which these provisions apply as though that application were a cause or matter in the Chancery Division: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(4) (as so added). As to the continuing application of specific provisions of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

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709. Reference to judge of application made during lives of parties.

The district judge¹ may at any time refer an application for the variation of a maintenance agreement during the lives of the parties², or any question arising thereon, to a judge³ for his decision, and where such an application is so referred or adjourned to a judge the proper officer⁴ must fix a date, time and place for the hearing of the application or the consideration of the question and give notice of that date to all parties⁵. The hearing or consideration must, unless the court otherwise directs, take place in chambers⁶. Where the application is proceeding in a divorce or civil partnership proceedings county court⁷ which is not a court of trial or is pending in the High Court and proceeding in a district registry⁸ which is not in a divorce town or a dissolution town⁹, the hearing or consideration must take place at such court of trial or divorce or dissolution town as in the opinion of the district judge is the nearest or most convenient¹⁰. The judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings¹¹.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 I.e. an application under the Matrimonial Causes Act 1973 s 35 or the Civil Partnership Act 2004 Sch 5 para 69 (see PARA 700 et seq).

3 As to the meaning of 'judge' see PARA 737 note 3.

4 As to the meaning of 'proper officer' see PARA 461 note 5.

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(1)(b), (5), (6) (Appendix 4 added by SI 2005/2922).

6 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(7) (as added: see note 5).

7 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

8 As to the meaning of 'district registry' see PARA 737 note 3.

9 As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2. For these purposes the Royal Courts of Justice are treated as a divorce town or a dissolution town, as the case may be: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(10) (as added: see note 5).

10 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(8), (9) (as added: see note 5).

11 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 7(4), 9(11) (as added: see note 5).

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(ii) Settlements

710. Marriage and civil partnership settlements.

A marriage or civil partnership settlement is a settlement made in consideration of marriage or civil partnership either before or after the marriage takes place or the civil partnership is registered, although in the latter case only if made in pursuance of an agreement to settle made prior to the marriage or in anticipation of the formation of the civil partnership¹. The form of a settlement has to a large extent become stereotyped², although not so stereotyped that any particular provision can be presumed to have been inserted in the settlement³.

1 As to contracts for settlements see **SETTLEMENTS** vol 42 (Reissue) PARA 627 et seq. As to consideration for settlements see **SETTLEMENTS** vol 42 (Reissue) PARAS 659-663. If the court grants a decree of divorce, nullity or judicial separation or makes a dissolution, nullity or separation order in respect of a civil partnership it has power to vary a post-nuptial settlement or a settlement made on the civil partners during the subsistence of their civil partnership for the benefit of the parties to the marriage or civil partnership and of any children of the family, and for this purpose the term 'settlement' has been interpreted as having a wide meaning: see the Matrimonial Causes Act 1973 s 24(1)(c); the Civil Partnership Act 2004 Sch 5 para 7(1)(c); and PARAS 510, 518. See also *Brooks v Brooks* [1996] AC 375, [1995] 3 All ER 257, HL, where a pension scheme was held to be a post-nuptial settlement for the purposes of the Matrimonial Causes Act 1973 s 24(1)(c).

2 See further **SETTLEMENTS** vol 42 (Reissue) PARA 628 et seq.

3 See *Re Knapp's Settlement*, *Cowan v Knapp* [1952] 1 All ER 458n; *Cummins v Hall and Cummins* [1933] IR 419. As to when a settlement will be a bill of sale see the Bills of Sale Act 1878 s 4; the Bills of Sale Act (1878) Amendment Act 1882 s 3; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1638.

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711. Post-nuptial settlements and settlements made during the subsistence of a civil partnership.

A post-nuptial settlement, or a settlement made during the subsistence of a civil partnership, will usually contain the same provisions as those contained in an ante-nuptial settlement or a settlement made in anticipation of the formation of a civil partnership¹. It will be considered as a voluntary settlement² unless either it is made in pursuance of an agreement made prior to the marriage or the registration of the civil partnership³, in which event it will be deemed to have been made in consideration of the marriage or civil partnership⁴, or it is the result of a bargain made after the marriage or civil partnership between the parties⁵, or it is made for valuable consideration given by some other person⁶.

1 As to variations of post-nuptial settlements and settlements made on civil partners during the subsistence of their civil partnership on divorce, dissolution, nullity or judicial separation see PARA 710 note 1. As to marriage and civil partnership settlements generally see **SETTLEMENTS** vol 42 (Reissue) PARA 628 et seq.

2 See *Goodright d Humphreys v Moses* (1775) 2 Wm Bl 1019; *Evelyn v Templar* (1787) 2 Bro CC 148; *Currie v Nind* (1836) 1 My & Cr 17; *Doe d Barnes v Rowe* (1838) 6 Scott 525; *Shurmur v Sedgwick, Crossfield v Shurmur* (1883) 24 ChD 597; *Re Gillespie, ex p Knapman, Trustee v Gillespie* (1913) 20 Mans 311. See also *Pownall v Anderson* (1856) 2 Jur NS 857, where articles entered into after marriage were held inoperative.

3 As to contracts for settlements see **SETTLEMENTS** vol 42 (Reissue) PARA 627 et seq.

4 As to marriage and civil partnership as consideration for a settlement see **SETTLEMENTS** vol 42 (Reissue) PARA 660 et seq; and see *Ex p Hall* (1812) 1 Ves & B 112 (settlement made after a marriage in Scotland did not become an ante-nuptial settlement by reason of the recelebration of the marriage in England).

5 *Teasdale v Braithwaite* (1876) 4 ChD 85 (affd (1877) 5 ChD 630, CA); *Re Foster and Lister* (1877) 6 ChD 87, dissenting from *Butterfield v Heath* (1852) 15 Beav 408; *Re Lynch, Lynch v Lynch* (1879) 4 LR Ir 210, Ir CA; *Re Bell's Estate* (1882) 11 LR Ir 512; *Schreiber v Dinkel* (1884) 54 LJ Ch 241. See also *Stileman v Ashdown* (1742) 2 Atk 477; *Brown v Jones* (1744) 1 Atk 188 at 190; *Ramsden v Hylton* (1751) 2 Ves Sen 304; *Parker v Carter* (1845) 4 Hare 400 at 409; *Harman v Richards* (1852) 10 Hare 81; *Hewison v Negus* (1853) 16 Beav 594; *Carter v Hind* (1853) 22 LTOS 116; *Whitbread v Smith* (1854) 3 De GM & G 727 at 739; *Stephens v Green, Green v Knight* [1895] 2 Ch 148, CA. In this case the consideration does not extend to the children of the family, who are volunteers and cannot enforce the settlement, unless they are parties to it (see *Joyce v Hutton* (1860) 11 I Ch R 123 (on appeal (1861) 12 I Ch R 71, Ir CA); *Green v Paterson* (1886) 32 ChD 95, CA; cf *Gandy v Gandy* (1885) 30 ChD 57, CA), or there is an executed trust in their favour (see *Joyce v Hutton*; *Green v Paterson*). See further **SETTLEMENTS** vol 42 (Reissue) PARA 615.

6 *Bayspoole v Collins* (1871) 6 Ch App 228; cf *Ex p Hall* (1812) 1 Ves & B 112. See also *Ford v Stuart* (1852) 15 Beav 493; *Townend v Toker* (1866) 1 Ch App 446.

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(iii) Ante-nuptial and Pre-registration Agreements

712. Unenforceability of agreements.

Although the following provisions¹ derive from common law decisions pre-dating the concept of civil partnerships, it is submitted that they must now also apply, to the extent that they have continuing relevance, to both marriage and civil partnership.

It has been held that ante-nuptial agreements, that is to say agreements made prior to marriage and seeking to regulate the prospective spouses' financial liabilities and responsibilities towards each other in the event of their subsequent divorce or separation, are unenforceable in English law since they are perceived as contrary to public policy for undermining the concept of marriage as a life-long union². Moreover, it has been held that that public policy argument applies even if the individual clauses are examined separately as each is part of an agreement to regulate the affairs on divorce³, and that such contracts are neither maintenance agreements⁴ nor ante-nuptial settlements⁵.

However, it has also been held that, whilst unenforceable, ante-nuptial agreements may have evidential weight when the terms of the agreement are relevant to an issue before the court in subsequent proceedings for divorce⁶, and that a judge has a discretionary power in proceedings for financial relief to require a party to show good cause why an ante-nuptial agreement should not govern the division of assets on the dissolution of the marriage⁷.

In the case of financial relief in England and Wales after an overseas divorce⁸, where the court is deciding whether or not to order a stay of proceedings⁹, the fact that the parties have entered into an ante-nuptial agreement governed by the law of another jurisdiction may be a powerful factor in an English court's decision that their claims for relief should be heard in the courts of that other jurisdiction¹⁰.

1 See the text and notes 2-10.

2 *Hyman v Hyman* [1929] AC 601, HL (wife who covenanted by a deed of separation not to take proceedings against her husband to allow her maintenance beyond the provision made for her by the deed and who subsequently obtained a decree of divorce on the grounds of her husband's adultery was not precluded by her covenant from applying for permanent maintenance); *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583, sub nom *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745 (Orthodox Jewish husband failing to take steps to obtain a get; wife sought specific performance of ante-nuptial agreement). See also *F v F (ancillary relief: substantial assets)* [1996] 2 FCR 397 at 399, [1995] 2 FLR 45 at 66 (the rights and responsibilities of persons whose financial affairs are regulated by statute cannot be much influenced by contractual terms which have been devised for the control and limitation of standards that are intended to be of universal application throughout our society); Case C-220/95 *Van den Boogaard v Laumen* [1997] All ER (EC) 517, [1997] ECR I-1147, ECJ (Dutch parties having separation of goods agreement).

3 *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583, sub nom *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745.

4 As to maintenance agreements see PARA 423 et seq.

5 As to marriage settlements see PARA 710.

6 *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583, sub nom *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745. Thus, in any application for financial relief, the existence of an ante-nuptial

agreement is a factor in the exercise by the court of its discretion to grant relief under the Matrimonial Causes Act 1973 s 25 or (presumably) the Civil Partnership Act 2004 Sch 5 paras 20, 21 (see PARA 589 et seq) to which weight may or may not be given, depending on the facts of the case: see *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745; *M v M (pre-nuptial agreement)* [2002] 1 FLR 654 (although the pre-nuptial agreement did not dictate the wife's entitlement, and the court was not in any way bound by its terms, the court should nonetheless consider it and decide in the particular circumstances what weight should, in justice, be attached to it).

7 See *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FCR 323.

8 Ie under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27): see PARA 530 et seq. For the corresponding civil partnership provision see the Civil Partnership Act 2004 Sch 7; and PARA 530 et seq.

9 As to stays of proceedings see PARA 845 et seq.

10 *S v S (matrimonial proceedings: appropriate forum)* [1997] 1 WLR 1200, [1997] 3 FCR 272 (where other jurisdictions have been persuaded that there are cases where justice can only be served by confining the parties to their rights under ante-nuptial agreements, there should be caution about asserting too categorically to the contrary).

UPDATE

712 Unenforceability of agreements

NOTE 7--In order to achieve fairness between the parties, a court should give due weight to the marital property regime into which they have freely entered: *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 12, [2010] 1 AC 1103 (where the court gave due weight to the marital property regime into which the parties had freely entered, the court found in favour of the wife's claim for a share of the husband's property). *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 12, [2010] 1 AC 1103. EWCA Civ 649, [2009] 2 FCR 645.

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(iv) Consent Orders

713. Orders for financial relief agreed by the parties.

On an application for a consent order¹ for financial relief², including an application for a consent order varying or discharging an order for financial relief, the court³ may⁴, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of such information as is required to be furnished with the application⁵.

1 For these purposes 'consent order', in relation to an application for an order, means an order in the terms applied for to which the respondent agrees: Matrimonial Causes Act 1973 s 33A(3) (s 33A added by the Matrimonial and Family Proceedings Act 1984 s 7); Civil Partnership Act 2004 Sch 5 para 66(3).

2 For these purposes, 'order for financial relief' means a financial provision order (ie an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5) (see PARA 458 et seq)), a property adjustment order (ie an order under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9) (see PARA 499 et seq)), an order for the sale of property (ie an order under the Matrimonial Causes Act 1973 s 24A or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14) (see PARA 520 et seq)), a pension sharing order (ie an order under the Matrimonial Causes Act 1973 s 24B or the Civil Partnership Act 2004 Sch 5 Pt 4 (paras 15-19) (see PARA 523 et seq)) or an order for financial provision during the subsistence of a marriage or civil partnership (ie an order under the Matrimonial Causes Act 1973 s 27(1) or the Civil Partnership Act 2004 Sch 5 para 39(1) (see PARA 542)); Matrimonial Causes Act 1973 s 33A(3) (as so added; amended by the Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 8); Civil Partnership Act 2004 Sch 5 para 66(3).

3 As to the meaning of 'court' see PARA 534 note 2.

4 Ie notwithstanding anything in the Matrimonial Causes Act 1973 Pt II (ss 21-40A) or the Civil Partnership Act 2004 Sch 5 paras 1-65 (see PARA 450 et seq).

5 Matrimonial Causes Act 1973 s 33A(1), (2) (as added: see note 1); Civil Partnership Act 2004 Sch 5 para 66(1), (2). As to the information to be supplied see PARA 714.

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714. Information to be supplied on application for consent order.

With every application for a consent order relating to a financial provision order¹, a property adjustment order² or an order for the sale of property³ there must be lodged two copies of a draft of the order in the terms sought, one of which must be indorsed with a statement signed by the respondent⁴ to the application signifying his agreement, and a statement of information, which may be made in more than one document, which must include:

- 915 (1) the duration of the marriage or civil partnership, the age of each party and of any minor or dependent child of the family⁵;
- 916 (2) an estimate in summary form of the approximate amount or value of the capital resources and net income of each party and of any minor child of the family⁶;
- 917 (3) what arrangements are intended for the accommodation of each of the parties and any minor child of the family⁷;
- 918 (4) whether either party has subsequently married or formed a civil partnership or has any present intention to do so or to cohabit with another person⁸;
- 919 (5) where the order includes provision to be made in respect of pension arrangements⁹, a statement confirming that the person responsible for the pension arrangement in question has been served with the required documents¹⁰ and that no objection to such an order has been made by that person within 21 days from such service¹¹;
- 920 (6) where the terms of the order provide for a transfer of property, a statement confirming that any mortgagee of that property has been served with notice of the application and that no objection to such a transfer has been made by the mortgagee within 14 days from such service¹²; and
- 921 (7) any other especially significant matters¹³.

This is subject to the proviso that where an application is made for a consent order varying an order for periodical payments, these provisions are sufficiently complied with if the statement of information required to be lodged with the application includes only the information in respect of net income mentioned in head (2) above and, where appropriate, a statement under head (5) above; and that an application for a consent order for interim periodical payments pending the determination of an application for ancillary relief may be made in like manner¹⁴. Where all or any of the parties attend the hearing of an application for financial relief, the court may dispense with the lodging of a statement of information in accordance with the above provisions and give directions for the information which would otherwise be required to be given in such a statement to be given in such a manner as it sees fit¹⁵.

1 Ie an order under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5) (see PARA 458 et seq).

2 Ie an order under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9) (see PARA 499 et seq).

3 Ie an order under the Matrimonial Causes Act 1973 s 24A or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14) (see PARA 520 et seq).

4 For these purposes, unless the context otherwise requires, 'respondent' means the respondent to the application: Family Proceedings Rules 1991, SI 1991/1247, r 2.51B(2) (added by SI 1999/3491).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(a) (r 2.61(1) amended by SI 2005/2922; Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(a) amended by SI 2005/2922). As to the meaning of 'child of the family' see PARA 553 note 4.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(b).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(c).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(d) (substituted by SI 2005/2922).

9 le provision under the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 25 or 26 (see PARAS 485-486).

10 le the documents required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(11) (see PARA 927).

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(dd) (added by SI 1996/1674; amended by SI 2000/2267; SI 2003/2839; SI 2005/2922; SI 2006/2080).

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(e).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1)(f).

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(2) (amended by SI 1996/1674).

15 Family Proceedings Rules 1991, SI 1991/1247, r 2.61(3).

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715. Procedure on application for consent order.

Both parties to an application for a consent order owe a duty of full and frank disclosure to each other and to the court; and that duty applies to negotiations prior to the issue of proceedings¹. The court will carry out a broad appraisal of the parties' financial circumstances as disclosed to it in a summary form without descending into detail; it is only if that appraisal puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further investigation is required by the judge before approving the consent order².

The primary duty when drawing up a consent order rests with the parties' advisers³. Although the parties may, by preamble to the order, agree to matters outside the statutory scheme, the order itself must comply with that scheme: thus the court has no jurisdiction, even with consent, to make a substantive order before a decree nisi is pronounced or a conditional order is made; and an order made before a decree nisi is pronounced or a conditional order is made cannot be rectified under the court's inherent jurisdiction or under the slip rule⁴.

1 *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424, [1985] 1 All ER 106, HL.

2 See *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA; *Harris (formerly Manahan) v Manahan* [1996] 4 All ER 454 at 461, [1997] 2 FCR 607 at 615, CA ('whilst the court is no rubber stamp, nor is it some kind of forensic ferret').

3 See *Dinch v Dinch* [1987] 1 All ER 818, [1987] 1 WLR 252, HL; *Arthur JS Hall & Co (a firm) v Simons* [2002] 1 AC 615, [2000] 3 All ER 673, HL.

4 *Munks v Munks* [1985] FLR 576, [1985] Fam Law 131, CA. See, however, *Pounds v Pounds* [1994] 4 All ER 777, [1994] 1 WLR 1535, CA (a court may approve a draft consent order in advance of a decree nisi and direct that it should take effect at a future date).

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8. INJUNCTIVE RELIEF

(1) NON-MOLESTATION ORDERS

716. Power of court to make non-molestation orders.

The court¹ may make an order (a 'non-molestation order'²) containing either or both of the following provisions:

- 922 (1) provision prohibiting a person (the 'respondent') from molesting³ another person who is associated⁴ with the respondent⁵; and
- 923 (2) provision prohibiting the respondent from molesting a relevant child⁶.

A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both⁷; and such an order may be made for a specified period or until further order⁸.

1 As to the meaning of 'court' see PARA 958.

2 As to the interrelationship between a non-molestation order under the Family Law Act 1996 and a restraining order under the Protection from Harassment Act 1997 (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 349) see *Lomas v Parle* [2003] EWCA Civ 1804, [2004] 1 All ER 1173, [2004] 1 WLR 1642; *Robinson v Murray* [2005] EWCA Civ 935, [2005] 3 FCR 504, [2006] 1 FLR 365. As to appeals against the making of a non-molestation order by a magistrates' court or any refusal to make such an order see the Family Law Act 1996 s 61; and PARA 721. As to variation and discharge see PARA 309. As to enforcement and arrest see PARAS 988-994.

3 Although 'molestation' will include acts and threats of violence (*Davis v Johnson* [1979] AC 264 at 341, [1978] 1 All ER 1132 at 1150, HL), it does not necessarily imply violence or threats of violence but applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court (*Horner v Horner* [1982] Fam 90, [1982] 2 All ER 495, CA; *Johnson v Walton* [1990] FCR 568, [1990] 1 FLR 350, CA). 'Molestation' does not include the invasion of privacy per se (*C v C (non-molestation order: jurisdiction)* [1998] Fam 70, [1998] 2 WLR 599 (wife's publicising of complaints about husband in newspaper articles held not to be molestation)); but sending offending photographs to a newspaper with the intent of causing distress to the claimant would constitute molestation (*Johnson v Walton*).

4 As to the meaning of 'associated person' see PARA 292 note 5.

5 Family Law Act 1996 s 42(1)(a). Where the facts amounting to molestation by the respondent and the association between the respondent and the applicant are proved, the court is not obliged to make a non-molestation order; but, if it does so, it is clear from the wording of s 47(2) (arrest for breach: see PARA 988) that it would, in all but exceptional circumstances, be obliged to include a power of arrest where the respondent has used or threatened violence: *Chechi v Bashier* [1999] 2 FCR 241, [1999] 2 FLR 489, CA.

6 Family Law Act 1996 s 42(1)(b). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

7 Family Law Act 1996 s 42(6).

8 Family Law Act 1996 s 42(7). While a non-molestation order, which may be so made for a specified period or until further order, may sometimes, even often, be designed to give the parties a breathing space so that the tensions between them can settle down and the order will then no longer be needed, at other times it may be appropriate for a much longer period; accordingly, to seek to limit the great variety of factual circumstances in which it may be needed to 'exceptional or unusual circumstances' is not helpful: *Re B-J (a child) (non-*

molestation order: power of arrest) [2001] Fam 415, [2001] 1 All ER 235, [2000] 2 FCR 599, CA, overruling *M v W* (*non-molestation order: duration*) [2000] 1 FLR 107.

UPDATE

716 Power of court to make non-molestation orders

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

TEXT AND NOTES 1-6--A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence: Family Law Act 1996 s 42A(1) (s 42A added by Domestic Violence, Crime and Victims Act 2004 s 1). The burden of proof relating to reasonable excuse is on the prosecution: *R v Richards* [2010] EWCA Crim 835, (2010) Times, 28 April. Where a person is convicted of an offence under the Family Law Act 1996 s 42A in respect of any conduct, that conduct is not punishable as a contempt of court, and a person cannot be convicted of an offence under s 42A in respect of any conduct which has been punished as a contempt of court: s 42A(3), (4). A person guilty of an offence under s 42A is liable (1) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both; (2) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum, or both: s 42A(5). A reference in any enactment to proceedings under Pt IV (ss 30-63), or to an order under Pt IV, does not include a reference to proceedings for an offence under s 42A or to an order made in such proceedings: s 42A(6).

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717. Applications for orders and making of orders.

The court¹ may make a non-molestation order² if:

- 924 (1) an application for the order has been made, whether in other family proceedings³ or without any other family proceedings being instituted, by a person who is associated⁴ with the respondent⁵; or
- 925 (2) in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child⁶ even though no such application has been made⁷.

A child under the age of 16 may not apply for a non-molestation order except with the leave of the court⁸; and the court may grant such leave only if it is satisfied that the child has sufficient understanding to make the proposed application⁹. A non-molestation order should not be made against a person who is under a disability by reason of mental incapacity¹⁰

A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed¹¹.

1 As to the meaning of 'court' see PARA 958.

2 As to the meaning of 'non-molestation order' see PARA 716. As to appeals against the making of a non-molestation order by a magistrates' court or any refusal to make such an order see the Family Law Act 1996 s 61; and PARA 721. As to variation and discharge see PARA 309. As to enforcement and arrest see PARAS 988-994.

The fee payable on applying for a non-molestation order, an occupation order or a forced marriage protection order (see PARA 289 et seq) is £60: Family Proceedings Fees Order 2008, SI 2008/1054, art 2, Sch 1, Fee 1.3 (amended by SI 2008/2856).

3 As to the meaning of 'family proceedings' see PARA 289 note 8; in relation to applications for non-molestation orders 'family proceedings' also includes proceedings in which the court has made an emergency protection order under the Children Act 1989 s 44 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 583 et seq) which includes an exclusion requirement as defined in s 44A(3) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 587): Family Law Act 1996 s 42(3).

4 As to the meaning of 'associated person' see PARA 292 note 5. The statutory provisions relating to non-molestation orders should be given a purposive construction; and courts should not decline jurisdiction unless the facts of the case were plainly incapable of being brought within those provisions. It would be unfortunate, in cases of domestic violence, if the Family Law Act 1996 s 62(3) (ie the definition of 'associated person': see PARA 292 note 5) were to be so narrowly construed as to exclude borderline cases where quick and effective protection for the victims of domestic violence is needed: *G v F (non-molestation order: jurisdiction)* [2000] Fam 186, [2000] 3 WLR 1202, per curiam (evidence in the respondent's statement that from his perspective the parties were cohabiting ignored; evidence of a sexual relationship and some financial support also present).

5 Family Law Act 1996 s 42(2)(a). As to the 'respondent' see PARA 716. If an agreement to marry or a civil partnership agreement (as defined by the Civil Partnership Act 2004 s 73: see PARA 16) is terminated, no application under s 42 may be made by virtue of s 62(3)(e) or s 62(3)(eza) (see the definition of 'associated person', PARA 292 note 5) by reference to that agreement after the end of the period of three years beginning with the day on which it is terminated: s 42(4), (4ZA) (ss 42(4ZA), 44(3), (4) added by the Civil Partnership Act 2004 Sch 9 paras 9, 10). The court must not make an order under s 42 by virtue of s 62(3)(e) or s 62(3)(eza) unless there is produced to it evidence in writing of the existence of the agreement to marry or the civil partnership agreement (s 44(1), (3) (s 44(3) as so added)), although this does not apply if the court is satisfied that the agreement to marry or the civil partnership agreement was evidenced by the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or a gift by one party to the

agreement to the other as a token of the agreement, or a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony (s 44(2), (4) (s 44(4) as so added)).

6 As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

7 Family Law Act 1996 s 42(2)(b).

8 Family Law Act 1996 s 43(1). A non-molestation order against a 16-year old cannot be enforced by imprisonment and, if the child has no means, should not be made: *Re P (a minor) (injunction)* [1994] Fam Law 131.

9 Family Law Act 1996 s 43(2).

10 *Wookey v Wookey, Re S (a minor)* [1991] Fam 121, [1991] 3 All ER 365, CA (the appropriate way of dealing with the problem of restraining unsocial behaviour by such a person is the use of the statutory powers of admission and detention for assessment and treatment, although it may be appropriate for the court to make a very limited interlocutory injunction while the mental condition of that person is investigated).

11 Family Law Act 1996 s 42(8).

UPDATE

717 Applications for orders and making of orders

NOTE 2--SI 2008/2856 amended: SI 2008/3106.

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718. Matters to which the court must have regard.

In deciding whether to make a non-molestation order¹ the court² must have regard to all the circumstances including the need to secure the health³, safety and well-being:

- 926 (1) of the applicant⁴ or, where the court makes the order without it having been applied for⁵, the person for whose benefit the order would be made⁶; and
- 927 (2) of any relevant child⁷.

1 As to the meaning of 'non-molestation order' see PARA 716.

2 As to the meaning of 'court' see PARA 958.

3 As to the meaning of 'health' see PARA 290 note 4.

4 In relation to a non-molestation order the 'applicant' includes (where the context permits) the person for whose benefit such an order would be or is made in exercise of the power conferred by the Family Law Act 1996 s 42(2)(b) (see PARA 717): s 42(4B) (added by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 36).

5 ie in a case falling within the Family Law Act 1996 s 42(2)(b) (see PARA 717).

6 Family Law Act 1996 s 42(5)(a).

7 Family Law Act 1996 s 42(5)(b). As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

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719. Without-notice orders.

The court¹ may, in any case where it considers that it is just and convenient to do so, make a non-molestation order² even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court³. In determining whether to exercise these powers, the court must have regard to all the circumstances including:

- 928 (1) any risk of significant harm⁴ to the applicant⁵ or a relevant child⁶, attributable to conduct of the respondent⁷, if the order is not made immediately⁸;
- 929 (2) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately⁹; and
- 930 (3) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved where the court is a magistrates' court, in effecting service of proceedings or in any other case, in effecting substituted service¹⁰.

If the court makes an order without notice it must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing¹¹.

1 As to the meaning of 'court' see PARA 958.

2 As to the meaning of 'non-molestation order' see PARA 716. As to appeals against the making of a non-molestation order by a magistrates' court or any refusal to make such an order see the Family Law Act 1996 s 61; and PARA 721. As to variation and discharge see PARA 309. As to enforcement and arrest see PARAS 988-994.

3 Family Law Act 1996 s 45(1). As to the attachment of a power of arrest to an order made by virtue of s 45(1) see s 47(3); and PARA 988.

If an order is made without notice, it must be strictly limited in time and operate only until the earliest day on which a hearing with notice can be arranged: *Ansah v Ansah* [1977] Fam 138, [1977] 2 All ER 638, CA; *Masich v Masich* (1977) 7 Fam Law 245, CA; *Practice Note* [1978] 2 All ER 919, sub nom *Practice Direction* [1978] 1 WLR 925; *Loseby v Newman* [1996] 1 FCR 647, [1995] 2 FLR 754, CA. While an ouster order is made without notice, it must be strictly limited in time, and any application to discharge it should be treated as urgent business; if there are listing difficulties, the matter should always be referred to a judicial officer, preferably a judge: *G v G (exclusion order)* [1990] FCR 572, [1990] 1 FLR 395, CA.

4 As to the meanings of 'harm' and 'significant harm' see PARA 290 note 4.

5 As to the 'applicant' see PARA 718 note 4.

6 As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

7 As to the 'respondent' see PARA 716.

8 Family Law Act 1996 s 45(2)(a).

9 Family Law Act 1996 s 45(2)(b).

10 Family Law Act 1996 s 45(2)(c).

11 Family Law Act 1996 s 45(3). For these purposes, 'full hearing' means a hearing of which notice has been given to all the parties in accordance with rules of court: s 45(5).

UPDATE

719 Without-notice orders

NOTE 3--In the case of a non-molestation order made by virtue of the Family Law Act 1996 s 45(1), a person can be guilty of an offence under s 42A (see PARA 716) only in respect of conduct engaged in at a time when he was aware of the existence of the order: s 42A(2) (s 42A added by the Domestic Violence, Crime and Victims Act 2004 s 1).

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720. Undertakings.

In any case where the court¹ has power to make a non-molestation order² it may accept an undertaking from any party to the proceedings³; but no power of arrest may be attached to any undertaking so given⁴. The court must not accept such an undertaking in any case where it appears to the court that the respondent⁵ has used or threatened violence against the applicant⁶ or a relevant child⁷ and for the protection of the applicant or child it is necessary to make a non-molestation order so that any breach may be punishable⁸. An undertaking so given to a court is enforceable as if the court had made a non-molestation order in terms corresponding to those of the undertaking⁹.

These provisions have effect without prejudice to the powers of the High Court and the county court apart from those provisions¹⁰.

1 As to the meaning of 'court' see PARA 958.

2 As to the meaning of 'non-molestation order' see PARA 716.

3 Family Law Act 1996 s 46(1). An undertaking can be enforced on breach by applying for a committal but there can be no appeal from an undertaking: *McConnell v McConnell* (1980) 10 Fam Law 214, CA.

4 Family Law Act 1996 s 46(2). See, however, PARA 716 note 5. As to the enforcement of undertakings see PARA 997.

5 As to the 'respondent' see PARA 716.

6 As to the 'applicant' see PARA 718 note 4.

7 As to the meaning of 'relevant child' see PARA 290 note 5; as to the meaning of 'child' see PARA 290 note 4.

8 Family Law Act 1996 s 46(3A) (s 46(3A) added, s 46(4) amended, by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 37). As to the punishment of a breach of a non-molestation order see the Family Law Act 1996 s 42; and PARA 716 et seq.

9 Family Law Act 1996 s 46(4) (as amended: see note 8). As to the breach of a non-molestation order made without notice see *Clarke v Clarke* [2004] EWCA Civ 1185, [2004] 3 FCR 161.

10 Family Law Act 1996 s 46(5).

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721. Appeals.

An appeal lies to the High Court against the making by a magistrates' court of a non-molestation order¹ or any refusal by a magistrates' court to make such an order, but no appeal lies against any exercise by a magistrates' court of the power to decline jurisdiction² if it considers that the case can more conveniently be dealt with by another court³. On such an appeal the High Court may make such orders as may be necessary to give effect to its determination of the appeal⁴; and, where an order is so made, the High Court may also make such incidental or consequential orders as appear to it to be just⁵. Any order of the High Court made on such an appeal, other than one directing that an application be reheard by a magistrates' court, is to be treated, for the purposes of the enforcement of the order and of any power to vary, revive or discharge orders⁶, as if it were an order of the magistrates' court from which the appeal was brought and not an order of the High Court⁷.

1 As to the meaning of 'non-molestation order' see PARA 716. As to the jurisdiction of courts for these purposes see PARA 958.

2 lie under the Family Law Act 1996 s 59(2): see PARA 960.

3 Family Law Act 1996 s 61(1).

4 Family Law Act 1996 s 61(2).

5 Family Law Act 1996 s 61(3). See further PARA 986.

6 As to variation and discharge see PARA 309.

7 Family Law Act 1996 s 61(4).

UPDATE

721 Appeals

TEXT AND NOTES--References to the High Court are now to a county court: Family Law Act 1996 s 61 (amended by SI 2009/871).

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722. Power to vary or discharge.

A non-molestation order¹ may be varied or discharged by the court² on an application by the respondent³ or the person on whose application the order was made⁴. Where the court made the non-molestation order without its having been applied for⁵, the court may vary or discharge the order even though no application for variation or discharge has been made⁶.

Proceedings to extend, vary or discharge a non-molestation order, or proceedings the determination of which may have the effect of varying or discharging such an order, must be made to the court which made the order⁷; but a court may⁸ transfer proceedings so made to any other court⁹.

1 As to the meaning of 'non-molestation order' see PARA 716.

2 As to the meaning of 'court' see PARA 958.

3 As to the 'respondent' see PARA 716.

4 Family Law Act 1996 s 49(1). An application to vary, extend or discharge an order must be made in accordance with the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL403 (added by SI 1997/1893); and the Family Proceedings Rules 1991, SI 1991/1247, r 3.9 (see PARA 975) applies to the hearing of such an application: r 3.9(8) (substituted by SI 1997/1893).

Where an order is made varying or discharging the relevant provisions of a non-molestation order the proper officer or the designated officer for the court must immediately inform the officer who received a copy of the form under the Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(1A) (see PARA 975) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(1A) (see PARA 978) and, if the applicant's address has changed, the officer for the time being in charge of the police station for the new address, and deliver a copy of the order to any officer so informed: Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(2) (added by SI 1997/1893; amended by SI 2007/1622); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(2) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(2) amended by SI 2005/617; SI 2007/1628). As to the meaning of 'proper officer' see PARA 461 note 5.

5 Ie in a case falling within the Family Law Act 1996 s 42(2)(b) (see PARA 717).

6 Family Law Act 1996 s 49(2).

7 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 5(1).

8 Ie in accordance with the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, arts 6-14: see PARA 964 et seq.

9 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 5(2).

UPDATE

722 Power to vary or discharge

TEXT AND NOTES 7-9--SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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(2) FORCED MARRIAGE PROTECTION ORDERS

723. Power of court to make orders.

The court¹ may make an order for the purposes of protecting:

- 931 (1) a person from being forced into a marriage or from any attempt to be forced into a marriage²; or
- 932 (2) a person who has been forced into a marriage³.

For these purposes 'marriage' means any religious or civil ceremony of marriage (whether or not legally binding)⁴, and a person is 'forced' into a marriage if another person forces him or her to enter into a marriage (whether with that other person or another person) without his or her free and full consent⁵. 'Force' includes coercion by threats or other psychological means, and related expressions are to be read accordingly⁶. The identity of the person against whom the conduct which forces the person in question to enter into a marriage is directed is immaterial⁷.

These provisions⁸ do not affect any other protection or assistance available to a person who is being, or may be, forced into a marriage or subjected to an attempt to be forced into a marriage or has been forced into a marriage⁹.

1 The High Court or a county court: Family Law Act 1996 ss 63M(1), 63S (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1). As to the jurisdiction of the courts in respect of forced marriage protection orders see s 63M(2)-(4); and PARA 958. As to the matters to which the court must have regard in considering whether to make an order under these provisions see PARA 726. As to the content and duration of orders see PARA 727. As to enforcement and arrest see PARAS 988-994.

2 Family Law Act 1996 s 63A(1)(a) (as added: see note 1).

3 Family Law Act 1996 s 63A(1)(b) (as added: see note 1).

4 Family Law Act 1996 s 63S (as added: see note 1).

5 Family Law Act 1996 ss 63A(4), 63S (as added: see note 1).

6 Family Law Act 1996 ss 63A(6), 63S (as added: see note 1).

7 See the Family Law Act 1996 s 63A(5) (as added: see note 1).

8 The Family Law Act 1996 Pt IV (see note 1).

9 Family Law Act 1996 ss 63R(1) (as added: see note 1). In particular, Pt IVA does not affect:

148 (1) the inherent jurisdiction of the High Court (s 63R(2)(a) (as so added));

149 (2) any criminal liability (s 63R(2)(b) (as so added));

150 (3) any civil remedies under the Protection from Harassment Act 1997 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 152-153) (Family Law Act 1996 s 63R(2) (c) (as so added));

151 (4) any right to an occupation order (see PARAS 289-309) or a non-molestation order (see PARAS 716-722) under Pt IV (s 63R(2)(d) (as so added));

- 152 (5) any protection or assistance under the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 199 et seq, 247 et seq, 577 et seq; **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 844 et seq) (Family Law Act 1996 s 63R(2)(e) (as so added));
- 153 (6) any claim in tort (s 63R(2)(f) (as so added)); or
- 154 (7) the law of marriage (s 63R(2)(g) (as so added)).

As to arranged and forced marriages generally see PARA 12. The Secretary of State may from time to time prepare and publish guidance to such descriptions of persons as the Secretary of State considers appropriate about the effect of Pt IVA or any provision thereof or other matters relating to forced marriages: s 63Q(1) (as so added). A person exercising public functions to whom guidance is so given must have regard to it in the exercise of those functions: s 63Q(2) (as so added). Nothing in s 63Q permits the Secretary of State to give guidance to any court or tribunal: s 63Q(3) (as so added).

UPDATE

723 Power of court to make orders

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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724. Applications for orders.

The court¹ may make a forced marriage protection order², either on an application being made to it for such an order³ or, without such an application being made, of the court's own volition pursuant to family proceedings⁴. An application may be made by the person who is to be protected by the order⁵, by a relevant third party⁶ or by any other person with the leave of the court⁷.

1 As to the meaning of 'court' see PARA 723 note 1.

2 Ie an order under the Family Law Act 1996 s 63A (see PARA 723): Family Law Act 1996 ss 63A(6), 63S (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1).

3 Family Law Act 1996 s 63C(1)(a) (as added: see note 2). For procedure see PARA 980 et seq. An application under s 63C may be made in other family proceedings or without any other family proceedings being instituted: s 63C(5) (as so added). By virtue of the Family Law Act 1996 s 63(1), (2) (amended by the Adoption and Children Act 2002 Sch 3 paras 85, 88; the Civil Partnership Act 2004 Sch 9 para 14; the Forced Marriage (Civil Protection) Act 2007 Sch 2 para 3) and the Family Law Act 1996 s 63C(7) (as so added), 'family proceedings' means:

- 155 (1) any proceedings under the inherent jurisdiction of the High Court in relation to children (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 200) or adults;
- 156 (2) any proceedings under the Family Law Act 1996 Pt IV (ss 30-63) (see PARAS 285 et seq, 292 et seq);
- 157 (3) any proceedings under the Matrimonial Causes Act 1973 (see PARA 317 et seq);
- 158 (4) any proceedings under the Adoption Act 1976 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 375 et seq);
- 159 (5) any proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 (see PARA 553 et seq);
- 160 (6) any proceedings under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (see PARAS 530 et seq, 938 et seq);
- 161 (7) any proceedings under the Children Act 1989 Pt I (ss 1-7), Pt III (ss 17-30) and Pt IV (ss 31-42) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 125, 133 et seq, 270 et seq, **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 851 et seq);
- 162 (8) any proceedings under the Human Fertilisation and Embryology Act 1990 s 30 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 106);
- 163 (9) any proceedings under the Adoption and Children Act 2002 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 331 et seq)
- 164 (10) any proceedings under the Civil Partnership Act 2004 Schs 5-7 (see PARA 450 et seq);
- 165 (11) any proceedings under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq);
- 166 (12) proceedings in which the court has made an emergency protection order under the Children Act 1989 s 44 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 583 et

seq) which includes an exclusion requirement as defined in s 44A(3) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 587); and

- 167 (13) proceedings in which the court has made an order under s 50 (recovery of abducted children etc: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 606-607).

4 See the Family Law Act 1996 s 63C(1)(b); and PARA 725. As to the matters to which the court must have regard in considering whether to make an order under these provisions see PARA 726. As to the content and duration of orders see PARA 727. As to enforcement and arrest see PARAS 988-994.

Where the court makes a forced marriage protection order of its own motion it must set out in the order:

- 168 (1) a summary of its reasons for making the order (Family Proceedings Rules 1991, SI 1991/1247, r 3.34(1)(a) (r 3.34 added by SI 2008/2446)); and
- 169 (2) the names of the persons who are to be served with the order (Family Proceedings Rules 1991, SI 1991/1247, r 3.34(1)(b) (as so added)).

The court may order service of the order on:

- 170 (a) any of the parties to the current proceedings (r 3.34(2)(a) (as so added));
- 171 (b) if different, the person being protected by the order (r 3.34(2)(b) (as so added)); and
- 172 (c) any other persons whom the court considers should be served (r 3.34(2)(c) (as so added)).

The court will give directions as to how the order is to be served (r 3.34(3) (as so added)) and may direct that a further hearing be held to consider any representations made by any of the persons named in the order (r 3.34(4) (as so added)).

5 Family Law Act 1996 s 63C(2)(a) (as added: see note 2).

6 Family Law Act 1996 s 63C(2)(b) (as added: see note 2). 'Relevant third party' means a person specified, or falling within a description of persons specified, by the Lord Chancellor: s 63C(7) (as so added). An order of the Lord Chancellor under this provision may, in particular, specify the Secretary of State: s 63C(8) (as so added).

7 Family Law Act 1996 s 63C(3) (as added: see note 2). In deciding whether to grant leave, the court must have regard to all the circumstances including the applicant's connection with the person to be protected, the applicant's knowledge of the circumstances of the person to be protected and the wishes and feelings of the person to be protected so far as they are reasonably ascertainable and so far as the court considers it appropriate, in the light of the person's age and understanding, to have regard to them: s 63C(4) (as so added). Where the leave of the court is required to apply for a forced marriage protection order, the person seeking leave must file: (1) a written request for leave in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL430 (added by SI 2008/2446) setting out: (a) the reasons for the application; (b) the applicant's connection with the person to be protected; (c) the applicant's knowledge of the circumstances of the person to be protected; and (d) the applicant's knowledge of the wishes and feelings of the person to be protected; and (2) a draft of the application for the making of which leave is sought, together with sufficient copies for one to be served on each respondent and the person to be protected: Family Proceedings Rules 1991, SI 1991/1247 r 3.27(1) (r 3.27 added by SI 2008/2446). As soon as practicable after receiving such a request, the court must either grant the request or direct that a date be fixed for the hearing of the request and fix the date, and the proper officer must inform the following persons of the court's action:

- 173 (i) the person making the request (Family Proceedings Rules 1991, SI 1991/1247, r 3.27(2)(i) (as so added));
- 174 (ii) the respondent (r 3.27(2)(ii) (as so added));
- 175 (iii) if different, the person to be protected (r 3.27(2)(iii) (as so added)); and
- 176 (iv) any other person directed by the court (r 3.27(2)(iv) (as so added)).

Where leave is granted to bring proceedings, the application must proceed in accordance with r 3.26 (see PARA 980); r 3.27(3) (as so added).

UPDATE

724 Applications for orders

NOTE 3--Head (8) substituted so as to refer to the Human Fertilisation and Embryology Act 2008 s 54: Human Fertilisation and Embryology Act 2008 Sch 6 para 37.

NOTE 6--See the Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009, SI 2009/2023, which specifies a local authority (as defined) as a relevant third party for the purposes of applying for a forced marriage protection order under the Family Law Act 1996 s 63C(2).

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725. Making of orders without prior application.

In addition to its powers to make a forced marriage protection order¹ on an application for such an order², the court³ may also make a forced marriage protection order without an application being made to it⁴ if:

- 933 (1) any other family proceedings⁵ are before the court (the 'current proceedings')⁶;
- 934 (2) the court considers that a forced marriage protection order should be made to protect a person (whether or not a party to the current proceedings)⁷; and
- 935 (3) a person who would be a respondent to any such proceedings for a forced marriage protection order is a party to the current proceedings⁸.

1 As to the meaning of 'forced marriage protection order' see PARA 724 note 2.

2 See PARA 724.

3 As to the meaning of 'court' see PARA 723 note 1.

4 Family Law Act 1996 s 63C(1)(b) (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1). As to the matters to which the court must have regard in considering whether to make an order under these provisions see PARA 726. As to the content and duration of orders see PARA 727. As to enforcement and arrest see PARAS 988-994.

5 As to the meaning of 'family proceedings' see PARA 724 note 3.

6 Family Law Act 1996 s 63C(6)(a) (as added: see note 4).

7 Family Law Act 1996 s 63C(6)(b) (as added: see note 4).

8 Family Law Act 1996 s 63C(6)(c) (as added: see note 4).

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726. Matters to which the court must have regard.

In deciding whether to exercise its powers to make a forced marriage protection order¹ and, if so, in what manner, the court² must have regard to all the circumstances including the need to secure the health, safety and well-being of the person to be protected³. In ascertaining that person's well-being, the court must, in particular, have such regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding⁴.

1 The powers conferred by the Family Law Act 1996 s 63A (see PARA 723). As to the meaning of 'forced marriage protection order' see PARA 724 note 2.

2 As to the meaning of 'court' see PARA 723 note 1.

3 Family Law Act 1996 s 63A(2) (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1).

4 Family Law Act 1996 s 63A(3) (as added: see note 3).

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727. Without-notice orders.

The court¹ may, in any case where it considers that it is just and convenient to do so, make a forced marriage protection order² even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court³. In deciding whether to exercise these powers the court must have regard to all the circumstances including:

- 936 (1) any risk of significant harm to the person to be protected or another person if the order is not made immediately⁴;
- 937 (2) whether it is likely that an applicant will be deterred or prevented from pursuing an application if an order is not made immediately⁵; and
- 938 (3) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and the delay involved in effecting substituted service will cause serious prejudice to the person to be protected or (if a different person) an applicant⁶.

The court must also give the respondent an opportunity to make representations about any order made by virtue of these provisions⁷.

1 As to the meaning of 'forced marriage protection order' see PARA 724 note 2.

2 As to the meaning of 'court' see PARA 723 note 1.

3 Family Law Act 1996 s 63D(1) (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1).

4 Family Law Act 1996 s 63D(2)(a) (as added: see note 3).

5 Family Law Act 1996 s 63D(2)(b) (as added: see note 3).

6 Family Law Act 1996 s 63D(2)(c) (as added: see note 3).

7 Family Law Act 1996 s 63D(3) (as added: see note 3). The opportunity must be as soon as just and convenient and at a hearing of which notice has been given to all the parties in accordance with rules of court: Family Law Act 1996 s 63D(4) (as so added).

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728. Content and duration of orders.

Forced marriage protection orders¹ may contain such prohibitions, restrictions or requirements, and such other terms, as the court considers appropriate for the purposes of the order². The terms of such orders may, in particular, relate to:

- 939 (1) conduct outside England and Wales as well as (or instead of) conduct within England and Wales³;
- 940 (2) respondents who are, or may become, involved in other respects as well as (or instead of) respondents who force or attempt to force⁴, or may force or attempt to force, a person to enter into a marriage⁵;
- 941 (3) other persons who are, or may become, involved in other respects as well as respondents of any kind⁶.

A forced marriage protection order may be made for a specified period or until varied or discharged⁷.

1 As to the meaning of 'forced marriage protection order' see PARA 724 note 2.

2 Family Law Act 1996 s 63B(1) (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1).

3 Family Law Act 1996 s 63B(2)(a) (as added: see note 2).

4 As to the meaning of 'force', in the context of a forced marriage, see PARA 723.

5 Family Law Act 1996 s 63B(2)(b) (as added: see note 2). As to the meaning of 'marriage' see PARA 723.

6 Family Law Act 1996 s 63D(2)(c) (as added: see note 2). For these purposes examples of 'involvement in other respects' are aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or to attempt to force, a person to enter into a marriage, or conspiring to force, or to attempt to force, a person to enter into a marriage: s 63B(3) (as so added).

7 Family Law Act 1996 s 63F (as added: see note 2).

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729. Undertakings instead of orders.

The court¹ may accept an undertaking from the respondent to proceedings for a forced marriage protection order² if it has power to make such an order³; no power of arrest⁴ may be attached to an undertaking so given⁵, and the court therefore may not accept an undertaking instead of making an order if a power of arrest would otherwise have been attached to the order⁶. An undertaking given to the court under these provisions is enforceable as if the court had made the order in terms corresponding to those of the undertaking⁷.

1 As to the meaning of 'court' see PARA 723 note 1. These provisions are without prejudice to the powers of the court apart from them: Family Law Act 1996 s 63E(5) (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1).

2 As to the meaning of 'forced marriage protection order' see PARA 724 note 2.

3 Family Law Act 1996 s 63E(1) (as added: see note 1).

4 See PARAS 988-994.

5 Family Law Act 1996 s 63E(2) (as added: see note 1).

6 Family Law Act 1996 s 63E(3) (as added: see note 1).

7 Family Law Act 1996 s 63E(4) (as added: see note 1).

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730. Variation and discharge.

The court¹ may vary or discharge a forced marriage protection order² on an application by:

- 942 (1) any party to the proceedings for the order³;
- 943 (2) the person being protected by the order (if not a party to the proceedings for the order)⁴; or
- 944 (3) any person affected by the order⁵.

The court may also vary or discharge a forced marriage protection order made without an application having been made to it⁶ even though no application for variation or discharge⁷ has been made to the court⁸.

If the court considers that it is just and convenient to do so it may vary a forced marriage protection order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court⁹. In deciding whether to exercise these powers the court must have regard to all the circumstances including:

- 945 (a) any risk of significant harm to the person to be protected or another person if the order is not varied immediately¹⁰;
- 946 (b) whether it is likely that an applicant will be deterred or prevented from pursuing an application if an order is not varied immediately¹¹; and
- 947 (c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and the delay involved in effecting substituted service will cause serious prejudice to the person to be protected or (if a different person) an applicant¹².

The court must also give the respondent an opportunity to make representations about any order varied without notice¹³.

The court may accept an undertaking from the respondent to proceedings for the variation of a forced marriage protection order if it has power to vary such an order¹⁴; no power of arrest¹⁵ may be attached to an undertaking so given¹⁶, and the court therefore may not accept an undertaking instead of varying an order if a power of arrest would otherwise have been attached to the order so varied¹⁷. An undertaking given to the court under these provisions is enforceable as if the court had varied the order in terms corresponding to those of the undertaking¹⁸.

1 As to the meaning of 'court' see PARA 723 note 1.

2 As to the meaning of 'forced marriage protection order' see PARA 724 note 2. As to the variation of powers of arrest see PARAS 988-994. Where an order is made varying or discharging the relevant provisions of a forced marriage protection order the proper officer must immediately inform the officer who received a copy of the form under the Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(1A) (see PARA 975) and, if the address of the person being protected by the order has changed, the officer for the time being in charge of the police station for the new address, and deliver a copy of the order to any officer so informed: Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(2), 3.35(5) (r 3.9A added by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(2) amended by SI 2007/1622; Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(2), 3.35 added by SI 2008/2446). As to the meaning of 'proper officer' see PARA 461 note 5.

- 3 Family Law Act 1996 s 63G(1)(a) (ss 63A-63S added by the Forced Marriage (Civil Protection) Act 2007 s 1).
- 4 Family Law Act 1996 s 63G(1)(b) (as added: see note 3).
- 5 Family Law Act 1996 s 63G(1)(c) (as added: see note 3).
- 6 le made by virtue of the Family Law Act 1996 s 63C(1)(b) (see PARA 725).
- 7 le under the Family Law Act 1996 s 63G(1) (see the text and notes 1-6).
- 8 Family Law Act 1996 s 63G(2) (as added: see note 3).
- 9 Family Law Act 1996 ss 63D(1), 63G(3), (5) (as added: see note 3).
- 10 Family Law Act 1996 s 63D(2)(a) (as added: see note 3).
- 11 Family Law Act 1996 s 63D(2)(b) (as added: see note 3).
- 12 Family Law Act 1996 s 63D(2)(c) (as added: see note 3).
- 13 Family Law Act 1996 s 63D(3) (as added: see note 3). The opportunity must be as soon as just and convenient and at a hearing of which notice has been given to all the parties in accordance with rules of court: Family Law Act 1996 s 63D(4) (as so added).
- 14 Family Law Act 1996 ss 63E(1), 63G(4), (5) (as added: see note 3). These provisions are without prejudice to the powers of the court apart from them: Family Law Act 1996 s 63E(5) (as added: see note 3).
- 15 See PARAS 988-994.
- 16 Family Law Act 1996 s 63E(2) (as added: see note 3).
- 17 Family Law Act 1996 s 63E(3) (as added: see note 3).
- 18 Family Law Act 1996 s 63E(4) (as added: see note 3).

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9. JURISDICTION AND PROCEDURE

(1) POWERS OF COURTS

(i) Jurisdiction in Family Business

731. Business assigned to the Family Division.

To the Family Division of the High Court¹ are assigned (inter alia):

- 948 (1) all matrimonial and civil partnership causes² and matters³, whether at first instance or on appeal⁴;
- 949 (2) applications for consent to the marriage, or formation of a civil partnership, of a minor⁵ or for a declaration⁶ in respect of a marriage between persons within the prohibited degrees of affinity⁷, or in respect of a declaration of no impediment of affinity to the formation of a civil partnership⁸;
- 950 (3) proceedings on appeal⁹ from an order or decision¹⁰ to enforce an order of a magistrates' court made in matrimonial proceedings or proceedings¹¹ relating to home rights and domestic violence¹²;

- 951 (4) applications¹³ for a declaration as to marital status¹⁴;
 952 (5) all proceedings¹⁵ relating to home rights, domestic violence and forced marriage protection orders¹⁶;
 953 (6) applications regarding declarations¹⁷ relating to civil partnerships¹⁸; and
 954 (7) all proceedings for the purpose of enforcing an order made in any proceedings of a type described in heads (1) to (6) above¹⁹.

- 1 As to the Family Division of the High Court see **COURTS** vol 10 (Reissue) PARA 606 et seq.
- 2 As to matrimonial and civil partnership causes see PARA 317.
- 3 For these purposes 'matter' means any proceedings in court not in cause: Supreme Court Act 1981 s 151(1). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.
- 4 Supreme Court Act 1981 s 61(1), (3), Sch 1 para 3(a), (i) (s 61(3) amended by the Constitutional Reform Act 2005 Sch 4, Pt 1 paras 114, 129(1), (2)(a), (b); Supreme Court Act 1981 Sch 1 para 3(i) added by the Civil Partnership Act 2004 Sch 27 para 70).
- 5 See PARA 46 et seq.
- 6 Ie under the Marriage Act 1949 s 27B(5) (see PARA 93).
- 7 Supreme Court Act 1981 Sch 1 para 3(c) (amended by the Marriage (Prohibited Degrees of Relationship) Act 1986 s 5).
- 8 Supreme Court Act 1981 Sch 1 para 3(j) (added by the Civil Partnership Act 2004 Sch 27 para 70).
- 9 Ie under the Administration of Justice Act 1960 s 13: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 512 et seq.
- 10 Ie made under the Magistrates' Courts Act 1980 s 63(3): see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 6.
- 11 Ie under the Family Law Act 1996 Pt IV (ss 30-63): see PARAS 285, 289 et seq.
- 12 Supreme Court Act 1981 Sch 1 para 3(d) (amended by the Family Law Act 1996 Sch 8 para 51). See the Family Proceedings Rules 1991, SI 1991/1247, r 8.3 (added by SI 1991/2113).
- 13 Ie under the Family Law Act 1986 Pt III (ss 55-62): see PARAS 421, 1001 et seq.
- 14 Supreme Court Act 1981 Sch 1 para 3(e) (added by the Family Law Act 1986 Sch 1 para 26).
- 15 See note 10.
- 16 Supreme Court Act 1981 Sch 1 para 3(f)(i) (added by SI 1991/1210; amended by the Forced Marriage (Civil Protection) Act 1997 Sch 2 para 1).
- 17 Ie declarations under the Civil Partnership Act 2004 s 58: see PARA 421 et seq.
- 18 Supreme Court Act 1981 Sch 1 para 3(k) (added by the Civil Partnership Act 2004 Sch 27 para 70).
- 19 Supreme Court Act 1981 Sch 1 para 3(g) (added by SI 1991/1210).

UPDATE

731 Business assigned to the Family Division

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 12--SI 1991/1247 r 8.3 amended: SI 2009/636.

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732. Divorce and civil partnership proceedings county courts.

The Lord Chancellor may, with the concurrence of the Lord Chief Justice, by order designate any county court as a 'divorce county court' or as a 'civil partnership proceedings county court'; and any court so designated has jurisdiction to hear and determine any matrimonial or civil partnership cause¹, except that it has jurisdiction to try such a cause only if it is also designated in the order as a court of trial². The jurisdiction so conferred is exercisable throughout England and Wales; but rules of court may provide for a matrimonial or civil partnership cause pending in one such court to be heard and determined in another or partly in that and partly in another³. Every matrimonial and civil partnership cause must be commenced in a divorce county court or civil partnership proceedings county court and must be heard and determined in that or another such court, unless or except to the extent that it is transferred⁴ to the High Court⁵.

The Lord Chancellor may, with the concurrence of the Lord Chief Justice, by order designate a divorce county court or civil partnership proceedings county court as a court for the exercise of jurisdiction in matrimonial and civil partnership matters arising under the statutory provisions⁶ relating to applications for financial relief after an overseas divorce, dissolution, annulment etc⁷.

Any provision to be made by rules of court⁸ with respect to any power exercisable by the court on an application made before the presentation of a petition, or on an application for a dissolution or separation order, confers jurisdiction to exercise the power on divorce county courts and civil partnership proceedings county courts⁹.

The jurisdiction conferred on divorce county courts and civil partnership proceedings county courts¹⁰, so far as it is exercisable by judges of such courts, must be exercised by such circuit judges as the Lord Chief Justice may, after consulting the Lord Chancellor, direct¹¹.

1 As to matrimonial and civil partnership causes see PARA 317.

2 Matrimonial and Family Proceedings Act 1984 ss 33(1), 36A(1)-(4) (ss 33(1), (4), 36 amended, s 33(6) added, by the Constitutional Reform Act 2005 Sch 4 paras 171, 172; Matrimonial and Family Proceedings Act 1984 ss 36A, 36D added by the Civil Partnership Act 2004 Sch 27 para 92; Matrimonial and Family Proceedings Act 1984 ss 36A(1), (8), 36D amended, s 36A(10) added, by SI 2006/1016). In the Family Proceedings Rules 1991, SI 1991/1247, unless the context otherwise requires, 'divorce county court' and 'civil partnership proceedings county court' mean a county court so designated (r 1.2(1) (amended by SI 2005/2922)); and references to a 'county court' are to be construed as references to a divorce county court (in relation to matrimonial proceedings) or to a civil partnership proceedings county court (in relation to civil partnership proceedings) (r 1.2(6) (substituted by SI 2005/2922)). For this purpose 'matrimonial proceedings' means proceedings of a kind with respect to which divorce county courts have jurisdiction by or under the Matrimonial and Family Proceedings Act 1984 s 33, s 34 (see PARA 733) or s 35 (see PARA 732), and 'civil partnership proceedings' means proceedings of a kind with respect to which civil partnership proceedings county courts have jurisdiction by or under the Matrimonial and Family Proceedings Act 1984 s 36A, 36B or 36C (see PARA 733); Family Proceedings Rules 1991, SI 1991/1247, r 1.2(7), (8) (r 1.2(8) added by SI 2005/2922).

As to the county courts so designated see the Civil Courts Order 1983, SI 1983/713, Sch 3 (amended by SI 1984/297; SI 1984/1075; SI 1985/511; SI 1986/754; SI 1986/1361; SI 1986/2001; SI 1986/2207; SI 1988/2165; SI 1989/106; SI 1989/107; SI 1989/914; SI 1991/1809; SI 1991/2211; SI 1992/593; SI 1992/1345; SI 1992/1810; SI 1992/3071; SI 1993/1809; SI 1993/3120; SI 1994/706; SI 1994/1536; SI 1994/2626; SI 1994/2893; SI 1995/1897; SI 1995/3173; SI 1996/68; SI 1996/588; SI 1996/2579; SI 1997/361; SI 1997/1085; SI 1997/2310; SI 1997/2762; SI 1998/1880; SI 1998/2910; SI 1999/216; SI 1999/1011; SI 1999/3187; SI 2000/1482; SI 2000/2738; SI 2001/4025; SI 2005/2923; SI 2006/1542; SI 2007/786).

- 3 Matrimonial and Family Proceedings Act 1984 ss 33(2), 36A(5) (s 36A as added: see note 2).
- 4 le under the Matrimonial and Family Proceedings Act 1984 s 39 (see PARA 746) or the County Courts Act 1984 s 41 (transfer to the High Court by order of the High Court: see **CIVIL PROCEDURE** vol 11 (2009) PARA 69).
- 5 Matrimonial and Family Proceedings Act 1984 ss 33(3), 36A(6), (7) (s 36A as added: see note 2).
- 6 le under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) or the Civil Partnership Act 2004 Sch 7 (see PARA 530 et seq).
- 7 Matrimonial and Family Proceedings Act 1984 ss 33(4), 36A(8) (as added and amended: see note 2). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4) (see **COURTS**)) to exercise these functions: Matrimonial and Family Proceedings Act 1984 ss 33(6), s 36A(10) (as so added and amended).
- 8 le for the purposes of the Matrimonial Causes Act 1973 s 7 or the Civil Partnership Act 2004 s 43 (see PARA 859).
- 9 Matrimonial and Family Proceedings Act 1984 ss 35, 36C (s 36C added by the Civil Partnership Act 2004 Sch 7 para 92).
- 10 le under the Matrimonial and Family Proceedings Act 1984 ss 32-36.
- 11 Matrimonial and Family Proceedings Act 1984 ss 36(1), 36D(1) (as added and amended: see note 2). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4) (see **COURTS**)) to exercise these functions: ss 36(2), 36D(2) (as so added and amended).

UPDATE

732 Divorce and civil partnership proceedings county courts

NOTE 2--SI 1983/713 Sch 3 further amended: SI 2009/2455, SI 2009/3320.

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733. Jurisdiction of county courts regarding financial relief and the protection of children.

A divorce county court¹ has the following jurisdiction:

- 955 (1) to exercise any power exercisable in relation to financial relief² or the restrictions on decrees affecting children³ in connection with any petition, decree or order pending in or made by such a court and to exercise any power relating to applications for reasonable maintenance⁴ or to the alteration of maintenance agreements during the lives of the parties⁵; and
- 956 (2) if duly designated by an order⁶, jurisdiction to exercise any power⁷ relating to financial relief in England and Wales after overseas divorces, annulments and legal separations⁸.

A civil partnership proceedings county court⁹ has the following jurisdiction:

- 957 (a) to exercise any power exercisable in relation to restrictions on the making of orders affecting children¹⁰, or financial relief in the courts¹¹ (other than arrears and repayments¹² and the alteration of maintenance agreements by court after death of one party¹³), in connection with any application or order pending in, or made by, a civil partnership proceedings county court¹⁴;
- 958 (b) to exercise any power exercisable in relation to the failure of a party to a civil partnership to provide reasonable maintenance for the applicant¹⁵ or the alteration of maintenance agreements during the lives of parties¹⁶, if duly designated by an order¹⁷; and
- 959 (c) if duly designated by an order¹⁸, jurisdiction to exercise any power¹⁹ relating to financial relief in England and Wales following an overseas dissolution of a civil partnership²⁰.

Any proceedings for the exercise of a power which a divorce or civil partnership proceedings county court has jurisdiction to exercise by virtue of these provisions must be commenced in such divorce or civil partnership proceedings county court as may be prescribed by rules of court²¹.

Nothing in these provisions affects the jurisdiction of a magistrates' court²² in relation to the alteration of maintenance agreements during the lives of the parties²³.

1 As to the meaning of 'divorce county court' see PARA 732.

2 Ie any power exercisable under the Matrimonial Causes Act 1973 Pt II (ss 21-40A) (see PARA 450 et seq).

3 Ie any power exercisable under the Matrimonial Causes Act 1973 Pt III (s 41) (see PARA 884).

4 Ie any power under the Matrimonial Causes Act 1973 s 27 (see PARA 542 et seq).

- 5 Matrimonial and Family Proceedings Act 1984 s 34(1)(a). The powers relating to applications for the alteration of maintenance agreements during the lives of the parties are those under the Matrimonial Causes Act 1973 s 35 (see PARA 700 et seq).
- 6 Ie under the Matrimonial and Family Proceedings Act 1984 s 33(4) (see PARA 732).
- 7 Ie any power under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (see PARA 530 et seq).
- 8 Matrimonial and Family Proceedings Act 1984 s 34(1)(b).
- 9 As to the meaning of 'civil partnership proceedings county court' see PARA 732.
- 10 Ie under the Civil Partnership Act 2004 s 63 (see PARA 884).
- 11 Ie under the Civil Partnership Act 2004 Sch 5 (see PARA 530 et seq).
- 12 Ie under the Civil Partnership Act 2004 Sch 5 paras 63-65 (see PARA 679).
- 13 Ie under the Civil Partnership Act 2004 Sch 5 para 73 (see PARA 701).
- 14 Matrimonial and Family Proceedings Act 1984 s 36B(1)(a) (s 36B added by the Civil Partnership Act 2004 Sch 27 para 92). A divorce county court does not by virtue of this provision have jurisdiction to exercise any power under the Matrimonial Causes Act 1973 s 32 (payment of certain arrears: see PARA 679), s 33 (repayment of sums paid under certain orders: see PARA 573), s 36 (alteration of maintenance agreements after the death of one of the parties: see PARA 701) or s 38 (repayment of certain sums after the cessation of an order by reason of remarriage or the formation of a civil partnership: see PARA 574): Matrimonial and Family Proceedings Act 1984 s 34(3).
- 15 Ie under the Civil Partnership Act 2004 Sch 5 paras 39-45 (see PARA 542 et seq).
- 16 Ie under the Civil Partnership Act 2004 Sch 5 paras 69-71 (see PARAS 700-704).
- 17 Matrimonial and Family Proceedings Act 1984 s 36B(1)(b) (as added: see note 14).
- 18 Ie made under the Matrimonial and Family Proceedings Act 1984 s 36A(8) (see PARA 732).
- 19 Ie any power under the Matrimonial and Family Proceedings Act 1984 Sch 7 (see PARA 530 et seq).
- 20 Matrimonial and Family Proceedings Act 1984 s 36B(1)(c) (as added: see note 14).
- 21 Matrimonial and Family Proceedings Act 1984 ss 34(2), 36B(2) (as added: see note 14).
- 22 See note 5 in relation to marriage and note 16 in relation to civil partnerships.
- 23 Matrimonial and Family Proceedings Act 1984 ss 34(4), 36B(3) (as added: see note 14).

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734. Estoppel and res judicata.

The principles of res judicata apply to matrimonial and civil partnership causes subject to the qualification that it is the statutory duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner, and into the facts alleged by respondent which are properly before it; and no doctrine of estoppel by res judicata can abrogate that duty¹. The court has the right, and indeed the duty in a proper case, to re-open the issue of a matrimonial or civil partnership allegation even though it has been litigated between the parties and decided by a competent court, and even though one of the parties objects to such re-opening². The court is not bound to be satisfied of the necessary facts because the one party is estopped against the other from denying them³. Whether the court should re-open the issue depends on the circumstances; but, if it is re-opened, each party can go into the matter afresh⁴. A party who has successfully alleged facts in one suit may repeat those facts in later proceedings between the parties⁵. If an allegation made in a suit between the parties is not adjudicated on, it may be alleged in later proceedings, and the other party is entitled to deny it, for the new issue has never been tried⁶; indeed, if the party propounding the charge in the later proceedings failed in the earlier suit, he or she may nevertheless in that earlier suit have told the truth as to the facts, and it would be wrong to prevent him or her from putting forward true facts in a later case⁷.

1 *Hudson v Hudson* [1948] P 292, [1948] 1 All ER 773; *Thompson v Thompson* [1957] P 19, [1957] 1 All ER 161, CA; *Warren v Warren* [1962] 3 All ER 1031, [1962] 1 WLR 1310. As to the principles of res judicata see **ESTOPPEL** vol 16(2) (Reissue) PARA 977 et seq.

2 *Thompson v Thompson* [1957] P 19 at 29, [1957] 1 All ER 161 at 165, CA per Denning LJ; *Harriman v Harriman* [1909] P 123 at 142, CA per Fletcher Moulton LJ; *Rutherford v Rutherford (Richardson intervener)* [1922] P 144, CA (affd sub nom *Rutherford v Richardson* [1923] AC 1, HL); *Russell v Russell* [1935] P 39; *Kara v Kara and Holman* [1948] P 287, [1948] 2 All ER 16, CA; *Winnan v Winnan* [1949] P 174, [1948] 2 All ER 862, CA; and see *Lowe v Lowe* (1855) Dea & Sw 130; *Warren v Warren* [1962] 3 All ER 1031, [1962] 1 WLR 1310.

3 *Harriman v Harriman* [1909] P 123 at 142, CA per Fletcher Moulton LJ.

4 *Thompson v Thompson* [1957] P 19 at 29, [1957] 1 All ER 161 at 165, CA per Denning LJ; and see *Finney v Finney* (1868) LR 1 P & D 483 (charges struck out); *Bright v Bright* [1954] P 270, [1953] 2 All ER 939 (petitioner not allowed to make charges); *Hill v Hill* [1954] P 291 at 301, [1954] 1 All ER 491 at 495 (allegations which failed in cruelty charge not permitted as just cause in later proceedings); *Cooper v Cooper (No 2)* [1955] P 168 at 175, [1954] 3 All ER 358 at 362, DC; cf *Dixon v Dixon* [1953] P 103, [1953] 1 All ER 910 (petitioner who failed in prior cruelty charge allowed to re-open issues in later charge of constructive desertion because findings in earlier proceedings were not clear); *Holland v Holland* [1961] 1 All ER 226, [1961] 1 WLR 194, CA (case where public interest did not permit wife to raise again issues which had already been determined against her); *Warren v Warren* [1962] 3 All ER 1031, [1962] 1 WLR 1310.

5 *Bernard v Bernard (Sutton cited)* [1958] 3 All ER 475, [1958] 1 WLR 1275.

6 *Fisher v Fisher* [1960] P 36, [1959] 3 All ER 131, CA (no estoppel; the charge of constructive desertion had never been tried in previous nullity suit), disapproving dictum in *Bright v Bright* [1954] P 270 at 288, [1953] 2 All ER 939 at 949, and approving *Cooper v Cooper (No 2)* [1955] P 168, [1954] 3 All ER 358, DC. See also *Bernard v Bernard (Sutton cited)* [1958] 3 All ER 475, [1958] 1 WLR 1275; *Schlesinger v Schlesinger* [1959] 1 All ER 155, [1959] 1 WLR 92, CA; *Warren v Warren* [1962] 3 All ER 1031, [1962] 1 WLR 1310; *Bohnel v Bohnel (No 2)* [1963] 2 All ER 325, [1964] 1 WLR 179 (wife alleged cruelty and failed; wife entitled to plead just cause to husband's later petition founded on desertion).

7 *Fisher v Fisher* [1960] P 36 at 51, [1959] 3 All ER 131 at 138, CA per Harman LJ.

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735. Jurisdiction in magistrates' courts.

In matrimonial and civil partnership proceedings magistrates' courts have jurisdiction in respect of:

- 960 (1) the variation of maintenance agreements during the lives of the parties¹;
- 961 (2) the making of orders for financial provision²;
- 962 (3) the making of occupation orders and non-molestation orders³; and
- 963 (4) applications for the consent to the marriage of, or the formation of a civil partnership by, a child⁴.

A person entitled to receive payments under a maintenance order made by the High Court or a county court may apply to the original court for the registration of the order in a magistrates' court⁵; and a person entitled to receive payments under a magistrates' court order may apply to the court which made the order for registration of the order in the High Court⁶.

A magistrates' court has jurisdiction⁷ to hear an application for an order for financial provision⁸ if it acts in, or is authorised by the Lord Chancellor to act for, a local justice area in which either the applicant or the respondent ordinarily resides at the date of the making of the application⁹. In certain cases a single justice may discharge the functions of the court¹⁰.

A finding by a magistrates' court cannot preclude the High Court from exercising its statutory duty to inquire into the truth of a petition which is properly brought before it¹¹. In such a case, however, weight must be given to the existence of the order and to its regular implementation¹². A magistrates' court order has certain statutory evidential effect¹³ and is in any event of strong probative value¹⁴.

1 See PARA 700 et seq.

2 See PARA 542 et seq.

3 See PARA 958 et seq.

4 See PARA 48.

5 See PARA 666 et seq.

6 See PARA 671 et seq.

7 Is subject to the Family Law Act 1986 s 2 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARAS 831, 834) and the Magistrates' Courts Act 1980 s 70 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 591) and any determination of the Lord Chancellor thereunder.

8 Is an order under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or under the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 30(1) (amended by the Magistrates' Courts Act 1980 Sch 7 para 163; the Family Law Act 1986 Sch 1 para 24; the Police and Magistrates' Courts Act 1994 Sch 8 para 29; the Courts Act 2003 Sch 8 para 194); Civil Partnership Act 2004 Sch 6 para 47(1). The jurisdiction so conferred on a magistrates' court is exercisable notwithstanding that any party to the proceedings is not domiciled in England and Wales: Domestic Proceedings and Magistrates' Courts Act 1978 s 30(5); Civil Partnership Act 2004 Sch 6 para 47(2). As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

10 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 25 (substituted by SI 1997/1894). Those cases are proceedings: (1) in which an application is made without notice for an occupation order or a non-molestation order under the Family Law Act 1996 Pt IV (s 30-63); and (2) in accordance with the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3 (see PARA 894), r 3A(2), (6), (8) (see PARA 977), r 4 (see PARA 1029), r 6, except r 6(2) (see PARA 895), r 7 (see PARA 1031), r 8 (see PARA 896), r 9 (see PARA 1028), r 10 (see PARA 1032), r 11 (see PARA 1034), r 12 (see PARAS 896, 899), r 12A (see PARA 978), r 12B (see PARA 979), r 13 (see PARA 1041) and r 14 (see PARA 1033): r 25.

11 *Hudson v Hudson* [1948] P 292, [1948] 1 All ER 773; *Winnan v Winnan* [1949] P 174, [1948] 2 All ER 862, CA; and see *James v James* [1948] 1 All ER 214, DC; *Hudson v Hudson* at 296 and at 774, 775; *Sanders (otherwise Saunders) v Sanders (otherwise Saunders)* [1952] 2 All ER 767, DC; *Foster v Foster* [1954] P 67 at 77, [1953] 2 All ER 518 at 522, DC (failure to put charge before magistrates' court; entitled to put it to another magistrates' court later); *Cooper v Cooper (No 2)* [1955] P 168, [1954] 3 All ER 358, DC.

12 *Skull v Skull* [1954] P 458 at 462, [1954] 1 All ER 1030 at 1032, 1033, DC.

13 See PARA 830.

14 *Kara v Kara and Holman* [1948] P 287 at 288, [1948] 2 All ER 16 at 17, CA per Lord Greene MR.

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736. Res judicata in magistrates' courts.

Where a spouse or civil partner's summons has been heard and dismissed the subject matter of that application is res judicata, and a second application may not be founded on the same ground¹, even if the second ground is the same as the first². The withdrawal of an application is, however, not equivalent to a dismissal and does not amount to estoppel per rem judicatam³. A subsequent inconsistent finding by the High Court enables a complaint to be made on the same set of facts⁴. When a summons contains more than one ground of complaint, each of them must be disposed of by the magistrates⁵.

A magistrates' court has no statutory power to reopen a case to rectify a mistake in civil proceedings⁶.

1 *Foster v Foster* [1954] P 67, [1953] 2 All ER 518, DC (evidence different on later complaint); *Cooper v Cooper (No 2)* [1955] P 168, [1954] 3 All ER 358, both approved in *Fisher v Fisher* [1960] P 36, [1959] 3 All ER 131, CA. For a review of the authorities on the doctrine of res judicata in relation to magistrates' courts see *Hager v Osborne* [1992] Fam 94, [1992] 2 All ER 494.

2 *Stokes v Stokes* [1911] P 195, DC; *Blackledge v Blackledge* [1913] P 9, DC; *Ellis v Ellis* (1929) 93 JP 175; *Wall v Wall* (1930) 94 JP 200, DC; but in *Kenney v Kenney* (1925) 133 LT 400, DC, the court was not prepared to rule definitely that magistrates may not reconsider a complaint after an abortive hearing; cf *Froud v Froud* (1920) 123 LT 176, DC; *Jones v Jones* [1924] P 203, DC.

3 *Land v Land* [1949] P 405, [1949] 2 All ER 218.

4 *Kendall v Kendall* [1952] 2 All ER 1038n, DC; *Pratt v Pratt* (1927) 96 LJP 123, DC.

5 *Tyrrell v Tyrrell* (1928) 138 LT 624, DC.

6 *R v Brighton Magistrates' Court, ex p Budd* [1986] 1 FLR 426, [1986] Fam Law 134, distinguishing *R v Chester Justices, ex p Holland* [1984] FLR 725, [1984] Fam Law 184. As to the court's power to set aside an order on failure properly to serve an application see PARA 1030.

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737. Jurisdiction to hear appeals.

In general¹, any party may appeal from an order or decision made or given by the district judge in family proceedings² in a county court to a judge on notice³. Unless the court otherwise orders, any notice must be issued within 14 days of the order or decision appealed against and served not less than 14 days before the day fixed for the hearing of the appeal⁴. An application may be made for an enlargement of time⁵. Appeals must be heard in chambers unless the judge otherwise directs⁶. Unless the court otherwise orders, an appeal does not operate as a stay of proceedings on the order or decision appealed against⁷. The procedure that the judge will adopt on hearing the appeal is now clearly established⁸.

An appeal in proceedings where periodical payments, a lump sum or property are in issue, from a district judge in a county court must be transferred to the High Court where it appears to the district judge, whether on application by a party or otherwise, that the appeal raises a difficult or important question, whether of law or otherwise⁹.

An appeal against a decision of a circuit judge sitting in a county court or as a judge of the Family Division, a High Court judge or a circuit judge or a High Court judge on appeal from a district judge, lies to the Civil Division of the Court of Appeal¹⁰. The rules relating to such an appeal are, in general, the same as for any other appeal to the Court of Appeal¹¹. An appeal against any decision of the Court of Appeal lies to the House of Lords: in general, no such appeal lies except with the leave of the Court of Appeal or the House of Lords¹² but in certain circumstances a High Court judge may, provided that all the parties consent, certify that a sufficient case has been made out for an appeal direct to the House of Lords to justify an application to the House of Lords for leave to bring an appeal under the 'leap-frog' procedure¹³.

An appeal lies from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court, including criminal contempt¹⁴.

1 For exceptions see note 3.

2 For these purposes 'family proceedings' are proceedings which are family business: Matrimonial and Family Proceedings Act 1984 s 32; Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1). 'Family business' means business of any description which in the High Court is for the time being assigned to the Family Division and to no other Division by or under the Supreme Court Act 1981 s 61, Sch 1: Matrimonial and Family Proceedings Act 1984 s 32 (amended by the Constitutional Reform Act 2005 Sch 11 para 1(2)).

As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

3 Family Proceedings Rules 1991, SI 1991/1247, r 8.1(1). In such a case, CCR Ord 13 r 1(10) (which enables the judge to vary or rescind an order made by the district judge in the course of proceedings) and CCR Ord 37 r 6 (right of appeal to the judge from a judgment or final decision of the district judge: see PARA 1005) do not apply to the order or decision: Family Proceedings Rules 1991, SI 1991/1247, r 8.1(1). As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005. The fee payable on filing a notice of appeal from a district judge to a judge is £100: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 5.1.

Any order or decision granting or varying an order (or refusing to do so) on an application for ancillary relief or in proceedings to which the Family Proceedings Rules 1991, SI 1991/1247, r 3.1 (application in case of failure to provide reasonable maintenance: see PARA 886 et seq), r 3.2 (application for alteration of maintenance agreement during lifetime of parties: see PARA 706), r 3.3 (application for alteration of maintenance agreement

after death of one party: see PARA 707) or r 3.6 (applications under the Married Women's Property Act 1882 or the Civil Partnership Act 2004 s 66: see PARA 955) applies is to be treated as a final order for the purposes of CCR Ord 37 r 6 (Family Proceedings Rules 1991, SI 1991/1247, r 8.1(2) (amended by SI 1997/1893)), and the Family Proceedings Rules 1991, SI 1991/1247, r 8.1(1) does not apply in those circumstances (r 8.1(1)): r 8.1 also does not apply to any appeal by a party to proceedings for the assessment of costs against a decision in those proceedings (r 8.1(7) (added by SI 2003/184)). On any appeal to which the Family Proceedings Rules 1991, SI 1991/1247, r 8.1(2) applies:

- 177 (1) the appeal must be limited to a review of the decision or order of the district judge unless the judge considers that in the circumstances of the case it would be in the interests of justice to hold a rehearing (r 8.1(3)(a) (r 8.1(3) substituted by SI 2003/184)); and
- 178 (2) oral evidence or evidence which was not before the district judge may be admitted if in all circumstances of the case it would be in the interests of justice to do so, irrespective of whether the appeal be by way of review or rehearing (Family Proceedings Rules 1991, SI 1991/1247, r 8.1(3)(b) (as so substituted)).

'Judge' does not include a district judge; 'district judge' in relation to proceedings in the Principal Registry, a district registry or a county court, means the district judge or one of the district judges of that registry or county court, as the case may be; 'Principal Registry' means the Principal Registry of the Family Division; 'district registry', except in r 4.22(2A) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 304, 305), means any district registry having a divorce county court or, as the case may be, a civil partnership proceedings county court within its district or, in any other case, means any district registry having a designated county court within its district; and 'designated county court' means a court designated as a divorce county court or a civil partnership proceedings county court or both a divorce county court and a civil partnership proceedings county court: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922). As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

4 Family Proceedings Rules 1991, SI 1991/1247, r 8.1(4).

5 See CCR Ord 13 r 4.

6 Family Proceedings Rules 1991, SI 1991/1247, r 8.1(5).

7 Family Proceedings Rules 1991, SI 1991/1247, r 8.1(6).

8 See *Marsh v Marsh* [1993] 2 All ER 794, [1993] 1 WLR 744, CA, approving *Lauerman v Lauerman* (*Practice Note*) [1992] 1 WLR 734, [1992] 2 FCR 497 and *Walters v Walters* [1992] 2 FCR 499, [1992] 2 FLR 337; *Campbell v Campbell* [1998] 2 FCR 123, [1997] 2 FLR 609, CA; *Piglowska v Piglowski* [1999] 3 All ER 632, [1999] 1 WLR 1360, HL.

9 See *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: distribution of business)* [1992] 1 WLR 586; and PARA 744.

10 See the Supreme Court Act 1981 s 16(1); the County Courts Act 1984 s 77(1); **CIVIL PROCEDURE** vol 12 (2009) PARA 1679; **COURTS** vol 10 (Reissue) PARA 639. An appeal against a decree nisi of divorce or nullity of marriage or a conditional order of dissolution or nullity of civil partnership made by a district judge lies to a judge on notice: see PARA 883.

11 See CPR Pt 52; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1657 et seq. As to appeals in detailed assessment proceedings see **CIVIL PROCEDURE** vol 12 (2009) PARA 1800 et seq.

12 See the Administration of Justice (Appeals) Act 1934 s 1(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1717.

13 See the Administration of Justice Act 1969 ss 12, 13; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1718. As to the cases excluded from s 12 see s 15; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1718. The House of Lords has an inherent power to rescind or vary an earlier order and re-open an appeal in circumstances where a party has been subjected to an unfair procedure in the House of Lords: *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577, HL.

14 See the Administration of Justice Act 1960 s 13; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 512 et seq. A court will interfere in exceptional circumstances only and where the decision is plainly wrong: *Wilson v Webster* [1998] 2 FCR 575, [1998] 1 FLR 1097, CA; *Neil v Ryan* [1999] 1 FCR 241, [1998] 2 FLR 1068, CA. Ordinarily, where an order has been made by a district judge, an appeal against such an order should be made to a judge; and the Court of Appeal will not normally be prepared to hear an appeal if the person has not first exercised his right of appeal to a judge: *King v Read and Slack* [1999] 1 FLR 425, [1999] Fam Law 90, CA.

UPDATE

737 Jurisdiction to hear appeals

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 3--In the definition of 'district registry', words 'except in r 4.22(2A)' omitted: SI 1991/1247 r 1.2(1) (amended by SI 2009/636). SI 1991/1247 r 8.1 now also does not apply to the proceedings referred to in r 8.2 (see PARA 900): r 8.1(7) (substituted by SI 2009/636).

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738. Applications for new trial.

Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, must be heard or determined by the Court of Appeal except where rules of court otherwise provide¹. New trials are granted or refused on the same principles as in cases from other Divisions of the High Court².

¹ See the Supreme Court Act 1981 s 17(1); and **COURTS** vol 10 (Reissue) PARA 639. As regards cases where the trial was by a judge alone and no error of the court at the trial is alleged, or any prescribed class of such cases, rules of court may provide that any such application must be heard and determined by the High Court: see s 17(2); and **COURTS** vol 10 (Reissue) PARA 639. Permission to make such an application is required: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1659. See also CPR 52.10(2)(c); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1671.

² The court must be satisfied that there has been an error or a miscarriage of justice: see *Hill v Hill* (1861) 31 LJPM & A 193 (new trial refused); *Barnes v Barnes and Beaumont* (1868) LR 1 P & D 572 (new trial). New trials were granted in the following cases: *Jago v Jago and Graham* (1862) 3 Sw & Tr 103 (mistake of witness); *Lee v Lee* (1872) LR 2 P & D 409 (surprise); *Wilkins v Wilkins* [1896] P 108, CA (nullity; re-appearance of first husband declared dead in a previous suit for judicial separation); *Fluister v Fluister and Hutton* [1897] P 22, CA (undefended case; surprise; costs thrown away paid); *Butchart v Butchart and Hill* [1901] AC 266, HL (weight of evidence); *Greenfield v Greenfield* (1955) Times, 24 May, CA (defence not prepared through omissions of respondent's solicitors and adjournment had been refused); *Sampson v Sampson* (1962) 106 Sol Jo 489, CA (unsatisfactory trial; full facts not given in evidence; trial judge refused application to recall wife to give further evidence or for adjournment for further evidence to be adduced, and dismissed petition); *Jenkinson v Jenkinson* (1963) Times, 15 March, CA (counsel not given opportunity to address court on matters in respect of which commissioner had said he was not satisfied); *Bates v Bates* (1964) Times, 8 December, CA (husband had been deprived of an opportunity of defending himself or putting his case through no fault of his own; decree nisi, which had been made absolute, set aside). New trials were refused in the following cases: *Miller v Miller and Hicks* (1862) 2 Sw & Tr 427 (fresh evidence); *Gethin v Gethin (Queen's Proctor intervening)* (1862) 2 Sw & Tr 560 (witnesses pretending they had only told a part of the truth); *Scott v Scott* (1863) 3 Sw & Tr 319 (witness discovered who could corroborate party); *Ellaytt v Ellaytt, Taylor and Halse* (1864) 3 Sw & Tr 503 (somewhat inconsistent verdict); *Pearson v Pearson* (1955) Times, 13 July, CA (adjournment refused; respondent advised not to contest case but to appeal; wrong advice); *Brassington v Brassington* [1962] P 276, [1961] 3 All ER 988n, CA (respondent withdrew from trial without sufficient reason).

UPDATE

738 Applications for new trial

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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739. Applications for rehearing.

An application for rehearing of a matrimonial or civil partnership cause¹ tried by a judge² alone, whether in the High Court or a designated county court³, where no error of the court⁴ at the hearing is alleged, must be made to a judge⁵. Unless otherwise directed, the application must be made to the judge by whom the cause was tried and must be heard in open court⁶. The application must be made:

964 (1) in the High Court, by a notice to attend before the judge on a day specified in the notice⁷; and

965 (2) in the county court, on notice⁸,

and the notice must state the grounds of the application⁹ and, unless otherwise directed, must be issued within six weeks after the judgment and served on every other party to the cause not less than 14 days before the day fixed for the hearing of the application¹⁰. The applicant must file a certificate that the notice has been duly served on each person required to be served therewith¹¹.

The application must be supported by an affidavit setting out the allegations on which the applicant relies or exhibiting a copy of any pleading which he proposes to file if the application is granted; and a copy of the affidavit must be served on every other party to the cause¹². Not less than seven days before the application is heard the applicant must file a copy of a transcript of so much as is relevant of any official shorthand note (or tape recording) of the proceedings at the trial¹³.

Where a party wishes to appeal against a decree absolute of divorce or nullity of marriage, or a final order of dissolution or nullity of civil partnership, the question whether he has had the time and opportunity to appeal from the decree nisi on which the decree absolute was founded or the conditional order on which the final order was founded, as the case may be, is to be determined on an application for a rehearing under these provisions¹⁴.

Any other application for rehearing must be made by way of appeal to the Court of Appeal¹⁵.

1 As to matrimonial and civil partnership causes see PARA 317.

2 As to the meaning of 'judge' see PARA 737 note 3.

3 As to the meaning of 'designated county court' see PARA 737 note 3.

4 An allegation, express or implied, that the trial judge came to a wrong conclusion on the material before him is an error of the court (*Peek v Peek* [1948] P 46, [1947] 2 All ER 578, DC; affd [1948] 2 All ER 297, CA) as is a case where it is alleged that the judge believed the wrong witnesses (*Petty v Petty* [1943] P 101, [1943] 2 All ER 511, DC; *Prince v Prince* [1951] P 71, [1950] 2 All ER 375, CA) or that he wrongly refused an adjournment (*Woodman v Woodman* [1967] 1 All ER 410, [1967] 1 WLR 32). The question whether the case was defended or undefended is irrelevant in determining whether an error of the court is alleged or not: *Peek v Peek*.

No error of the court is alleged where a rehearing is sought because a party was misled into not defending (*Pratt v Pratt* [1966] 3 All ER 272, [1966] 1 WLR 1568, DC), because a party failed to defend through ignorance or lack of advice (*Nash v Nash* [1968] P 597, [1967] 1 All ER 535), because a party had not been served with the proceedings (*Manners v Manners and Fortescue* [1936] P 117, [1936] 1 All ER 41), where a rehearing of a suit previously undefended is sought on grounds of public policy (*Winter v Winter* [1942] P 151, [1942] 2 All ER

390), on the ground that the petitioner failed to make proper discovery of her own adultery (*Alhadeff v Alhadeff* [1951] WN 367, DC) or when the judge has drawn an inference from undisputed evidence which was justifiable on the material before him, although subsequently proved to be incorrect (*Prince v Prince*).

The judge has no power to order a rehearing after decree absolute or final order has been pronounced in circumstances of procedural irregularity: *Edwards v Edwards* [1951] P 228, [1951] 1 All ER 63, DC.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(1) (amended by SI 2005/2922). Rule 2.42 applies, with necessary modifications, to a cause disposed of under r 2.36 (see PARA 815) as it applies to a cause tried by a judge alone, save that, where in such a case the decree or civil partnership order, as the case may be, was pronounced by a district judge, the application must be made to a district judge: r 2.42(10) (amended by SI 2005/2922). As to the meaning of 'district judge' see PARA 737 note 3.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(2).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(3)(a).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(3)(b). The notice must be in accordance with CCR Ord 13 r 1 (applications in the course of proceedings): Family Proceedings Rules 1991, SI 1991/1247, r 2.42(3)(b). As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(3).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(4).

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(5).

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(6).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(7).

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(8) (amended by SI 2005/2922); and see *Rampal v Rampal* [2001] 2 FCR 543 (bigamous marriage).

15 Family Proceedings Rules 1991, SI 1991/1247, r 2.42(9).

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740. Rehearing by magistrates.

Where, on appeal to the Divisional Court, a rehearing is ordered because of a mistake of law, the magistrates before whom the rehearing takes place should consider the transcript of the Divisional Court judgments in order to avoid a repetition of the mistake. Where, however, the order for retrial has been made because the Divisional Court has taken a different view of the facts, the magistrates should not refer to the transcript unless, during the rehearing, reference is made to any point on which the Divisional Court is said to have expressed an opinion or to any part of the reasoning on an issue of fact by the justices before whom the case was originally tried¹.

1 *Claxton v Claxton* [1959] P 33, [1959] 1 All ER 386, DC.

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741. Judicial review.

The basis for the law of matrimonial and civil partnership proceedings is statutory with well-defined procedures for appeal. The question whether an application should be made for judicial review, which is essentially concerned with the decision-making process of public bodies rather than the decision itself¹, will in practice rarely arise in matrimonial or civil partnership proceedings².

1 As to judicial review generally see **JUDICIAL REVIEW** vol 61 (2010) PARA 601 et seq.

2 For a case where an application was refused see *R v High Peak Magistrates' Court, ex p B* [1995] 3 FCR 237, [1995] 1 FLR 568 (appeal against financial provision order). See also *R v Bristol Magistrates' Court, ex p Hodge* [1996] 4 All ER 924 at 932, sub nom *R v Bristol Justices, ex p Hodge* [1997] 2 WLR 756 at 763 (where relief was granted where the applicant could have proceeded by way of case stated but was out of time).

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742. Jurisdiction over foreign co-respondents.

The jurisdiction of the court over a co-respondent in a suit properly instituted does not depend on domicile, allegiance or residence, so that, subject to service, a foreign co-respondent or a co-respondent abroad is in the same position as any other co-respondent¹. A reigning sovereign cannot be made a co-respondent² and a person protected by diplomatic privilege cannot be served³.

1 See *Rayment v Rayment and Stuart, Chapman v Chapman and Buist* [1910] P 271; *Rush v Rush, Bailey and Pimenta* [1920] P 242, CA.

2 *Mighell v Sultan of Johore* [1894] 1 QB 149, CA; *Statham v Statham and Gaekwar of Baroda* [1912] P 92; and see *Musurus Bey v Gadban* [1894] 2 QB 352, CA; *Viscount Gort v Viscountess Gort* (1925) Times, 13 June; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 15.

3 See the Diplomatic Privileges Act 1964 Sch 1 art 31; *Shaw v Shaw* [1979] Fam 62, [1979] 3 All ER 1; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 274.

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743. Separate representation for children.

As from a day to be appointed¹ the Lord Chancellor may by regulations provide for the separate representation, in specified circumstances, of children² in proceedings in England and Wales which relate to any matter in respect of which a question has arisen, or may arise under the statutory provisions relating to the making of occupation orders and non-molestation orders³, the statutory provisions regulating divorce, nullity etc⁴, and providing for financial relief, including the provision of financial relief during the subsistence of a marriage or civil partnership⁵.

1 At the date at which this volume states the law no day had been appointed for the coming into force of the Family Law Act 1996 s 64 (see the text and notes 2-5).

2 As to the meaning of 'child' see PARA 290 note 4.

3 Family Law Act 1996 s 64(1)(b), (2) (not yet in force). For the statutory provisions relating to the making of occupation orders and non-molestation orders see the Family Law Act 1996 Pt IV (ss 30-63); and PARA 285 et seq.

4 Family Law Act 1996 s 64(1)(c) (not yet in force). For the statutory provisions regulating divorce, dissolution, nullity etc see the Matrimonial Causes Act 1973; and PARA 317 et seq.

5 Family Law Act 1996 s 64(1)(d), (e) (not yet in force) (s 64(1)(e) added by the Civil Partnership Act 2004 Sch 27 para 152). For the statutory provisions providing for financial relief, including the provision of financial relief during the subsistence of a marriage or civil partnership, see the Matrimonial Causes Act 1973; the Civil Partnership Act 2004 Schs 5, 6; and PARA 450 et seq.

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(ii) Allocation, Distribution and Transfer of Business

744. Directions as to distribution and transfer of family business and proceedings.

The President of the Family Division¹ may, with the concurrence of the Lord Chancellor, give directions with respect to the distribution and transfer between the High Court and county courts of family business² and family proceedings³.

Family proceedings⁴, including interlocutory proceedings, must be dealt with in the High Court where it appears to the court seised of the case that, by reason of the complexity, difficulty or gravity of the issues, they ought to be tried in the High Court⁵. The relevant Practice Direction⁶-- which pre-dates the concept of civil partnerships but presumably applies also to the corresponding civil partnership provisions--states that the following proceedings must nevertheless⁷ be dealt with in the High Court unless the nature of the issues of fact or law raised in the case makes them more suitable for trial in a county court than in the High Court:

- 966 (1) petitions for divorce on the grounds that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition⁸ where those petitions are opposed⁹;
- 967 (2) petitions for presumption of death and dissolution of marriage¹⁰;
- 968 (3) proceedings involving a contested issue of domicile¹¹;
- 969 (4) applications for a stay of proceedings¹²;
- 970 (5) applications to restrain a respondent from taking or continuing with foreign proceedings;
- 971 (6) suits in which the Queen's Proctor intervenes or shows cause and elects trial in the High Court¹³;
- 972 (7) interlocutory applications involving Mareva injunctions¹⁴ and directions as to dealing with assets out of the jurisdiction;
- 973 (8) petitions¹⁵ in respect of declarations as to marital status.

In proceedings where periodical payments¹⁶, a lump sum¹⁷ or property¹⁸ are in issue, the court must¹⁹ have regard, in particular, to the following factors when considering²⁰ whether the complexity, difficulty or gravity of the issues are such that they ought to be tried in the High Court:

- 974 (a) the capital values of the assets involved and the extent to which they are available for, or susceptible to, distribution or adjustment;
- 975 (b) any substantial allegations of fraud or non-disclosure;
- 976 (c) any substantial contested allegations of conduct,

and an appeal in such proceedings from a district judge in a county court must be transferred to the High Court where it appears to the district judge, whether on application by a party or otherwise, that the appeal raises a difficult or important question, whether of law or otherwise.

Subject to these provisions, family proceedings may be dealt with in a county court²¹.

Proceedings in the High Court which under these criteria fall to be dealt with in a county court

or a divorce county court²² (or, presumably, a civil partnership proceedings county court²³), as the case may be, and proceedings in a county court which likewise fall to be dealt with in the High Court must be transferred accordingly, in accordance with rules of court, unless to do so would cause undue delay or hardship to any party or other person involved²⁴.

The hearing and determination of a claim for a declaration of incompatibility under the Human Rights Act 1998²⁵ or an issue which may lead to the court considering making such a declaration is to be confined to a High Court judge; and the hearing and determination of a claim made under the 1998 Act in respect of a judicial act is to be confined in the High Court to a High Court judge and in county courts to a circuit judge²⁶.

1 As to the President of the Family Division see **COURTS** vol 10 (Reissue) PARA 515; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 303.

2 As to the meaning of 'family business' see PARA 737 note 2.

3 Matrimonial and Family Proceedings Act 1984 s 37. As to the meaning of 'family proceedings' see PARA 737 note 2. In exercise of the power so conferred the President of the Family Division made *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: distribution of business)* [1992] 1 WLR 586: see note 5.

4 Ie other than proceedings under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (see PARA 530 et seq), which may be dealt with in the High Court alone.

5 *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: distribution of business)* [1992] 1 WLR 586 paras 1(b), 2(1).

6 See note 5.

7 Ie by virtue of *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: distribution of business)* [1992] 1 WLR 586 para 2(2)(a)-(f), (h), (i), but without prejudice to the generality of para 2(1).

8 Ie petitions under the Matrimonial Causes Act 1973 s 1(2)(e), to which the corresponding civil partnership provision (relating to dissolutions on the stated grounds) is the Civil Partnership Act 2004 s 44(5)(c): see PARAS 347, 410 et seq.

9 Ie pursuant to the Matrimonial Causes Act 1973 s 5, to which the corresponding civil partnership provision is the Civil Partnership Act 2004 s 47: see PARA 411.

10 Ie under the Matrimonial Causes Act 1973 s 19, to which the corresponding civil partnership provision is the Civil Partnership Act 2004 s 55: see PARA 415 et seq.

11 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 939.

12 Ie applications under the Domicile and Matrimonial Proceedings Act 1973 s 5(6), to which the corresponding civil partnership provision is the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 10: see PARA 841.

13 As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545; and as to interventions by the Queen's Proctor (in both matrimonial and civil partnership proceedings) see PARAS 852-853.

14 As to Mareva injunctions, now known in proceedings other than family proceedings as freezing injunctions, see PARA 661.

15 Ie petitions in respect of declarations under the Family Law Act 1986 Pt III (ss 55-62), to which the corresponding civil partnership provision is the Civil Partnership Act 2004 ss 58-61: see PARAS 421, 1001 et seq.

16 As to periodical payments see PARA 458 et seq.

17 As to lump sum payments see PARA 476 et seq.

18 As to property adjustment orders see PARA 498 et seq.

19 le by virtue of *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: distribution of business)* [1992] 1 WLR 586 para 4.

20 le in accordance with *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: Distribution of Business)* [1992] 1 WLR 586 para 2(1): see note 5.

21 *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: Distribution of Business)* [1992] 1 WLR 586 para 5.

22 As to the meaning of 'divorce county court' see PARA 732.

23 As to the meaning of 'civil partnership proceedings county court' see PARA 732.

24 *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: distribution of business)* [1992] 1 WLR 586 para 6.

25 le under the Human Rights Act 1998 s 4: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

26 *Practice Direction* [2000] 4 All ER 288, sub nom *Practice Direction (family proceedings: human rights)* [2000] 1 WLR 1782. As to human rights applications see PARA 1024 et seq.

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745. Transfer of family proceedings from the High Court to a county court.

At any stage in any family proceedings¹ in the High Court the court may, if the proceedings are transferable under these provisions, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to a county court².

The following family proceedings are so transferable to a county court, namely:

- 977 (1) all family proceedings commenced in the High Court which are within the jurisdiction of a county court, a divorce county court, or a civil partnership proceedings county court³;
- 978 (2) most wardship proceedings⁴; and
- 979 (3) all family proceedings transferred⁵ from a county court to the High Court⁶.

Proceedings so transferred must be transferred to such county court as the High Court directs⁷. Where a matrimonial or civil partnership cause⁸ or matter within the jurisdiction of a divorce or civil partnership proceedings county court only is transferred it must be transferred to such divorce or civil partnership proceedings county court as the High Court directs⁹.

The transfer does not affect any right of appeal from the order directing the transfer, or the right to enforce in the High Court any judgment signed, or order made, in that court before the transfer¹⁰.

Where proceedings are so transferred to a county court, the county court:

- 980 (a) if it otherwise has no jurisdiction, has jurisdiction to hear and determine those proceedings¹¹;
- 981 (b) has jurisdiction to award any relief which could have been awarded by the High Court¹².

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 Matrimonial and Family Proceedings Act 1984 s 38(1). As to the transfer of proceedings see PARA 964.

3 Matrimonial and Family Proceedings Act 1984 s 38(2)(a) (amended by SI 2005/3336). As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732. The Principal Registry of the Family Division is treated as a divorce county court and a civil partnership proceedings county court for the purpose of any transfer of family proceedings under these provisions: see the Matrimonial and Family Proceedings Act 1984 s 42(4)(c), (4ZA)(c).

4 Matrimonial and Family Proceedings Act 1984 s 38(2)(b) (amended by the Children Act 1989 Sch 13 para 51). Applications for an order that a minor be made, or cease to be, a ward of court and any other proceedings which relate to the exercise of the inherent jurisdiction of the High Court with respect to minors are not transferable under these provisions: Matrimonial and Family Proceedings Act 1984 s 38(2)(b) (as so amended).

5 I.e. under the Matrimonial and Family Proceedings Act 1984 s 39 (see PARA 746) or the County Courts Act 1984 s 41 (transfer to the High Court by order of the High Court: see **CIVIL PROCEDURE** vol 11 (2009) PARA 69).

6 Matrimonial and Family Proceedings Act 1984 s 38(2)(c). As to the transfer of proceedings relating to minors see s 38(2)(b); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 212 et seq.

7 Matrimonial and Family Proceedings Act 1984 s 38(3) (s 38(3) substituted, s 38(3A), (3B) added, by the Civil Partnership Act 2004 Sch 7 para 93).

8 As to matrimonial and civil partnership causes see PARA 317.

9 Matrimonial and Family Proceedings Act 1984 s 38(3A), (3B) (as added: see note 7).

10 Matrimonial and Family Proceedings Act 1984 s 38(4).

11 Matrimonial and Family Proceedings Act 1984 s 38(5)(a).

12 Matrimonial and Family Proceedings Act 1984 s 38(5)(b).

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746. Transfer of family proceedings from a county court to the High Court.

At any stage in any family proceedings¹ in a county court, the county court may, if the proceedings are transferable under these provisions, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to the High Court².

The following family proceedings are so transferable to the High Court, namely:

- 982 (1) all family proceedings commenced in a county court, divorce county court or civil partnership proceedings county court³;
- 983 (2) all family proceedings transferred⁴ from the High Court to a county court, a divorce county court or a civil partnerships proceedings county court⁵.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 Matrimonial and Family Proceedings Act 1984 s 39(1). As to the transfer of proceedings see PARA 964.

3 Matrimonial and Family Proceedings Act 1984 s 39(2)(a) (s 39(2) amended by the Civil Partnership Act 2004 Sch 27 para 94). As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732. The Principal Registry of the Family Division is treated as a divorce county court and a civil partnership proceedings county court for the purpose of any transfer of family proceedings under these provisions: see the Matrimonial and Family Proceedings Act 1984 s 42(4)(c), (4ZA)(c). Section 39 is excluded in relation to proceedings for occupation orders and non-molestation orders: see PARA 964.

4 ie under the Matrimonial and Family Proceedings Act 1984 s 38: see PARA 745.

5 Matrimonial and Family Proceedings Act 1984 s 39(2)(b) (as amended: see note 3).

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747. Orders for transfer of family proceedings.

Where a matrimonial or civil partnership cause¹ is pending in the High Court, the district judge² of the registry in which the cause is pending, or a judge³, may order that the cause be transferred to another registry⁴. Where a cause⁵ is pending in a divorce county court or a civil partnership proceedings court⁶, the court⁷ may order that the cause be transferred to another divorce county court⁸. The court must not, either of its own motion or on the application of any party, make an order under these provisions⁹ unless the parties have either had an opportunity of being heard on the question or have consented to such an order¹⁰. Where the parties, or any of them, desire to be heard on the question of a transfer, the court must give the parties notice of a date, time and place at which the question will be considered¹¹.

1 As to matrimonial and civil partnership causes see PARA 317. These provisions apply to applications in causes as they apply to causes; but, before making an order for the transfer of an application, the court (ie a judge or a district judge: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1)) must consider whether it would be more convenient to transfer the cause pursuant to the text and notes 1-7: r 10.10(3) (amended by SI 2005/2922).

2 As to the meaning of 'district judge' see PARA 737 note 2.

3 For these purposes, unless the context otherwise requires, 'judge' does not include a district judge: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.10(1), (1A) (r 10.10(1) amended, r 10.10(1A) added, by SI 2005/2922).

5 As to the meaning of 'cause' see PARA 321 note 1.

6 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

7 For these purposes, 'court' means a judge or district judge: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

8 Family Proceedings Rules 1991, SI 1991/1247, r 10.10(2), (2A) (r 10.10(2A) added by SI 2005/2922).

9 Ie the provisions set out in the text and notes 1-7.

10 Family Proceedings Rules 1991, SI 1991/1247, r 10.10(4) (amended by SI 2005/2922). Rule 10.10(4) and r 10.10(5) (see the text and note 10) apply with the necessary modifications to an order for the transfer of family proceedings under the Matrimonial and Family Proceedings Act 1984 s 38 (see PARA 746) or s 39 (see PARA 746) as they apply to an order under the Family Proceedings Rules 1991, SI 1991/1247, r 10.10(1), (1A), (2) or (2A): r 10.10(6) (amended by SI 2005/2922).

11 Family Proceedings Rules 1991, SI 1991/1247, r 10.10(5) (amended by SI 2005/2922).

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748. Procedure on transfer of cause or application.

Where any cause¹ or application is ordered to be transferred from one court² or registry to another, the proper officer³ of the first-mentioned court or registry must, unless otherwise directed, give notice of the transfer to the parties⁴.

Proceedings transferred from a designated county court to the High Court⁵ must, unless the order for transfer otherwise directs, proceed in the registry nearest to the designated county court from which they are transferred⁶.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 As to the meaning of 'court' see PARA 751 note 1.

3 As to the meaning of 'proper officer' see PARA 461 note 5.

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.11(1). Any provision in the Family Proceedings Rules 1991, SI 1991/1247, or in any order made or notice given pursuant thereto, for the transfer of proceedings between a designated county court and the High Court is to be construed, in relation to proceedings which, after the transfer, are to continue in the Principal Registry:

179 (1) in the case of a transfer from the High Court to a designated county court, as a provision for the proceedings to be treated as pending in a designated county court (r 10.11(2)(a) (amended by SI 2005/2922)); and

180 (2) in the case of a transfer from a designated county court to the High Court, as a provision for the proceedings no longer to be treated as pending in a designated county court: r 10.11(2) (b) (amended by SI 2005/2922).

As to the meaning of 'designated county court' see PARA 737 note 3. As to the meaning of 'Principal Registry' see PARA 737 note 3.

5 le pursuant to any provision in the Family Proceedings Rules 1991, SI 1991/1247.

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.11(3) (amended by SI 2005/2922). Nothing in the Family Proceedings Rules 1991, SI 1991/1247, r 10.11(3) prejudices any power under the Family Proceedings Rules 1991, SI 1991/1247, to order the transfer of the proceedings to a different registry: r 10.11(3).

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749. Allocation of family proceedings which are within the jurisdiction of county courts.

The President of the Family Division¹ may, after consulting the Lord Chancellor, give directions that, in such circumstances as may be specified², any family proceedings³ which are within the jurisdiction of county courts⁴ or any specified description of such proceedings⁵ are to be allocated to specified judges⁶ or to specified descriptions of judge⁷, and any such directions have effect regardless of any rules of court⁸. Where any directions have been so given allocating any proceedings to specified judges, the validity of anything done by a judge in, or in relation to, the proceedings cannot be called into question by reason only of the fact that he was not a specified judge⁹.

1 As to the President of the Family Division see **COURTS** vol 10 (Reissue) PARA 515; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 303.

2 For these purposes 'specified' means specified in the directions: Courts and Legal Services Act 1990 s 9(5).

3 For these purposes 'family proceedings' has the same meaning as in the Matrimonial and Family Proceedings Act 1984 (see PARA 737 note 2) and also includes any other proceedings which are 'family proceedings' for the purposes of the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 199); Courts and Legal Services Act 1990 s 9(5).

4 Courts and Legal Services Act 1990 s 9(1)(a) (s 9(1) amended by the Constitutional Reform Act 2005 Sch 4 para 213). For these purposes 'county court' includes the Principal Registry of the Family Division of the High Court, in so far as it is treated as a county court: Courts and Legal Services Act 1990 s 9(4). As to the Principal Registry of the Family Division see PARA 737 note 3.

5 Courts and Legal Services Act 1990 s 9(1)(b) (as amended: see note 4).

6 For these purposes 'judge' means any person who:

181 (1) is capable of sitting as a judge for a county court district (Courts and Legal Services Act 1990 s 9(5));

182 (2) is a district judge, an assistant district judge or a deputy district judge (s 9(5)); or

183 (3) is a district judge of the Principal Registry of the Family Division of the High Court (s 9(5)).

As to district judges see PARA 737 note 3.

7 Courts and Legal Services Act 1990 s 9(1) (as amended: see note 4). In exercise of the power so conferred the Lord Chancellor, with the concurrence of the President of the Family Division, made the *Family Proceedings (Allocation to Judiciary) Directions 1999* [1999] 2 FLR 799, which have been amended by the *Family Proceedings (Allocation to Judiciary) (Amendment) Directions 2002* [2002] 2 FLR 692; the *Family Proceedings (Allocation to Judiciary) (Amendment No 1) Directions 2006* [2006] 1 FLR 1147; the *Family Proceedings (Allocation to Judiciary) (Amendment No 2) Directions 2006* [2006] 1 FLR 1150; the *Family Proceedings (Allocation to Judiciary) (Amendment) Directions 2007* [2007] 1 FLR 459; and the *Practice Direction (Family Proceedings (Allocation to Judiciary) (amendment) directions 2008)* [2008] All ER (D) 135 (Oct).

8 Courts and Legal Services Act 1990 s 9(2).

9 Courts and Legal Services Act 1990 s 9(3).

UPDATE

749 Allocation of family proceedings which are within the jurisdiction of county courts

NOTE 9--See *P v P (financial relief: procedure)* [2009] EWHC 2953 (Fam), [2009] 1 FLR 696, [2009] All ER (D) 168 (Apr).

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(2) MATRIMONIAL AND CIVIL PARTNERSHIP CAUSES

(i) Jurisdictional Matters

750. Jurisdiction of High Court and county court.

The court¹ has jurisdiction to entertain proceedings for divorce, dissolution, separation or nullity of marriage or civil partnership² if, and only if:

- 984 (1) it has the appropriate jurisdiction³; or
- 985 (2) no court⁴ has⁵ jurisdiction⁶ and either of the parties to the marriage or civil partnership is domiciled⁷ in England and Wales on the date when the proceedings are begun⁸ or (in the case of proceedings for nullity) died before that date and either was at death domiciled in England and Wales or had been habitually resident⁹ in England and Wales throughout the period of one year ending with the date of death¹⁰; or
- 986 (3) in relation to civil partnership proceedings only, the two people concerned registered as civil partners of each other in England or Wales¹¹ and no court has, or is recognised as having, the appropriate jurisdiction¹², and it appears to the court to be in the interests of justice to assume jurisdiction in the case¹³.

The court has jurisdiction to entertain proceedings for death to be presumed and a marriage or civil partnership to be dissolved or a presumption of death order to be made¹⁴ if, and only if:

- 987 (a) the petitioner or applicant is domiciled in England and Wales on the date when the proceedings are begun¹⁵;
- 988 (b) the petitioner or applicant was habitually resident in England and Wales throughout the period of one year ending with that date¹⁶; or
- 989 (c) in the case of civil partnership proceedings only, the two people concerned registered as civil partners of each other in England and Wales and it appears to the court to be in the interests of justice to assume jurisdiction in the case¹⁷.

1 For these purposes 'court' means the High Court or, if a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt 5 (ss 32-44), a county court: Domicile and Matrimonial Proceedings Act 1973 s 5(1A) (added by SI 2001/310); Civil Partnership Act 2004 s 220.

2 As to matrimonial and civil partnership causes generally see PARA 317 et seq. At any time when proceedings are pending in respect of which it has jurisdiction pursuant to these provisions (see the text and notes 3-13) the court also has jurisdiction to entertain other proceedings, in respect of the same marriage or civil partnership, for nullity, divorce or judicial separation, dissolution or separation, notwithstanding that jurisdiction would not otherwise be so exercisable: Domicile and Matrimonial Proceedings Act 1973 s 5(5); Civil Partnership Act 2004 s 221(3). As to stays of proceedings where there are concurrent proceedings elsewhere in respect of the same marriage see PARA 845 et seq.

3 Domicile and Matrimonial Proceedings Act 1973 s 5(1)(a), (2)(a), (3)(a) (s 5(2), (3) substituted by SI 2001/310); Civil Partnership Act 2004 s 221(1)(a), (2)(a). In relation to marriage proceedings, the court will have the appropriate jurisdiction if it has jurisdiction under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and in relation to civil partnership proceedings the court will have the

appropriate jurisdiction if it has jurisdiction under the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334: Domicile and Matrimonial Proceedings Act 1973 s 5(3)(a) (as so substituted); Civil Partnership Act 2004 s 221(2)(a). As to these regulations see further PARA 751 et seq.

The Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, are made under the Civil Partnership Act 2004 s 219, under which the Lord Chancellor may by regulations ('section 219 regulations') make provision:

- 184 (1) as to the jurisdiction of courts in England and Wales in proceedings for the dissolution or
annulment of a civil partnership or for legal separation of the civil partners in cases where a civil
partner:
- 63 1. (a) is or has been habitually resident in a member state (s 219(1)(a)(i), (8));
- 64 2. (b) is a national of a member state (s 219(1)(a)(ii)); or
- 65 3. (c) is domiciled in a part of the United Kingdom or the Republic of Ireland (s 219(1)(a)
(iii)); and
- 185 (2) as to the recognition in England and Wales of any judgment of a court of another member
state which orders the dissolution or annulment of a civil partnership or the legal separation of
the civil partners (s 219(1)(b)).

Such regulations may in particular make provision corresponding to that made by EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) (Civil Partnership Act 2004 s 219(3)): they may also provide that for these purposes 'member state' means either all member states with the exception of such member states as are specified in the regulations or such member states as are specified in the regulations (s 219(4)), and may make provision under s 219(1)(b) which applies even if the date of the dissolution, annulment or legal separation is earlier than the date on which this section comes into force (s 219(5)).

4 For the purposes of marriage proceedings it is specified that this is a reference to a court of a 'Contracting State' (ie: (1) a party to EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1), that is to say Belgium, Cyprus, Czech Republic, Germany, Greece, Spain, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Slovakia, Slovenia, Finland, Sweden and the United Kingdom; and (2) a party which has subsequently adopted that Regulation): Domicile and Matrimonial Proceedings Act 1973 s 5(1A), (2)(b), (3)(b) (s 5(1A) added by SI 2001/310; and amended by SI 2005/265; Domicile and Matrimonial Proceedings Act 1973 s 5(2), (3) as substituted (see note 3)).

5 Or, in the case of civil partnership proceedings, is recognised as having: Civil Partnership Act 2004 s 221(1)(b), (2)(b).

6 Ie under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) (in the case of marriage proceedings) or under section 219 regulations (in the case of civil partnership proceedings): see note 3.

7 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

8 Domicile and Matrimonial Proceedings Act 1973 s 5(2)(b), (3)(b)(i) (as substituted: see note 3); Civil Partnership Act 2004 s 221(1)(b), (2)(b)(i).

9 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59.

10 Domicile and Matrimonial Proceedings Act 1973 s 5(3)(b)(ii) (as substituted: see note 3); Civil Partnership Act 2004 s 221(2)(b)(ii).

11 Civil Partnership Act 2004 s 221(1)(c)(i), (2)(c)(i).

12 Civil Partnership Act 2004 s 221(1)(c)(ii), (2)(c)(ii). As to the appropriate jurisdiction see note 3.

13 Civil Partnership Act 2004 s 221(1)(c)(iii), (2)(c)(ii).

14 As to presumption of death see PARA 415 et seq. As to the jurisdiction in proceedings for presumption of death and declarations as to status see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 261-264.

15 Domicile and Matrimonial Proceedings Act 1973 s 5(1)(b), (4)(a); Civil Partnership Act 2004 s 222(a).

16 Domicile and Matrimonial Proceedings Act 1973 s 5(4)(b); Civil Partnership Act 2004 s 222(b).

17 Civil Partnership Act 2004 s 222(c).

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751. Jurisdiction of courts in England and Wales.

The courts in England and Wales have jurisdiction in relation to proceedings for divorce, dissolution, separation or annulment¹ if:

- 990 (1) both spouses or civil partners are habitually resident² in England and Wales³;
- 991 (2) both spouses or civil partners were last habitually resident in England and Wales and one of the spouses or civil partners continues to reside there⁴;
- 992 (3) the respondent is habitually resident in England and Wales⁵;
- 993 (4) the petitioner or applicant is habitually resident in England and Wales and has resided there for at least one year immediately preceding the presentation of the petition or the making of the application⁶; or
- 994 (5) the petitioner or applicant is domiciled⁷ and habitually resident in England and Wales and has resided there for at least six months immediately preceding the presentation of the petition or the making of the application⁸.

1 As to matrimonial and civil partnership causes generally see PARA 317 et seq. Jurisdiction in respect of matrimonial causes is conferred by EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and jurisdiction in respect of civil partnership causes is conferred by the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334: see PARA 750 note 3. These two instruments are differently expressed, the latter specifically conferring the relevant jurisdiction on the courts of England and Wales while the former confers such jurisdiction by reference to the persons involved being within the territory of a particular member state, but the effect of both is as stated in the text. For the former purposes, it is provided that the term 'court' covers all the authorities with jurisdiction in civil proceedings relating to divorce, legal separation and marriage annulment in the member states: EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) arts 1.1(a), 1.2. 'Member state' means all member states with the exception of Denmark: art 2.3. 'Court' is not specifically defined for the purposes of the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, but cf PARA 750 note 1.

A spouse who is habitually resident in the territory of a member state or is a national of a member state or, in the case of the United Kingdom, has his or her domicile in the territory of the United Kingdom, may be sued in another member state only in accordance with EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) arts 3-5: art 6.

Where no court of a member state has jurisdiction pursuant to these provisions, jurisdiction is to be determined, in each member state, by the laws of that state: art 7.1. As against a respondent who is not habitually resident and is not either a national of a member state or, in the case of the United Kingdom, does not have his domicile within the territory of the United Kingdom, any national of a member state who is habitually resident within the territory of another member state may, like the nationals of that state, avail himself of the rules of jurisdiction applicable in that state: art 7.2. As to 'habitual residence' see note 2.

A court of a member state which has given a judgment on a legal separation also has jurisdiction for converting that judgment into a divorce, if the law of that member state so provides: EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 5. In urgent cases the provisions of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) do not prevent the courts of a member state from taking such provisional, including protective, measures in respect of persons or assets in that state as may be available under the law of that member state, even if, under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1), the court of another member state has jurisdiction as to the substance of the matter: art 20.1.

2 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59. With regard to a member state in which two or more systems of law or sets of rules concerning matters governed by EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) apply in different territorial units, any reference to habitual residence in that member state refers to habitual residence in a territorial unit: art 66(a).

3 Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, reg 4(a); EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 3.1.

4 Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, reg 4(b); EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 3.1.

5 Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, reg 4(c); EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 3.1.

6 Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, reg 4(d); EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 3.1.

7 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq. With regard to a member state in which two or more systems of law or sets of rules concerning matters governed by EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) apply in different territorial units, any reference, in the case of the United Kingdom, to domicile refers to the territorial unit designated by the law of the United Kingdom: art 66(b).

8 Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, reg 4(e); EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 3.1.

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752. Decrees granted outside England and Wales.

The validity of a divorce, annulment or legal separation obtained in a country outside the British Islands is to be recognised¹ in the United Kingdom if, and only if, it is entitled to recognition by virtue of the relevant provisions of the Family Law Act 1986² or any other enactment³.

¹ See subject to the Family Law Act 1986 ss 45(2), 51, 52 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 254, 259).

² See by virtue of the Family Law Act 1986 s 46 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 255, 256), s 47 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 255, 256), s 48 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 255) and s 49 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 257).

³ See the Family Law Act 1986 s 45(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 254. The Family Law Act 1986 s 45(1) does not apply to an overseas divorce, annulment or legal separation as regards which provision as to recognition is made by EC Council Regulation 2201/2003 (OJ L160, 23.12.2003, pp 9-11, 13) arts 21-27, 41(1), 42(1) (see **CONFLICT OF LAWS**): see the Family Law Act 1986 s 45(2); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 254.

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753. Jurisdiction to examine counterclaim.

The court¹ in which proceedings are pending for divorce, legal separation or marriage annulment² also has jurisdiction to examine a counterclaim, in so far as the latter comes within the scope³ of the relevant provisions⁴.

The instrument from which these provisions derive⁵ relates only to proceedings involving marriage; quaere their extended application to proceedings involving civil partnerships.

1 As to the meaning of 'court' see PARA 751 note 1.

2 Ie on the basis of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, art 2.

3 Ie within the scope of EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1).

4 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 4.

5 See note 2.

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754. Examination as to jurisdiction and admissibility.

In proceedings relating to divorce, legal separation or marriage annulment it is provided that where a court¹ of a member state² is seised of a case over which it has no jurisdiction³ and over which a court of another member state has such jurisdiction, it must declare of its own motion that it has no jurisdiction⁴.

Where a respondent habitually resident⁵ in a state other than the member state where the action was brought does not enter an appearance, the court with jurisdiction must stay the proceedings, so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end⁶.

The instrument from which these provisions derive⁷ relates only to proceedings involving marriage; quare their extended application to proceedings involving civil partnerships.

1 As to the meaning of 'court' see PARA 751 note 1.

2 As to the meaning of 'member state' see PARA 751 note 1.

3 Ie under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility: see PARA 751.

4 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 17.

5 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59; and PARA 751 note 2.

6 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 18.1. EC Council Regulation 1348/2000 (OJ L160, 30.6.2000, p 37) art 19 (service in member states of judicial and extrajudicial documents in civil or commercial matters: see **CIVIL PROCEDURE** vol 11 (2009) PARA 156) applies instead of the provisions of EC Council Regulation 1347/2000 art 18.1 if the document instituting the proceedings or an equivalent document had to be transmitted from one member state to another pursuant to EC Council Regulation 1348/2000 (OJ L160, 30.6.2000, p 37) art 19: EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 18.2. Where the provisions of EC Council Regulation 1348/2000 (OJ L160, 30.6.2000, p 37) art 19 are not applicable, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965; TS 50 (1969); Cmnd 3986) art 15 on the service abroad of judicial and extrajudicial documents in civil or commercial matters applies if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant thereto: EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 18.3.

7 See note 3.

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(ii) Institution of Proceedings by Petition

A. FORM, CONTENT AND FILING OF PETITIONS

755. Commencement of matrimonial and civil partnership causes by petition.

Every matrimonial or civil partnership cause¹ must be commenced by petition in a divorce county court or a civil partnership proceedings county court². However, proceedings are not thereby prevented from being commenced in the Principal Registry of the Family Division, except where rules of court otherwise provide³; and proceedings pending at any time in the Principal Registry which, if they had been begun in a divorce county court or a civil partnership proceedings county court, would be pending at that time in such a court are to be treated⁴ as pending in a divorce county court or civil partnership proceedings county court and not in the High Court⁵.

Where there is before a divorce county court, a civil partnership proceedings county court or the High Court a petition which has not been dismissed or otherwise finally disposed of, another petition by the same petitioner in respect of the same marriage or civil partnership must not be presented without leave granted on an application made in the pending proceedings⁶; and such leave may be given retrospectively⁷. No such leave is, however, required where it is proposed, after the expiration of the period of one year from the date of the marriage or civil partnership, to present a petition for divorce or dissolution alleging such of the facts which might be evidence of irretrievable breakdown⁸ as were alleged in a petition for separation presented before the expiration of that period⁹.

Before a petition is served on any person, the petitioner may file a notice of discontinuance, whereupon the cause stands dismissed¹⁰.

1 As to matrimonial and civil partnership causes see PARA 317.

2 See the Matrimonial and Family Proceedings Act 1984 ss 33(3), 36A(6); Family Proceedings Rules 1991, SI 1991/1247, r 2.2(1); and PARA 732. The fee payable on presenting any petition, other than a second petition with leave granted under r 2.6(4), (4A) (see PARA 755) is £300: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 1.2. A petition may be presented in a matrimonial cause to any divorce county court, and in a civil partnership cause, to any civil partnership proceedings county court: r 2.6(1) (substituted by SI 2005/2922). As to divorce county courts and civil partnership proceedings county courts see PARA 732.

3 See the Matrimonial and Family Proceedings Act 1984 s 42(1).

4 See for the purposes of the Family Proceedings Rules 1991, SI 1991/1247, and of any provisions of the County Court Rules 1981, SI 1981/1687, and the County Courts Act 1984, but subject to the provisions of Family Proceedings Rules 1991, SI 1991/1247. References in r 1.4 to the County Court Rules 1981, SI 1981/1687, are references to the County Court Rules 1981, SI 1981/1687, in force immediately before 26 April 1999 and references thereto in the Family Proceedings Rules 1991, SI 1991/1247, are to be read accordingly: Family Proceedings (Miscellaneous Amendments) Rules 1999, SI 1999/1012, r 3(1). As to the continued application of the County Court Rules 1981, SI 1981/1687, in matrimonial and civil partnership proceedings see PARA 1005.

5 Family Proceedings Rules 1991, SI 1991/1247, r 1.4(1) (substituted by SI 2005/2922). Unless the context otherwise requires, any reference to a divorce county court, a civil partnership proceedings county court or a designated county court in any provision of the Family Proceedings Rules 1991, SI 1991/1247, which relates to

the commencement or prosecution of proceedings in, or the transfer of proceedings to or from, such a court includes a reference to the Principal Registry: r 1.4(2) (amended by SI 2005/2922). As to the meaning of 'designated county court' see PARA 737 note 3. Unless the context otherwise requires, a cause begun by petition is to be treated as pending for the purposes of the Family Proceedings Rules 1991, SI 1991/1247, notwithstanding that a final decree or order has been made on the petition or it has otherwise been finally disposed of: r 1.2(2) (amended by SI 2005/2922).

6 Family Proceedings Rules 1991, SI 1991/1247, rr 2.6(4), (4A) (r 2.6(4) amended, r 2.6(4A) added, by SI 2005/2922). The fee payable on presenting a second or subsequent petition with leave granted under r 2.6(4) or (4A) is £80: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 1.4. See, however, PARA 830. A respondent seeking relief in an answer does not have the right to file a second answer claiming relief without obtaining leave even where the petitioner has already obtained such leave: *Bartlett v Bartlett* (1963) 107 Sol Jo 912.

7 *Cooper v Cooper* [1964] 3 All ER 167n, [1964] 1 WLR 1323. See also *Bainbridge v Bainbridge* [1962] 2 All ER 267, [1962] 1 WLR 495.

8 le in relation to marriage, such of the facts as are mentioned in the Matrimonial Causes Act 1973 s 1(2), and in relation to civil partnerships such of the facts as are mentioned in the Civil Partnership Act 2004 s 44(5): see PARA 347.

9 Family Proceedings Rules 1991, SI 1991/1247, rr 2.6(4) proviso, (4A) proviso (as amended and added: see note 6).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.8. Technically, once filed, a petition cannot be withdrawn: see PARA 858; *Ryder v Ryder* (1861) 30 LJPM & A 164. Cf *Brocas v Brocas* (1861) 2 Sw & Tr 383; *Onslow v Onslow, Jones and Campbell* (1889) 60 LT 680; *Demetriou v Demetriou* [1950] P 261, [1950] 2 All ER 49, CA.

UPDATE

755 Commencement of matrimonial and civil partnership causes by petition

NOTE 2--SI 2008/1054 Sch 1, Fee 1.2 amended: SI 2008/2856.

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756. Contents of petitions generally.

Unless otherwise directed¹, every petition in a matrimonial or civil partnership cause² must state:

- 995 (1) the names of the parties to the marriage or civil partnership and the date and place of the marriage, or the date and place at which the civil partnership was registered³;
- 996 (2) the last address at which the parties to the marriage or civil partnership have lived together as husband and wife or as civil partners of one another⁴;
- 997 (3) the grounds of jurisdiction⁵;
- 998 (4) where it is alleged that the court has jurisdiction⁶ based on domicile⁷, the country in which the petitioner is domiciled and, if that country is not England and Wales, the country in which the respondent is domiciled⁸;
- 999 (5) where it is alleged that the court has jurisdiction⁹ based on habitual residence¹⁰, the country in which the petitioner has been habitually resident throughout the period of one year ending with the date of the presentation of the petition or, if the petitioner has not been habitually resident in England and Wales, the country in which the respondent has been habitually resident during that period, with details in either case, including the addresses of the places of residence and the length of residence at each place¹¹;
- 1000 (6) where it is alleged that the court should assume jurisdiction over a civil partnership cause¹², the facts and matters relied on in support of that assertion¹³;
- 1001 (7) the occupation and residence of the petitioner and the respondent¹⁴;
- 1002 (8) whether there are any living children of the family¹⁵;
- 1003 (9) whether¹⁶ any other child now living has been born to the wife or, as the case may be, either of the civil partners during the marriage or civil partnership and, if so, the full names, including surname, of the child and his date of birth or, if it be the case, that he is over 18¹⁷;
- 1004 (10) if it be the case, that there is a dispute whether a living child is a child of the family¹⁸;
- 1005 (11) whether or not there are or have been any other proceedings in any court in England and Wales or elsewhere with reference to the marriage or civil partnership or to any child of the family or between the petitioner and the respondent with reference to any property of either or both of them¹⁹;
- 1006 (12) whether or not there have been any applications²⁰ for a maintenance calculation in respect of any child of the family²¹;
- 1007 (13) whether there are any proceedings continuing in any country outside England and Wales which relate to the marriage or civil partnership or are capable of affecting its validity or subsistence²²;
- 1008 (14) where the fact on which the petition is based is five years' separation²³, whether any, and if so what, agreement or arrangement has been made or is proposed to be made between the parties for the support of the respondent or, as the case may be, the petitioner or any child of the family²⁴;
- 1009 (15) in the case of a petition for divorce or dissolution, that the marriage or civil partnership has broken down irretrievably²⁵;

- 1010 (16) the fact which might be evidence of irretrievable breakdown alleged by the petitioner²⁶ or, where the petition is not for divorce, dissolution, judicial separation or a separation order, the ground on which relief is sought, together in any case with brief particulars of the individual facts relied on but not the evidence by which they are to be proved²⁷; and
- 1011 (17) any further or other information²⁸ as may be applicable²⁹.

1 Where it is desired to omit from a petition any information required to be contained therein by the Family Proceedings Rules 1991, SI 1991/1247, r 2.3, Appendix 2 (see the text and notes 2-29), the petition should be filed without such information; but, before service is effected, an application without notice must be made to a district judge for leave for the petition to stand. If leave is refused, the district judge will make an order requiring the petition to be amended: *Practice Direction* [1968] 2 All ER 88, [1968] 1 WLR 782.

2 In every petition other than a petition under the Family Proceedings Rules 1991, SI 1991/1247, rr 3.12, 3.12A (declarations as to marital or civil partnership status: see PARA 1001), r 3.13 (declaration of parentage: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 121), r 3.14 (declaration of legitimacy or legitimation: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 122) or r 3.15 (declaration as to adoption effected overseas: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 375): r 2.3, Appendix 2 para 1 (amended by SI 2005/2922). As to matrimonial and civil partnership causes generally see PARA 317.

3 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(a) (amended by SI 2005/2922). Precision in pleading the marriage ceremony was held by Lord Merriman P to be a matter of substance not of form: *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272, [1955] 2 All ER 377 (where there are two ceremonies both should be stated; if only one ceremony is stated and a decree is pronounced relating to that ceremony, the court has no power after the decree has been made absolute to amend it so as to relate it to the other ceremony, even though that may have been the effective ceremony), but on appeal [1955] P 272 at 285, [1955] 3 All ER 129, CA, the majority held that: (1) the statement of the date or place of the marriage is not fundamental; (2) if either date or place is wrongly stated, the court can grant liberty to amend even after decree absolute; and see PARA 879; *Hampson v Hampson* [1908] P 355; *Clarke v Clarke* (1961) 105 Sol Jo 386 (similar case; prior register office ceremony); *Amadasun v Amadasun* [1992] 1 FLR 585, [1992] Fam Law 235 (tribal ceremony of marriage in Nigeria followed by civil service in the United Kingdom; if the court was satisfied that first ceremony was valid, it was that ceremony alone that should be cited in decrees). Where two ceremonies are stated, the court decides which of two ceremonies created the relationship in issue and recites it in the decree: see *Reder v Reder* [1948] WN 238, CA (decree nisi dissolving 'whichever of two ceremonies created a marriage' held to be a nullity); cf *Hewett v Hewett and Dupin* (1929) 73 Sol Jo 402 (where the court refused to include a reference to the second ceremony in a decree where the first ceremony was the valid celebration of the marriage and held that the proper remedy in relation to the second ceremony was an application for declaration of nullity).

4 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(b) (substituted by SI 2005/2922). See however *Practice Direction* [1975] 2 All ER 384, [1975] 1 WLR 787 para 1 (where necessary for the protection of the petitioner a district judge had power to direct that the petition in a matrimonial cause did stand, notwithstanding that it omitted the petitioner's place of residence). As to the procedure on an application to omit the petitioner's address see *Practice Direction* [1975] 2 All ER 384, [1975] 1 WLR 787 paras 2-5.

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(bb) (added by SI 2001/821; substituted by SI 2005/2922). Thus where it is alleged that the court has jurisdiction under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (see PARA 750 note 3), the petition must state the grounds of jurisdiction under art 3.1 (see PARA 751), and where it is alleged that the court has jurisdiction under the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334 (see PARA 750 note 3), the petition must state the grounds of jurisdiction under reg 4 (see PARA 751): Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(bb) (as so added and substituted).

6 In other than under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) or the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334 (see PARA 751).

7 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

8 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(c) (amended by SI 2001/821; SI 2005/2922).

9 In other than under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) (see PARA 751).

10 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59.

11 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(d) (amended by SI 2001/821).

12 le under the Civil Partnership Act 2004 s 221(1)(c) or s 221(2)(c) (see PARA 750).

13 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(dd) (added by SI 2005/2922).

14 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(e).

15 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(f). As to the meaning of 'child of the family' see PARA 707 note 9. If the petition states that there are any living children of the family it must also state the number of such children and the full names, including surname, of each and his date of birth or, if it be the case, that he is over 18, and, in the case of each minor child over the age of 16, whether he is receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation: Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(f).

16 le to the knowledge of the petitioner in the case of a husband's petition in a matrimonial cause or to the knowledge of the petitioner in a civil partnership cause: Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(g), (ga) (Appendix 2 para 1(g) amended, Appendix 2 para 1(ga) added, by SI 2005/2922).

17 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(g), (ga) (as amended and added: see note 16).

18 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(h).

19 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(i)(i) (amended by SI 2005/2922). If the petition states that there are or have been any other such proceedings it must also state the nature of the proceedings, the date and effect of any decree or order and, in the case of proceedings with reference to the marriage or civil partnership, whether there has been any resumption of cohabitation since the making of the decree, conditional order or other order: Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(i)(i) (as so amended).

20 le under the Child Support Act 1991: see **CHILDREN AND YOUNG PERSONS**.

21 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(ia) (added by SI 1993/295; amended by SI 2001/821). If the petition states that there have been any applications it must also state the date of any such application and details of the calculation made: Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(ia) (as so added and amended).

22 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j) (amended by SI 2005/2922). Such proceedings include any which are not instituted in a court of law in the country in question, if they are instituted before a tribunal or other authority having power under the law having effect there to determine questions of status, and are to be treated as continuing if they have been begun and have not been finally disposed of: Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j). If the petition states that there are any such proceedings it must also state:

186 (1) particulars of the proceedings, including the court in or tribunal or authority before which they were begun (Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j)(i));

187 (2) the date when they were begun (Appendix 2 para 1(j)(ii));

188 (3) the names of the parties (Appendix 2 para 1(j)(iii));

189 (4) the date or expected date of any trial in the proceedings (Appendix 2 para 1(j)(iv)); and

190 (5) such other facts as may be relevant to the question whether the proceedings on the petition should be stayed under the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 (see PARA 840 et seq) or, as the case may be, the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921 (see PARA 840 et seq) (Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j)(v), (vi) (as so amended)).

23 As to five years' separation see PARA 410 et seq.

24 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(k).

25 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(l) (substituted by SI 2005/2922). As to the requirement that a marriage or civil partnership has broken down irretrievably see PARAS 346, 347.

26 le for the purposes of the Matrimonial Causes Act 1973 s 1(2) or the Civil Partnership Act 2004 s 44(5):
see PARA 347.

27 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(m), (ma) (Appendix 2 para 1(m)
amended, para 1(ma) added, by SI 2005/2922).

28 le as required by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 paras 2-4 (see PARAS 759,
762, 764) and r 3.11 (see PARA 1010).

29 Family Proceedings Rules 1991, SI 1991/1247 Appendix 2 para 1(n).

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757. Bar on petitions and applications in first year of marriage or civil partnership.

No petition for divorce or application for dissolution is to be presented or made to the court¹ before the expiration of the period of one year from the date of the marriage or the formation of the civil partnership² (although the presentation of a petition or an application based on matters which occurred before the expiration of that period is not thereby prohibited³). A petition presented or application made before the expiration of the one-year period is, therefore, null and void and a court has no jurisdiction to entertain it⁴.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Matrimonial Causes Act 1973 s 3(1) (s 3 substituted by the Matrimonial and Family Proceedings Act 1984 s 1); Civil Partnership Act 2004 s 41(1). In connection with applications for orders dissolving recognised overseas relationships see the Civil Partnership (Treatment of Overseas Relationships) Order 2005, SI 2005/3042, art 3(1).

3 Matrimonial Causes Act 1973 s 3(2) (as substituted: see note 2); Civil Partnership Act 2004 s 41(2).

4 *Butler v Butler (Queen's Proctor intervening)* [1990] FCR 336, [1990] 1 FLR 114 (petition for judicial separation filed within one year from the date of the marriage could not be subsequently amended to pray for divorce).

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758. Divorce or dissolution not precluded by previous proceedings.

A person is not prevented from presenting a petition for divorce or an application for the dissolution of a civil partnership, and the court is not prevented from granting a decree of divorce or a dissolution order, by reason only that the petitioner, applicant or respondent has at any time, on the same or substantially the same facts as those proved in support of the petition for divorce or application for dissolution, been granted:

- 1012 (1) a decree of judicial separation or a separation order¹;
- 1013 (2) an order for financial relief during the subsistence of a marriage or a civil partnership²; or
- 1014 (3) in the case of civil partnerships only, an occupation order³ or an order that neither civil partner is entitled to occupy the civil partnership home⁴.

On a petition for divorce or an application for a dissolution order in such a case, the court may treat the order as sufficient proof of any desertion or other fact (or, in the case of a marriage, adultery) by reference to which it was made, but must not grant a decree of divorce or make a dissolution order without receiving evidence from the applicant⁵.

1 Matrimonial Causes Act 1973 s 4(1) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 Sch 2 para 38); Civil Partnership Act 2004 s 46(1)(a), (2). As to judicial separation and separation orders see PARA 346 et seq.

2 Matrimonial Causes Act 1973 s 4(1) (as amended: see note 1); Civil Partnership Act 2004 s 46(1)(b). As to orders for financial relief during the subsistence of a marriage or a civil partnership see the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35); the Civil Partnership Act 2004 Sch 6; and PARA 553 et seq.

3 I.e. an order under the Family Law Act 1996 s 33: see PARA 292 et seq.

4 Civil Partnership Act 2004 s 46(1)(c), (d). An order that neither civil partner is entitled to occupy the civil partnership home is an order under the Family Law Act 1996 s 37: see PARA 305 et seq.

5 Matrimonial Causes Act 1973 s 4(2); Civil Partnership Act 2004 s 46(3). See further PARA 366.

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759. Additional requirements in case of a nullity petition.

A petition for a decree of nullity or an application for a nullity order on the ground that at the time of the marriage or the formation of the civil partnership the respondent was pregnant by some person other than the petitioner or applicant¹, or that the respondent is a person whose gender had become the acquired gender² at the time of the marriage or civil partnership³, and a petition for a decree of nullity on the ground that the respondent was suffering from venereal disease in a communicable form⁴, must state⁵ whether the petitioner was at the time of the marriage or the formation of the civil partnership ignorant of the facts alleged⁶.

Where a petition for nullity of marriage or civil partnership has been presented on the ground that the respondent at the time of the marriage or the formation of the civil partnership was suffering from mental disorder⁷ of such a kind or to such an extent as to be unfitted for marriage or civil partnership⁸, then, whether or not the respondent gives notice of intention to defend⁹, the petitioner or applicant must not proceed with the cause without the leave of the district judge¹⁰. The district judge by whom an application for leave is heard may make it a condition of granting leave that some proper person be appointed to act as litigation friend of the respondent¹¹.

1 Ie a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(f) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(c): see PARA 333.

2 Ie under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 Ie a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(h) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(e): see PARA 334.

4 Ie a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(e): see PARA 343.

5 Ie in addition to the information required by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1: see PARA 756.

6 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 2 (substituted by SI 2005/2922). As to nullity generally see PARA 319 et seq; and as to the procedure where it is desired to omit from a petition any information required to be so contained therein see PARA 756 note 1.

7 Ie within the meaning of the Mental Health Act 1983: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402.

8 As to a petition for nullity of marriage or civil partnership on this ground see PARA 332.

9 As to the meaning of 'notice of intention to defend' see PARA 779.

10 Family Proceedings Rules 1991, SI 1991/1247, r 9.4(1), (1A) (r 4.9(1) amended, r 4.9(1A) added, by SI 2005/2922). As to the meaning of 'district judge' see PARA 737 note 3.

11 Family Proceedings Rules 1991, SI 1991/1247, r 9.4(2).

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760. Co-respondents in proceedings involving adultery or improper conduct to be made parties to proceedings.

Where in a petition for divorce or judicial separation, or in any other pleading praying for either form of relief, one party to a marriage alleges that the other has committed adultery, he or she must make the person alleged to have committed adultery with the other party to the marriage a party to the proceedings unless excused by the court on special grounds from doing so¹; but, where the person alleged to have committed adultery with the other party to the marriage is not named in the petition or other pleading, rules of court may, either generally or in such cases as may be prescribed by the rules, exclude the application of that provision².

In matrimonial proceedings not falling within the above provision, and in appropriate civil partnership proceedings³, rules of court may also make provision with respect to the joinder as parties to proceedings of persons involved in allegations of adultery or other improper conduct made in those proceedings, and with respect to the dismissal from such proceedings of any parties so joined⁴.

In every case in which adultery with any party to a suit is alleged against any person not made a party to the suit or in which the court considers, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may if it thinks fit allow that person to intervene on such terms, if any, as the court thinks just⁵.

1 Matrimonial Causes Act 1973 s 49(1); and see *Sage v Sage* [1947] P 71, [1947] 1 All ER 492 (where Willmer J suggested the factors to be taken into account when the court considers whether there are special grounds); and the cases there cited. Where, in pursuance of these provisions, a person is made a party to proceedings for divorce or judicial separation, the court may, if after the close of the evidence on the part of the person making the allegation of adultery it is of opinion that there is not sufficient evidence against the person so made a party, dismiss him or her from the suit: Matrimonial Causes Act 1973 s 49(3).

For cases where the court has considered that there are special grounds that the co-respondent, though known, should not be named see eg *Tomkin v Tomkin* (1858) 1 Sw & Tr 182; *Hook v Hook* (1858) 1 Sw & Tr 183; *Peters v Peters and Willett* (1861) 3 Sw & Tr 264; *Jinkings v Jinkings* (1867) LR 1 P & D 330; *Gill v Gill* (1889) 60 LT 712; *Bagot v Bagot* (1890) 62 LT 612; *Edwards v Edwards and Wilson* [1897] P 316; *Saunders v Saunders* [1897] P 89, CA; *Boger v Boger* [1908] P 300; *Jeffreys v Jeffreys* (1912) 28 TLR 504. For cases where the court considered there was no special grounds see eg *Quicke v Quicke* (1861) 2 Sw & Tr 419; *Payne v Payne*, *Rodway and Eddels* (1888) 60 LT 238; *Cornish v Cornish* (1890) 15 PD 131; *Jones v Jones* [1896] P 165 (see the comment on this case in *Saunders v Saunders* at 95); *Sage v Sage*.

2 Matrimonial Causes Act 1973 s 49(2). See PARA 761.

3 In proceedings under the Civil Partnership Act 2004 ss 37-56: see PARA 346 et seq.

4 Matrimonial Causes Act 1973 s 49(4); Civil Partnership Act 2004 s 64(1)(a), (b). See PARA 761. Rules of court so made may make different provision for different cases: Matrimonial Causes Act 1973 s 49(4); Civil Partnership Act 2004 s 64(2).

5 Matrimonial Causes Act 1973 s 49(5); Civil Partnership Act 2004 s 64(3). Cf *Kunstler v Kunstler* [1969] 3 All ER 673, [1969] 1 WLR 1506 (first wife concerned in proceedings relating to alleged later marriage with another woman).

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761. Naming of co-respondents.

Where a petition alleges that the respondent has committed adultery, the person with whom the adultery is alleged to have been committed must be made a co-respondent in the cause unless that person is not named in the petition or the court otherwise directs¹. An application for directions in such a case may be made without notice if no notice of intention to defend² has been given³. Where a petition alleges that the respondent has been guilty of rape on a person named⁴, that person must not⁵ be made a co-respondent in the cause, unless the court so directs⁶.

Where a petition alleges that the respondent has been guilty of an improper association, other than adultery, with a person named, the court may direct that the person named be made a co-respondent in the cause and, for that purpose, the district judge⁷ may require the proper officer⁸ to give notice to the petitioner and to any other party who has given notice of intention to defend of a date, time and place at which the court will consider giving such a direction⁹.

If, after leave to proceed has been given, the identity of an unknown adulterer is discovered, the matter must be brought to the notice of the court¹⁰.

1 Family Proceedings Rules 1991, SI 1991/1247, r 2.7(1). The provisions of r 2.7(1), (3) do not apply where the person named has died before the filing of the petition: r 2.7(5). Where the co-respondent dies after the petition is served and before trial, the court must be asked to strike his name out of the suit: *Walpole v Walpole and Chamberlain* [1901] P 86; and see *Slaytor v Slaytor and Jackson* [1897] P 85 (his name should not appear in title and citation, but only in the body of the petition, which should state that he is dead); *Tollemache v Tollemache* (1858) 28 LJP & M 2; *Delahunty v Delahunty* [1961] 1 All ER 923, [1961] 1 WLR 515.

2 As to the meaning of 'notice of intention to defend' see PARA 779.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.7(4).

4 For these purposes, 'person named' includes a person described as 'passing under the name of AB': Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

5 Ie notwithstanding the Family Proceedings Rules 1991, SI 1991/1247, r 2.7(1): see the text and note 1.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.7(2).

7 As to the meaning of 'district judge' see PARA 737 note 1.

8 As to the meaning of 'proper officer' see PARA 461 note 5.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.7(3). Rule 2.7(3) does not apply where the person named has died before the filing of the petition: r 2.7(5).

10 See *Muspratt v Muspratt* (1861) 31 LJP & A 28; *Miles v Miles* (1896) Times, 20 March.

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762. Additional requirements in the case of a petition for a decree of presumption of death and dissolution.

A petition for a decree of presumption of death and dissolution of marriage, or an application for an order for presumption of death and dissolution of civil partnership¹, must state²:

- 1015 (1) the last place at which the parties to the marriage or civil partnership cohabited³;
- 1016 (2) the circumstances in which the parties ceased to cohabit⁴;
- 1017 (3) the date when and the place where the respondent was last seen or heard of⁵; and
- 1018 (4) the steps which have been taken to trace the respondent⁶.

1 As to presumption of death see PARA 415 et seq.

2 ie in addition to the information required by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1: see PARA 756. As to the procedure where it is desired to omit from a petition any information required to be so contained therein see PARA 756 note 1.

3 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 3(i).

4 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 3(ii).

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 3(iii).

6 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 3(iv).

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763. Petitioner relying on evidence of conviction.

A petitioner who intends¹ to adduce evidence that a person:

1019 (1) was convicted of an offence by or before a court in the United Kingdom or by a court-martial there or elsewhere²; or

1020 (2) was found guilty of adultery in matrimonial proceedings or to be the father of a child in relevant proceedings before any court in England and Wales, or was adjudged to be the father of a child in affiliation proceedings before a court in the United Kingdom³,

must include in his petition a statement of his intention with particulars of:

1021 (a) the conviction, finding or adjudication and the date thereof⁴;

1022 (b) the court or court-martial which made the conviction, finding or adjudication and, in the case of a finding or adjudication, the proceedings in which it was made⁵; and

1023 (c) the issue in the proceedings to which the conviction, finding or adjudication is relevant⁶.

1 le in reliance on the Civil Evidence Act 1968 s 11 or s 12: see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1208, 1211. If a finding that a person has committed adultery is relied on to prove adultery in later matrimonial proceedings in the High Court or a divorce county court, a transcript of the judgment, or an appropriate extract, recording the finding will be required by the court at the hearing. Any party to the original proceedings may order the transcript from the official shorthand writer; and any other person requiring such a transcript may make application to a district judge for permission for the official shorthand writer to supply a copy: *Practice Direction* [1969] 2 All ER 873, [1969] 1 WLR 1192.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.4(1)(a).

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.4(1)(b). As to the meanings of 'matrimonial proceedings', 'relevant proceedings' and 'affiliation proceedings' for these purposes see the Civil Evidence Act 1968 s 12(5); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1211 (definition applied by the Family Proceedings Rules 1991, SI 1991/1247, r 2.4(2)). In relation to England and Wales, affiliation proceedings were abolished by the Family Law Reform Act 1987 s 17.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.4(1)(i).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.4(1)(ii).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.4(1)(iii).

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764. Contents of prayer.

Every petition must conclude with a prayer setting out particulars of the relief claimed, including any claim for costs and any application for financial relief which it is intended to claim¹. Where the prayer asks for relief in the alternative, as where the marriage or civil partnership is sought to be annulled on the ground of wilful refusal to consummate it, or, alternatively, dissolved on some fact such as desertion, the issue as to nullity will be tried first, and the prayer for annulment should precede the prayer for divorce².

¹ Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 4(a) (amended by SI 1992/2067).

² See *S (otherwise P) v S* [1970] P 208, [1970] 2 All ER 251; *M (otherwise D) v D* (1885) 10 PD 175; *S (otherwise G) v S* [1907] P 224; *Pickett v Pickett (otherwise Moss)* [1951] P 267, [1951] 1 All ER 614; cf *Robertson v Robertson* [1954] 3 All ER 413n, [1954] 1 WLR 1537.

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765. Indorsement after prayer.

Every petition must conclude with:

- 1024 (1) the names and addresses of the persons who are to be served with the petition, indicating if any of them is a child or protected party¹; and
- 1025 (2) the petitioner's address for service².

1 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 4(b). For these purposes 'child' means a person under 18; and 'protected party' means a party, or an intended party, who lacks capacity, within the meaning of the Mental Capacity Act 2005 (see **MENTAL HEALTH**) to conduct the proceedings: Family Proceedings Rules 1991, SI 1991/1247, r 9.1 (amended by SI 2007/2187).

2 Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 4(c). Where the petitioner sues by a solicitor, his address for service must be the solicitor's name or firm and address, and where the petitioner, although suing in person, is receiving legal advice from a solicitor, the solicitor's name or firm and address may be given as the address for service if he agrees: Appendix 2 para 4(c) (where a solicitor has agreed to his name and address being used as the address for service but subsequently wishes to withdraw his agreement, he must notify the court to this effect, give the petitioner's last known address and certify that he has notified the petitioner of the withdrawal of his agreement: *Practice Direction* [1979] 2 All ER 45, [1979] 1 WLR 533). In any other case, the petitioner's address for service must be the address of any place in England and Wales to which documents for the petitioner may be delivered or sent: Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 4(c).

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766. Signature.

Every petition must signed by counsel if settled by him or, if not, by the petitioner's solicitor in his own name or the name of his firm or by the petitioner if he sues in person¹.

¹ Family Proceedings Rules 1991, SI 1991/1247, r 2.5. In practice it is enough if the draft is signed by counsel or the solicitor and the signature reproduced on the petition. There is no reported case on the effect of failure to sign or failure to reproduce the name on the petition. It would appear that either of these failures would make the document ineffective, though it is most doubtful if the proceedings based on it would thereby be invalidated. It is suggested that the proper course would be to add the signature of counsel or solicitor or the litigant in person at any stage of the proceedings. As to signature of counsel to pleadings generally see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1131.

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767. Documents to accompany petitions.

Unless otherwise directed on an application made without notice, a certificate of the marriage or civil partnership to which the cause relates must be filed with the petition¹. Where a petition for divorce, nullity of marriage or judicial separation, or for dissolution, nullity of civil partnership or separation, discloses that there is a minor child of the family² who is under 16 or who is over that age and is receiving instruction at an educational establishment or undergoing training for a trade or profession, the petition must be accompanied by a statement, signed by the petitioner personally and, if practicable, agreed with the respondent, containing the prescribed information³, to which must be attached a copy of any medical report mentioned therein⁴. Where a solicitor is acting for a petitioner for divorce, dissolution or separation, a certificate with regard to reconciliation in the prescribed form⁵ must be filed with the petition, unless otherwise directed on an application made without notice⁶.

Where a petitioner files a petition for nullity of marriage or civil partnership on the ground that an interim gender recognition certificate⁷ has, after the time of the marriage or the formation of the civil partnership, been issued to either party to the marriage or civil partnership⁸ he must file with his petition a copy of the interim certificate unless otherwise directed on an application made without notice⁹. Where a petition for nullity of marriage or civil partnership is brought on the grounds that the respondent is a person whose gender had become the acquired gender¹⁰ at the time of the marriage or civil partnership¹¹ and a full gender recognition certificate has been issued to the respondent, the petitioner must file a copy of that certificate with his petition, unless otherwise directed on an application made without notice¹².

1 Family Proceedings Rules 1991, SI 1991/1247, r 2.6(2) (amended by SI 2005/2922).

2 As to the meaning of 'child of the family' see PARA 707 note 9.

3 For the prescribed information see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M4 (amended by SI 1993/295; SI 2005/2922).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.2(2) (amended by SI 1992/2067; SI 2005/2922). A respondent on whom there is served such a statement may, whether or not he agreed that statement, file in the court office a written statement of his views on the present and proposed arrangements for the children, and on receipt of such a statement from the respondent the proper officer must send a copy to the petitioner: Family Proceedings Rules 1991, SI 1991/1247, r 2.38(1). Any such statement of the respondent's views must, if practicable, be filed within the time limited for giving notice of intention to defend and in any event before the district judge considers the arrangements or proposed arrangements for the upbringing and welfare of the children of the family under the Matrimonial Causes Act 1973 s 41(1) or the Civil Partnership Act 2004 s 63(1) (see PARA 884): Family Proceedings Rules 1991, SI 1991/1247, r 2.38(2) (amended by SI 2005/2922). As to the meaning of 'proper officer' see PARA 461 note 5; as to the meaning of 'district judge' see PARA 737 note 3; and as to the meaning of 'notice of intention to defend' see PARA 779.

5 For the prescribed form of certificate see the Family Proceedings Rules 1991, SI 1991/1247, r 2.6(3), Appendix 1, Form M3.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.6(3) (amended by SI 2005/2922).

7 Ie under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

8 le a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(g) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(d): see PARA 334. See also, in connection with marriages celebrated before 1971, PARA 344.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.6A(1), (2) (rr 2.6A, 2.6B added by SI 2005/559; Family Proceedings Rules 1991, SI 1991/1247, rr 2.6A(1), 2.6B amended, r 2.6A(5), (6) substituted, by SI 2005/2922). The proper officer must give notice in writing to the Secretary of State of a petition to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.6A applies when it is presented under r 2.6: r 2.6A(3) (as so added). Such a notice must state the names of the parties to the petition, its case number and the court in which it is pending: r 2.6A(4) (as so added). Where a copy of an interim certificate has been filed the notice given must be accompanied by a copy of the certificate: r 2.6A(5) (as so added and substituted). Where a copy of the certificate has not been filed the notice given must also state the names of the parties to the marriage or civil partnership and the date and place of the marriage or the formation of the civil partnership (r 2.6A(6)(a)(i), (b) (i) (as so added and substituted)), the last address at which the parties to the marriage or civil partnership lived together as husband and wife or as civil partners of each other (r 2.6A(6)(a)(ii), (b)(ii) (as so added and substituted)), and such further particulars as the proper officer considers appropriate (r 2.6A(6)(c) (as so added and substituted)).

10 le under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

11 le a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(h) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(e): see PARA 334.

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.6B (as added and amended: see note 9).

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768. Filing of petitions.

The petition must be presented by filing it, together with any statement and report required¹, in the court office, with as many copies of the petition as there are persons to be served and a copy of the statement and report required for service on the respondent². On the filing of the petition, the proper officer³ must annex to every copy of the petition for service a notice in the prescribed form⁴ with an acknowledgment of service in the prescribed form⁵ attached⁶. The proper officer must also annex to the copy petition for service on a respondent the copy of any statement, report and affidavit filed⁷ by the petitioner⁸.

1 le required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.2(2): see PARA 767.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.6(5). Where a solicitor begins to act for a petitioner after the presentation of a petition, he must file either a notice of acting, where he is acting for limited purposes, or a notice of change, where he is instructed generally. Failure to file the appropriate notice will result in the solicitor's name not being on the record: *Practice Direction* [1977] 1 All ER 844, [1977] 1 WLR 319.

3 As to the meaning of 'proper officer' see PARA 461 note 5.

4 For the prescribed forms of notice see the Family Proceedings Rules 1991, SI 1991/1247, r 2.6(6), Appendix 1, Forms M5, M5A (Form M5 amended by SI 1992/456; SI 1992/2067; SI 1993/295; SI 1994/3155; SI 1996/816; SI 1998/1901; SI 2001/821; SI 2003/2839; SI 2005/264; SI 2005/559; Form M5A added by SI 2005/2922).

5 For the prescribed form of acknowledgment of service see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Forms M6, M6A (Form M6 amended by SI 1993/295; SI 2001/821; SI 2005/264; Form M6A added by SI 2005/2922).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.6(6) (substituted by SI 2005/2922).

7 le pursuant to the Family Proceedings Rules 1991, SI 1991/1247, r 2.6(5): see the text and notes 1-2.

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.6(6) (as substituted: see note 6).

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B. SUPPLEMENTAL PETITIONS AND AMENDMENT OF PETITIONS

769. When to amend or file supplemental petition.

Generally amendments of charges should refer to acts, occurring before the petition is filed, of which evidence has been obtained since that date¹, especially where the amendment raises a charge of behaviour, but there is no special practice of the Family Division prohibiting the addition of an amendment containing an allegation that could have been made when the petition was filed².

When a petitioner wishes to add allegations of events which have occurred since the date of the petition³, a supplemental petition⁴ must be filed. It does not follow that, because an original petition is still on the file, a supplemental petition may be filed regardless of lapse of time or other circumstances⁵. A supplemental petition is not a separate proceeding but part of, and an amendment to, the original petition; where the original petition is dismissed, the supplemental petition is dismissed with it⁶. Further, where desertion is alleged, the two-year period must precede the original petition; it is not permissible to allege two years' desertion immediately preceding the filing of a supplemental petition⁷.

At any time up to the hearing of a case the omission of a prayer for financial relief from a petition (or answer) may be remedied by an application for leave to amend the pleading⁸ re-service of which will usually be ordered⁹.

1 *Bannister v Bannister and Davis* (1860) 29 LJPM & A 53; but see *Gillett v Gillett* [1952] 1 All ER 1399, CA (leave to amend by adding allegation of condoned adultery; important matter for court as it might relate not only to the direct issues but also to maintenance and custody); *Hodgkins v Hodgkins* [1965] 3 All ER 164, [1965] 1 WLR 1448, CA (amendment where issue whether child was a child of the family had not been tried).

2 *Nelson v Nelson and Slinger* [1958] 2 All ER 744, [1958] 1 WLR 894, CA, distinguishing *Jayne v Jayne and Prothero* (1869) 21 LT 401 (by co-respondent); *Austin v Austin* (1871) 41 LJP & M 8 (by respondent); but cf *Gillett v Gillett* [1952] 1 All ER 1399, CA (cited in note 1). See also *Topper v Topper* (1869) 38 LJP & M 36. A husband's becoming bankrupt, and his failure to pay his wife's assessed costs, did not prevent his amending his answer by alleging her adultery: *Greator v Greator* (1864) 34 LJPM & A 9.

3 *Borham v Borham and Brown* (1870) LR 2 P & D 193 (fresh acts of adultery); cf *Webb v Webb* (1828) 1 Hag Ecc 349.

4 As to supplemental petitions see PARA 770.

5 *Scharrer v Scharrer* (1909) Times, 7 July, CA; *Lapington v Lapington* (1888) 14 PD 21.

6 *Sandler v Sandler* [1934] P 149, CA (answer); and see *Chapman v Chapman and Thomas* [1938] P 93, [1938] 1 All ER 635.

7 *Spawforth v Spawforth* [1946] P 131, [1946] 1 All ER 379 (where it was not possible to amend the original petition because three years' desertion had not taken place at the date at which the petition was filed); not following *Howard-Williams v Howard-Williams* [1944] P 85.

8 As to claims for financial relief in petitions see the Family Proceedings Rules 1991, SI 1991/1247, r 2.3, Appendix 2 para 4(a); and PARA 764; and as to amendments to petitions and other pleadings see rr 2.11, 2.18; and PARAS 770, 774 respectively.

9 *Practice Note (No 3)* [1957] 1 All ER 860, sub nom *Practice Direction (ancillary relief)* [1957] 1 WLR 555.
See also *Wilson v Wilson* [1976] Fam 142, [1975] 3 All ER 464, CA.

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770. Supplemental petition and amendment of petition.

A supplemental petition may be filed¹ without leave at any time before an answer is filed² but thereafter only with leave; and a petition may be amended without leave at any time before an answer is filed but thereafter only with leave³.

An application for leave:

- 1026 (1) may, if every opposite party consents in writing to the supplemental petition being filed or the petition being amended, be made by lodging in the court office the supplemental petition or a copy of the petition as proposed to be amended⁴; and
- 1027 (2) must, in any other case, be made on notice, or in the High Court by summons⁵, to be served, unless otherwise directed, on every opposite party⁶,

but the district judge⁷ may, if he thinks fit, require an application for leave to be supported by an affidavit⁸.

An order granting leave must:

- 1028 (a) where any party has given notice of intention to defend⁹, fix the time within which his answer must be filed or amended¹⁰;
- 1029 (b) where the order is made after directions for trial have been given¹¹, provide for a stay of the hearing until after the directions have been renewed¹².

An amendment authorised to be made under the above provisions must be made by filing a copy of the amended petition¹³.

Unless otherwise directed, a copy of a supplemental or amended petition, together with a copy of the order, if any, made under the above provisions must be served on every respondent and co-respondent named in the original petition or in the supplemental or amended petition¹⁴. The petitioner must file the documents required to be so served on any person¹⁵.

Although it has been held that charges in matrimonial proceedings could not be struck out merely because the party making them desired their withdrawal¹⁶, this would no longer appear to be the case.

1 le subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.14: see PARA 775.

2 As to the filing of the answer to a petition see PARA 779.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(1). Rule 2.5 (see PARA 766) and r 2.7 (see PARA 761) apply to a supplemental or amended petition as they apply to the original petition: r 2.11(6). The fee payable on amending or presenting a second or subsequent petition with leave granted under r 2.6(4) is £80: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 1.4.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(2)(a).

5 As to the procedure on summonses see PARA 1006.

- 6 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(2)(b).
- 7 As to the meaning of 'district judge' see PARA 737 note 3.
- 8 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(3).
- 9 As to the meaning of 'notice of intention to defend' see PARA 779.
- 10 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(4)(a).
- 11 As to directions for trial see PARA 814.
- 12 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(4)(b).
- 13 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(5).
- 14 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(7).
- 15 Family Proceedings Rules 1991, SI 1991/1247, r 2.11(8). Thereupon, unless otherwise directed, r 2.6(6) (see PARA 768) and r 2.9 (see PARAS 776, 777) apply in relation to that person as they apply in relation to a person required to be served with an original petition: r 2.11(8).
- 16 See *Cheetham v Cheetham* [1954] 2 All ER 535n, [1954] 1 WLR 990, CA (where it was said that public interest was involved, and there might be collusion, collusion no longer being a bar to divorce, judicial separation or nullity).

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771. Changing relief prayed for.

A petition for judicial separation or a separation order¹ may be amended to one for dissolution of marriage or civil partnership², and vice versa³, even after decree nisi or conditional order and before decree absolute or final order⁴, but not to defeat the Queen's Proctor⁵. A petition for judicial separation or a separation order filed within one year of the marriage or the formation of the civil partnership cannot be amended to a petition for divorce or dissolution on the expiry of that year⁶; but a second petition for divorce or dissolution alleging the same fact or facts as in the petition for judicial separation or a separation order may be presented as of right⁷.

1 Although the provisions described in this paragraph derive from common law decisions pre-dating the concept of civil partnerships and concerned with proceedings for divorce and judicial separation of married persons only, it is submitted that they must now apply equally to proceedings for the dissolution of civil partnerships and for separation orders.

2 *Cartledge v Cartledge* (1862) 4 Sw & Tr 249. *Lewis v Lewis* (1860) 29 LJP & A 123 (petition for judicial separation first dismissed) no longer holds good. In *Parkinson v Parkinson* (1869) LR 2 P & D 27, a wife, having failed to prove desertion, was offered a judicial separation, but, having learnt meanwhile of the legal effect of communication of syphilis, she was allowed to plead cruelty and re-serve petition. In *Corpataux v Corpataux and Staub* (1875) 23 WR 456, the amendment was made after the verdict.

3 *Duplany v Duplany* [1892] P 53; *Parsons v Parsons* [1907] P 331 (at any time before decree absolute); and see *Smith v Smith* (1859) 1 Sw & Tr 359; *Boreham v Boreham* (1866) LR 1 P & D 77. In *Dent v Dent* (1865) 4 Sw & Tr 105, and *Bromfield v Bromfield* (1871) 41 LJP & M 17, an amended prayer for judicial separation was allowed, although opposed by the husband; whilst in *Lempriere v Lempriere and Roebel* (1868) LR 1 P & D 569, the husband was refused either a decree nisi or a judicial separation. In *Mycock v Mycock* (1870) LR 2 P & D 98, a wife, who had proved cruelty and adultery, was not allowed to amend her prayer to one for judicial separation until the husband had time to investigate a charge of adultery against her. See also *Emery v Emery* (1963) Times, 10 October; *Wright v Wright* (1964) Times, 19 June; *Aldridge v Aldridge and Ashton* (1964) 108 Sol Jo 898.

4 *Parsons v Parsons* [1907] P 331; *Griffiths v Griffiths* (1912) 106 LT 646; *Rutherford v Richardson* [1923] AC 1, HL; *Daglish v Daglish* [1936] P 49; cf *Jeffrey v Jeffrey* [1951] P 32, [1950] 2 All ER 449 (conversion from dissolution to judicial separation not allowed, as petitioner's motive was to secure financial advantage). In *Davies v Davies* [1956] P 212, [1955] 3 All ER 588, the wife applied for the decree nisi she had obtained to be changed to a decree of judicial separation. Her application was prompted by her desire to retain her right to remain with her children in the former matrimonial home. The court having a complete discretion in the matter and there being no grounds for refusal, the application was granted. Such an application was also granted in *Davis v Davis* (1966) Times, 17 March, a similar case except that the husband being anxious to marry the woman named applied for decree nisi to be made absolute. Where such an application is opposed by the other spouse or civil partner, it ought to be deferred until the spouse or civil partner's right to apply for a decree absolute or final order accrues so that both applications can be heard together: *Dove v Dove* [1963] P 321, [1963] 2 All ER 10, CA.

5 *Drummond v Drummond (Queen's Proctor intervening)* (1861) 2 Sw & Tr 269. As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545; and as to interventions by the Queen's Proctor see PARA 852 et seq.

6 Direction dated 24 July 1942, following an unreported decision of Hodson J.

7 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.6(4) proviso; and PARA 755.

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772. Amendment to add co-respondent.

The addition of a co-respondent will not be allowed as of course¹.

¹ *Codrington v Codrington and Anderson* (1864) 3 Sw & Tr 368 (application by petitioner to add second co-respondent refused; held not to be bona fide).

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773. Adding counter-charges.

A co-respondent has been allowed to add counter-charges against the petitioner during the hearing to enable him to cross-examine the petitioner as to their truth¹.

¹ *Plumer v Plumer and Bygrave* (1859) 4 Sw & Tr 257.

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774. Supplemental answer and amendment of other documents.

The rules relating to supplemental petitions and the amendment of petitions¹ apply, with the necessary modifications, to the filing of a supplemental answer, and the amendment of a pleading or other document not being a petition, as they apply to the filing of a supplemental petition and the amendment of a petition².

¹ See the Family Proceedings Rules 1991, SI 1991/1247, r 2.11: see PARA 770.

² Family Proceedings Rules 1991, SI 1991/1247, r 2.18. See also *Tulley v Tulley* [1967] P 285, [1967] 1 All ER 639.

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775. Filing and amendment of pleadings after directions for trial.

No pleading may be filed or amended without leave after directions for trial¹ have been given².

1 As to directions for trial see PARA 814.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.14.

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C. SERVICE OF PETITIONS

776. Service of petition.

A copy of every petition must¹ be served personally or by post on every respondent or co-respondent². Where the party to be served is a child or protected party³, service may be effected through the petitioner, and in any other case, through the court or, if the petitioner so requests, through the petitioner⁴; but personal service must in no case be effected by the petitioner himself⁵. A copy of any petition which is to be served through the court must be served by post by an officer of the court or, if on a request by the petitioner the district judge⁶ so directs, by a bailiff delivering a copy of the petition to the party personally⁷.

For these purposes a copy of a petition is deemed to be duly served if:

- 1030 (1) an acknowledgment of service in the prescribed form⁸ is signed by the party to be served or by a solicitor on his behalf and is returned to the court office⁹; and
- 1031 (2) where the form purports to be signed by the respondent, if his signature is proved at the hearing or, where the cause is undefended, in the affidavit filed¹⁰ by the petitioner¹¹.

Where a copy of a petition has been sent to a party and no acknowledgment of service has been returned to the court office, the district judge, if satisfied by affidavit or otherwise that the party has nevertheless received the document, may direct that the document is to be deemed to have been duly served on him¹², except in cases where the petition alleges two years' separation coupled with the respondent's consent to a decree or civil partnership order being granted and no other relevant fact¹³ is alleged, unless the petitioner produces to the court a written statement containing the respondent's consent to the grant of a decree or order¹⁴.

Where a copy of a petition has been served on a party personally and no acknowledgment of service has been returned to the court office, service is to be proved by filing an affidavit of service or, in the case of service by bailiff¹⁵, an indorsement of service¹⁶ showing, in the case of a respondent, the server's means of knowledge of the identity of the party served¹⁷.

Where an acknowledgment of service is returned to the court office, the proper officer¹⁸ must send a photographic copy of it to the petitioner¹⁹.

1 le subject to the provisions of the Family Proceedings Rules 1991, SI 1991/1247, r 2.9 (see the text and notes 2-19; and PARA 777), r 9.3 (service on children or protected party: see PARA 1019) and r 10.6 (service out of England and Wales: see PARA 1022). As to service by post see PARA 1017.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(1). A petition for divorce or dissolution should be served as soon as possible after it is filed; it is not appropriate for a petition to be filed and then held in secret and not served until it suits the petitioner: *R v R (divorce: stay of proceedings)* [1995] 1 FCR 745, [1994] 2 FLR 1036. Where, however, a valid divorce or dissolution petition has been filed but not served on the respondent, and no order has been made dispensing with service or making alternative provision for service on the respondent, a decree absolute or final order granted to the petitioner is void rather than merely voidable: *Ebrahim v Ali (otherwise Ebrahim) (Queen's Proctor intervening)* [1983] 3 All ER 615, sub nom *Ali Ebrahim v Ali Ebrahim (Queen's Proctor intervening)* [1983] 1 WLR 1336, CA (cited in PARA 853 note 1).

3 As to the meanings of 'child' and 'protected party' see PARA 765 note 1.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(2) (amended by SI 2007/2187). When serving a divorce petition, the server should not interrogate to obtain a confession of adultery: *Hallam v Hallam* (1903) 20 TLR 34. This does not, however, exclude evidence being given by the process server as to any relevant matters he may hear or see, or an inquiry as to the name and identity of a woman cited as a woman unknown.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(3). See *Milne v Milne* (1865) 4 Sw & Tr 183 (acceptance of service on another's behalf; not good service); *De Niceville v De Niceville* (1868) 37 LJP & M 43 (bad service not cured by appearance and pleading). Service personally on a person in prison requires the leave of the Home Office (*Bland v Bland* (1875) LR 3 P & D 233), but otherwise service may be effected by post.

6 As to the meaning of 'district judge' see PARA 737 note 3.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(4). As to proof of service see PARA 1021; and as to the fee payable on a request for service by a bailiff see the Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 10.1.

8 As to the prescribed form of acknowledgment of service see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Forms M6, M6A (Form M6 amended by SI 1993/295; SI 2001/821; SI 2005/264; Form M6A added by SI 2005/2922).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(5)(a). Where a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(g) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(d) (petition or application for nullity of marriage or civil partnership on the ground that an interim gender recognition certificate under the Gender Recognition Act 2004 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) has, after the time of the marriage or the formation of the civil partnership, been issued to either party to the marriage or civil partnership: see PARA 334) or a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(h) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(e) (petition or application for nullity of marriage or civil partnership on the ground that the respondent is a person whose gender had become the acquired gender under the Gender Recognition Act 2004 at the time of the marriage or civil partnership: see PARA 334) is brought and an interim or full gender recognition certificate has been issued to the respondent, and the respondent returns an acknowledgment of service in the prescribed Form (see note 8) to the court office, he must file with it a copy of that interim certificate or that full certificate, as the case might be, unless otherwise directed on an application made without notice: Family Proceedings Rules 1991, SI 1991/1247, r 2.9A (added by SI 2005/559; amended by SI 2005/2922).

10 *Ie* under the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3): see PARA 814.

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(5)(b); and cf *Gilbert v Gilbert and Brooks* [1948] P 314, [1948] 2 All ER 64, CA.

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(6); and see *Heath v Heath* [1950] P 193, [1950] 1 All ER 877, CA (leave given to proceed without further service as the petition sent by registered post, but not acknowledged, had probably been received by the respondent).

13 For these purposes 'relevant fact' is one of the facts mentioned in the Matrimonial Causes Act 1973 s 1(2) or, as the case may be, the Civil Partnership Act 2004 s 44(5) (see PARA 347 et seq): Family Proceedings Rules 1991, SI 1991/1247, r 2.9(6B) (added by SI 2005/2922).

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(6A) (added by SI 1997/1893; amended by SI 2005/2922).

15 CCR Ord 7 r 8 applies in relation to service by bailiff under the Family Proceedings Rules 1991, SI 1991/1247, r 2.9 as it applies to service of a summons by bailiff in accordance with CCR Ord 7 r 10: Family Proceedings Rules 1991, SI 1991/1247, r 2.9(10). As to the continued application of specified provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

16 *Ie* under CCR Ord 7 r 6.

17 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(7); and see *Practice Direction* [1972] 2 All ER 623, sub nom *Practice Direction (Petition: Personal Service)* [1972] 1 WLR 775. See also *Alton v Alton* (1920) 64 Sol Jo 308 (respondent's signature as proof of service); *Smith v Smith and Armstrong* (1919) 64 Sol Jo 226; *Spendley v Spendley and Goard*, *Hobbs v Hobbs* [1920] P 40; *Carter v Carter* (1919) 36 TLR 121 (no evidence of identity of respondent; court allowed evidence of identity to be given). Identification by use of photographs is permissible if they are recent and clear: *Dawson v Dawson and Reilly* (1907) 23 TLR 716; *Hills v Hills and Easton* (1915) 31 TLR 541. The affidavit should identify the person in it who was served.

18 As to the meaning of 'proper officer' see PARA 461 note 5.

19 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(8).

UPDATE

776 Service of petition

NOTE 7--SI 2008/1054 Sch 1, Fee 10.1 amended: SI 2009/1499.

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777. Substituted service.

In cases where service in the prescribed mode¹ cannot be effected², leave may be sought to substitute some other mode of service, or to substitute notice of the proceedings by advertisement or otherwise³, even where the necessity for substituted service is caused by the delay of the petitioner⁴. An application for such leave must be made without notice by lodging an affidavit setting out the grounds on which the application is made; and the form of any advertisement must be settled by the district judge⁵. No order giving leave to substitute notice of the proceedings by advertisement may, however, be made unless it appears to the district judge that there is reasonable probability that the advertisement will come to the knowledge of the person concerned⁶.

1 See PARA 776.

2 *Rowbotham v Rowbotham* (1858) 1 Sw & Tr 73 (practical impossibility of personal service); *Lacey v Lacey* (1858) 28 LJP & M 24 (proof of inquiries at last residence).

3 *Chandler v Chandler* (1858) 27 LJP & M 35; *Chandler v Chandler* (1858) 28 LJP & M 6 (service ordered on respondent's brother); *Peckover v Peckover and Jolly* (1858) 1 Sw & Tr 219 (advertisements); *Nuttall v Nuttall* (1862) 31 LJPM & A 164 (leaving at last address and solicitor's office); *Appleyard v Appleyard and Smith* (1875) LR 3 P & D 257 (on stepmother, and by advertisement); and see *Trubner v Trubner and Cristiani* (1889) 15 PD 24; *Stumpel v Stumpel and Zepfel* (1900) 70 LJP 6; *Wray v Wray and D'Almeida* [1901] P 132 (by registered letter abroad); *Turner v Turner* [1916] P 324 (registered letter to respondent serving in one of Her Majesty's ships); cf *Cox v Cox* (1889) 61 LT 698 (where the court had to be satisfied that the document had been received in Mexico). As to advertising see *Elsley v Elsley, Beacham and Bagshaw* (1863) 32 LJPM & A 145. Arrangements have been made whereby the court may request the disclosure of addresses from government departments to enable a person (inter alia) to trace a person in proceedings against whom another person is seeking to obtain or enforce an order for financial provision either for himself or herself or for the children of a former marriage: see *Practice Direction* [1989] 1 All ER 765, sub nom *Practice Direction (disclosure of addresses: 1989)* [1989] 1 WLR 219.

4 *Jenson v Jenson* (1898) 78 LT 764.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(9); and see *Practice Direction* [1975] 3 All ER 432, [1975] 1 WLR 1325 paras 2, 3. As to the meaning of 'district judge' see PARA 737 note 3. Full disclosure of the circumstances must be made on such an application: *Wiseman v Wiseman* [1953] P 79, [1953] 1 All ER 601, CA (decree absolute set aside); *Clifford v Clifford* [1985] FLR 732, CA (insufficient disclosure to obtain order for substituted service; resultant decree nisi set aside).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(9) proviso.

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778. Dispensing with service.

Where, in the opinion of the district judge¹, it is impracticable to serve a party² or it is otherwise necessary or expedient to dispense with service of a copy of a petition on the respondent or any other person, the district judge may make an order dispensing with such service³. An application for such an order must be made in the first instance without notice by lodging an affidavit setting out the grounds of the application; but the district judge may, if he thinks fit, require the attendance of the petitioner on the application⁴.

1 As to district judges generally see **COURTS** vol 10 (Reissue) PARA 661; as to the meaning of 'district judge' for the purposes of the Family Proceedings Rules see PARA 737 note 3.

2 Ie in accordance with any of the provisions of the Family Proceedings Rules 1991, SI 1991/1247, r 2.9: see PARAS 776-777.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(11). See *Weighman v Weighman* [1947] 2 All ER 852, CA; *Paolantonio v Paolantonio* [1950] 2 All ER 404, CA; *Spalenkova v Spalenkova* [1954] P 141, [1953] 2 All ER 880; *N v N* [1957] P 385, [1957] 1 All ER 536; *Whitehead v Whitehead (otherwise Vasbor)* [1963] P 117 at 138, 139, [1962] 3 All ER 800 at 811, 812, CA.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.9(11). The necessity for personal attendance may usually be avoided by making inquiries of all likely sources of information as to the missing party's whereabouts, stating in detail in the affidavit or affidavits what has been done and with what result, and demonstrating the absence of any other practicable line of inquiry: *Practice Direction* [1975] 3 All ER 432, [1975] 1 WLR 1325 para 5.

Solicitors applying for, and district judges making, an order dispensing with service of a petition have a duty to take great care to ensure that all practical steps to contact the respondent have been taken: *Purse v Purse* [1981] Fam 143, [1981] 2 All ER 465, CA per curiam. The affidavit lodged should set out in detail the facts relied on to support the claim that every reasonable line of inquiry has already been tried but without success. It is insufficient to lodge an affidavit simply stating in general terms that all inquiries have been made or that the petitioner knows of no means of getting in touch with the respondent: *Practice Direction* [1975] 3 All ER 432, [1975] 1 WLR 1325 para 4.

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(iii) Answers to Petitions

A. NOTICE OF INTENTION TO DEFEND

779. Filing of answer to petition.

Within 21 days after the expiration of the time limited for giving notice of intention to defend¹, a respondent or co-respondent must² file an answer³ to the petition:

- 1032 (1) if he wishes to defend the petition or to dispute any of the facts alleged in it⁴;
- 1033 (2) if he is the respondent and wishes to make in the proceedings any charge against the petitioner in respect of which he prays for relief⁵; or
- 1034 (3) if he is the respondent to a petition for divorce or dissolution in which the petitioner alleges five years' separation⁶ and wishes to oppose the grant of a decree or order on the ground that it will cause him grave financial or other hardship⁷.

An answer may be filed notwithstanding that the person filing the answer has not given notice of intention to defend⁸.

Where, in a cause in which relief is sought on the ground that the marriage or civil partnership is voidable because of the mental disorder of one of the parties⁹, the respondent files an answer containing no more than a simple denial of the facts stated in the petition, he must, if he intends to rebut the charges in the petition, give the court notice to that effect when filing his answer¹⁰. Where a petitioner files a petition for nullity of marriage or civil partnership on the ground that an interim gender recognition certificate¹¹ has, after the time of the marriage or the formation of the civil partnership, been issued to either party to the marriage or civil partnership¹² he must file with his petition a copy of the interim certificate unless otherwise directed on an application made without notice¹³. Where a petition for nullity of marriage or civil partnership is brought on the grounds that the respondent is a person whose gender had become the acquired gender¹⁴ at the time of the marriage or civil partnership¹⁵ and a full gender recognition certificate has been issued to the respondent, the respondent must file a copy of that full certificate with his answer, unless otherwise directed on an application made without notice¹⁶.

1 'Notice of intention to defend' is a reference to an acknowledgment of service in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M6 or M6A (as the case may be), containing a statement to the effect that the person by whom or on whose behalf it is signed intends to defend the proceedings to which the acknowledgment relates, and any reference to giving notice of intention to defend is a reference to returning such a notice to the court office: rr 1.2, 10.8(1) (r 10.8(1) substituted by SI 2005/2922). In relation to any person on whom there is served a document requiring or authorising an acknowledgment of service to be returned to the court office, references to the time limited for giving notice of intention to defend are references:

191 (1) to seven days after service of the document, in the case of notice of intention to defend a petition under the Family Proceedings Rules 1991, SI 1991/1247, Pt II (see PARA 755 et seq) (r 10.8(2)(a)); and

192 (2) in any other case, to 14 days or such other time as may be fixed (r 10.8(2)(b)).

Subject to this a person may give notice of intention to defend notwithstanding that he has already returned to the court office an acknowledgment of service not constituting such a notice: r 10.8(3).

For these purposes, any reference to a person who has given notice of intention to defend is to be construed as including a reference to a person who has filed an answer without giving notice of intention to defend: Family Proceedings Rules 1991, SI 1991/1247, r 2.12(3).

2 le subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.10 (see PARA 786), r 2.14 (see PARA 775) and r 2.37 (see PARA 1038).

3 For cases where leave was sought to file an answer out of time see *Rose v Rose* (1970) 115 Sol Jo 12, CA; *Huxford v Huxford* [1972] 1 All ER 330, [1972] 1 WLR 210; *Collins v Collins* [1972] 2 All ER 658, [1972] 1 WLR 689, CA; *Spill v Spill* [1972] 3 All ER 9, [1972] 1 WLR 793, CA; *Rogers v Rogers* [1974] 2 All ER 361, [1974] 1 WLR 709, CA. Where it is sought to file an answer only a few days out of time, leave to do so will normally be given unless the answer is an abuse of the process of the court such as being frivolous, irrelevant or otherwise such as to justify its being struck out; the fact that the respondent may eventually be unsuccessful or that he has made admissions which may support the petition is not a good reason for refusing leave at that stage: *Lawlor v Lawlor* [1995] 1 FCR 412, [1995] 1 FLR 269, CA. The fee payable on filing an answer to a petition or cross-petition is £200: Family Proceedings Fees Order 2008, SI 2008/1058, Sch 1, Fee 1.5.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.12(1)(a).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.12(1)(b).

6 le a petition to which the Matrimonial Causes Act 1973 s 5(1) or the Civil Partnership Act 2004 s 47(1) (see PARA 411) applies.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.12(1)(c) (amended by SI 2005/2922).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.12(2).

9 le a cause in which relief is sought under the Matrimonial Causes Act 1973 s 12(d) or the Civil Partnership Act 2004 s 50(1)(b): see PARA 332.

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.12(4) (amended by SI 2005/2922).

11 le under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

12 le a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(g) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(d): see PARA 334. See also, in connection with marriages celebrated before 1971, PARA 344.

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.12A(1), (1A), (2) (rr 2.12A, 2.12B added by SI 2005/559; Family Proceedings Rules 1991, SI 1991/1247, rr 2.12A(1), 2.12B amended, r 2.12A(1A) added, r 2.12A(5), (6) substituted, by SI 2005/2922). The proper officer must give notice in writing to the Secretary of State of a petition to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.12A applies when it is filed: r 2.12A(3) (as so added). Such a notice must state the names of the parties to the petition, its case number and the court in which it is pending: r 2.12A(4) (as so added). Where a copy of an interim certificate has been filed the notice given must be accompanied by a copy of the certificate: r 2.12A(5) (as so added and substituted). Where a copy of the certificate has not been filed the notice given must also state the names of the parties to the marriage or civil partnership and the date and place of the marriage or the formation of the civil partnership (r 2.12A(6)(a)(i), (b)(i) (as so added and substituted)), the last address at which the parties to the marriage or civil partnership lived together as husband and wife or as civil partners of each other (r 2.12A(6)(a)(ii), (b)(ii) (as so added and substituted)), and such further particulars as the proper officer considers appropriate (r 2.12A(6)(c) (as so added and substituted)).

14 le under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

15 le a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(h) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(e): see PARA 334.

16 Family Proceedings Rules 1991, SI 1991/1247, r 2.12B (as added and amended: see note 13).

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780. Content of answer and subsequent pleadings.

Where an answer, reply or subsequent pleading contains more than a simple denial of the facts stated in the petition, answer or reply, as the case may be¹, the pleading must set out with sufficient particularity the facts relied on but not the evidence by which they are to be proved; and, if the pleading is filed by a spouse or civil partner it must, in relation to those facts, contain the information required² in the case of a petition based on five years' separation³.

Unless otherwise directed, an answer by a spouse or civil partner who disputes any statement as to whether there are any living children of the family⁴, whether any other child now living has been born to the wife or a civil partner during the marriage or civil partnership⁵, or that there is a dispute whether a living child is a child of the family⁶, must contain full particulars of the facts relied on⁷.

Where an answer to any petition contains a prayer for relief, it must contain the required information⁸ as to whether there are any proceedings continuing in any country outside England and Wales which relate to the marriage or civil partnership or are capable of affecting its validity or subsistence, in so far as it has not been given by the petitioner⁹.

Where a party's pleading includes a statement of a previous conviction, finding or adjudication, relying on the Civil Evidence Act 1968¹⁰, then, if the opposite party:

- 1035 (1) denies the conviction, finding or adjudication to which the statement relates¹¹;
- 1036 (2) alleges that the conviction, finding or adjudication was erroneous¹²; or
- 1037 (3) denies that the conviction, finding or adjudication is relevant to any issue in the proceedings¹³,

he must make the denial or allegation in his pleading¹⁴.

1 As to bare denials in the case of adultery, conduct or desertion see PARA 782.

2 I.e the information required in the case of a petition by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(k): see PARA 756.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.15(1) (amended by SI 2005/2922). Appendix 2 para 4(a) (see PARA 764) applies, where appropriate, with the necessary modifications, to a respondent's answer as it applies to a petition; but it is not necessary to include in the answer any claim for costs against the petitioner: r 2.15(3). Rule 2.4 (see PARA 763) and r 2.5 (see PARA 766) apply, with the necessary modifications, to a pleading other than a petition as they apply to a petition: r 2.15(6).

4 I.e the statement required by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(f) to be included in the petition: see PARA 756.

5 I.e the statement required by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(g), (ga) to be included in the petition: see PARA 756.

6 I.e the statement required by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(h) to be included in the petition: see PARA 756.

- 7 Family Proceedings Rules 1991, SI 1991/1247, r 2.15(2) (amended by SI 2005/2922).
- 8 le the information required by the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j): see
PARA 756.
- 9 Family Proceedings Rules 1991, SI 1991/1247, r 2.15(4).
- 10 le such a statement as is mentioned in the Family Proceedings Rules 1991, SI 1991/1247, r 2.4: see PARA
763.
- 11 Family Proceedings Rules 1991, SI 1991/1247, r 2.15(5)(a).
- 12 Family Proceedings Rules 1991, SI 1991/1247, r 2.15(5)(b).
- 13 Family Proceedings Rules 1991, SI 1991/1247, r 2.15(5)(c).
- 14 Family Proceedings Rules 1991, SI 1991/1247, r 2.15(5).

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781. Desertion up to time of answer.

If an answer claims relief on the ground of desertion, the statutory period must be pleaded as continuing up to the date of the presentation of the answer¹.

¹ *Faulkner v Faulkner* [1941] 2 All ER 748.

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782. Insufficiency of bare denial when desertion alleged.

It may well be that, where the charge is adultery or conduct, a bare denial is an appropriate answer¹, but in answer to a charge of desertion the respondent should go on to say any one of a number of things, for example that there was no separation, or that there was separation by consent, or that there was just cause², or that there was constructive desertion by the petitioner, or that since the desertion there had been an offer to return made in good faith.

Both the spirit and the letter of the rule requiring particulars of the facts relied on to be set out in the answer³ require that the real defence should be indicated⁴.

1 *Slater v Slater* [1952] 1 All ER 1343n; and see *Haque v Haque* [1977] 3 All ER 667, [1977] 1 WLR 888 (where a spouse petitions for divorce relying on the respondent's behaviour, the respondent may either plead a simple denial of the allegations or plead which of the facts alleged against him are admitted and which are denied, according to whichever plea is appropriate in his case), not following *Andrews v Andrews* [1974] 3 All ER 643 (where it was held that a bare denial of alleged conduct was insufficient and that the respondent had in his answer to indicate with reasonable particularity which of the facts alleged against him he admitted, which he denied and which he admitted subject to some excuse or explanation). As to particulars see PARA 787 et seq.

2 As to just cause see PARA 380 et seq.

3 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.15(1); and PARA 780.

4 *Slater v Slater* [1952] 1 All ER 1343n (bare denial, if it means anything at all, amounts to a denial that the separation ever took place in the way or at the time the petition alleges); and see *Finch v Finch (Hayes intervening)* [1960] 2 All ER 52, [1960] 1 WLR 429. As to the defences to desertion see PARA 371 et seq.

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783. Allegations against third persons.

The rules relating to who should be made parties in the case of a petition¹ and the rules as to service of a petition² apply, with the necessary modifications, to a pleading other than a petition as they apply to a petition, except that for references therein to a co-respondent or respondent there should be substituted references to a party cited³. Similarly, the rules as to filing an answer to a petition⁴ apply, with the necessary modifications, to a party cited as they apply to a co-respondent⁵.

1 Ie the Family Proceedings Rules 1991, SI 1991/1247, r 2.7: see PARA 761.

2 Ie the Family Proceedings Rules 1991, SI 1991/1247, r 2.9: see PARAS 776, 777.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.16(1).

4 Ie the Family Proceedings Rules 1991, SI 1991/1247, r 2.12: see PARA 779.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.16(2).

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784. Scope of defence.

The answer may consist of an absolute denial of the factum of the legality¹, or of the continued existence², of the marriage or civil partnership alleged, or of all or any of the other allegations; and it may be pleaded in addition in five years' separation cases that the dissolution will result in grave financial or other hardship³, or that the matter is *res judicata*, or that the petitioner is otherwise estopped⁴. Specific defences have been discussed previously⁵.

1 *Silver v Silver* (1870) 21 LT 734 (bigamy).

2 *Cohen v Cohen* (1876) 34 LT 33 (divorce).

3 See PARA 411.

4 See PARA 880 et seq.

5 See PARA 351 et seq.

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785. Defences by co-respondent or party cited.

A co-respondent or party cited is entitled to put forward every defence which the respondent may plead¹. A co-respondent may plead matters which, as between the parties, would afford a defence to the petition even though no claim has been made against him².

1 See PARA 351 et seq.

2 *N v N and L* [1957] P 333, [1957] 1 All ER 914.

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B. CONSENT TO GRANT OF DECREE OR CIVIL PARTNERSHIP ORDER

786. Filing of answer to petition.

Where, before the hearing of a petition alleging two years' separation coupled with the respondent's consent to a decree or civil partnership order being granted¹, the respondent wishes to indicate to the court that he consents to the grant of the decree or order, he must do so by filing a notice to that effect signed by the respondent personally². For these purposes, an acknowledgment of service containing a statement that the respondent consents to the grant of a decree or order is to be treated as such a notice if the acknowledgment is signed, in the case of a respondent acting in person, by the respondent, or in the case of a respondent represented by a solicitor, by the respondent as well as by the solicitor³.

A respondent to such a petition may give notice to the court either that he does not consent to a decree or order being granted or that he withdraws any consent which he has already given, and where such notice is given and no other relevant fact⁴ is alleged, the proceedings on the petition must be stayed and the proper officer⁵ must thereupon give notice of the stay to all parties⁶.

¹ See PARA 407.

² Family Proceedings Rules 1991, SI 1991/1247, r 2.10(1) (amended by SI 2005/2922).

³ Family Proceedings Rules 1991, SI 1991/1247, r 2.10(1) (as amended: see note 2).

⁴ In relation to marriage, such of the facts as are mentioned in the Matrimonial Causes Act 1973 s 1(2), and in relation to a civil partnership such of the facts as are mentioned in the Civil Partnership Act 2004 s 44(5) (see PARA 347); Family Proceedings Rules 1991, SI 1991/1247, r 2.10(3) (added by SI 2005/2922).

⁵ As to the meaning of 'proper officer' see PARA 461 note 5.

⁶ Family Proceedings Rules 1991, SI 1991/1247, r 2.10(2) (amended by SI 2005/2922).

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C. REQUEST FOR PARTICULARS

787. Applications for particulars.

If allegations in a pleading are in such general terms¹, or are so vague², that they cannot be properly met, a party on whom a pleading has been served may³ in writing request the party whose pleading it is to give particulars of any allegation or other matter⁴. If that party fails to give the particulars⁵ within a reasonable time, the party requiring them may apply for an order that the particulars be given⁶, or that such allegations be struck out⁷. The request or order in pursuance of which particulars are given must be incorporated with the particulars, each item of the particulars following immediately after the corresponding item of the request or order⁸. A party giving particulars, whether in pursuance of an order or otherwise, must at the same time file a copy of them⁹.

1 *Leete v Leete* (1862) 2 Sw & Tr 568; *Wheeler-Cherry v Wheeler-Cherry* [1939] 2 All ER 603, CA; *Banks v Banks* [1952] P 249, [1952] 2 All ER 232, CA (husband alleged wife committed adultery at place unknown with man unknown; husband said he could give no better particulars, but denied paternity of child born to wife; he had to give facts from which the inference that he was not the father was drawn); *H v H* [1962] P 244, sub nom *Holman v Holman* [1962] 2 All ER 477, CA; cf *Garven v Garven* [1962] 3 All ER 241, [1963] 1 WLR 38; *Thompson v Thompson* [1957] P 19, [1957] 1 All ER 161, CA.

2 *Hartopp v Hartopp and Earl Cowley* (1902) 71 LJP 78, CA; but see *Boddy v Boddy and Grover* (1858) 28 LJP & M 16; *Smith v Smith and Liddard* (1859) 29 LJP & A 62.

3 The applicant should himself be in order: *Burrell v Burrell* (1863) 32 LJP & A 136.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.19(1); *Hubbock v Hubbock* [1948] 2 All ER 412, CA. In nullity proceedings, particulars of incapacity may be sought (*Wise (otherwise Blakeley) v Wise* [1944] P 56, sub nom *W (otherwise B) v W* [1944] 1 All ER 446).

5 The particulars must be sufficient particulars: see *Philipps v Philipps* (1878) 4 QBD 127 at 139, CA.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.19(1).

7 See RSC Ord 18 r 19. As to the continuing application of specific provisions of the Supreme Court Rules in matrimonial and civil partnership proceedings see PARA 1005. In *Hepworth v Hepworth* (1860) 6 Jur NS 831, striking-out was refused where time to answer had twice been given. See also *Wheeler-Cherry v Wheeler-Cherry* [1939] 2 All ER 603, CA (on application to strike out the test is not whether the petitioner is likely to establish his case); *Reiss v Woolf* [1952] 2 QB 557, [1952] 2 All ER 112, CA (striking out not automatic: further application required).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.19(2).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.19(3).

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788. Defence of 'just cause' to desertion.

Where there is a defence of just cause to a charge of desertion, particulars of that plea may be ordered¹.

¹ Cf *MacLulich v MacLulich* [1920] P 439, CA; and see *Finch v Finch (Hayes intervening)* [1960] 2 All ER 52, [1960] 1 WLR 429. As to just cause for separation see PARA 380 et seq.

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789. Voluntary particulars.

It is the practice in matrimonial and civil partnership causes to allow particulars to be delivered voluntarily without a request or order for them, but they must relate to some allegation in the pleading which they particularise¹. A copy of any voluntary particulars must be filed at the time they are given².

1 *E v E* (1907) 23 TLR 364; *Walker v Walker* (1912) 107 LT 655 (charge of communicating a venereal disease must be specifically pleaded).

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.19(3).

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790. Striking out.

Particulars of a charge of adultery, alleging acts short of adultery, will be allowed to stand¹; but, if the particulars delivered have no reference to the charges made, such particulars may be struck out², as also may a plea which is irrelevant to the issue³, or scandalous⁴.

1 *Cox v Cox* (1893) 70 LT 200, CA (flirtation; allowing liberties; desire to elope).

2 *Sanderson v Sanderson, Stephens and Hiscox* (1871) 41 LJP & M 24. As to the striking out of allegations where insufficient particulars had been given see PARA 787.

3 *Green v Green* (1869) 21 LT 401.

4 See *Northover v Northover* (1910) 26 TLR 224. Nothing that is relevant can be scandalous: *Fisher v Owen* (1878) 8 ChD 645, CA.

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791. Disclosure of names of witnesses.

If it is alleged that the acts charged took place in the presence of certain persons described, the names of such persons may be ordered to be disclosed¹.

¹ *Bishop v Bishop* [1901] P 325 (insulting language in presence of guests and servants), thus following the ecclesiastical rather than the common law practice.

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792. Explanatory affidavit.

If the particulars, when delivered, do not on the face of them¹ appear to be sufficient, a fresh application for further particulars may be made. On this application an 'explanatory affidavit' may be ordered. This affidavit is made by the solicitor or a clerk and states that the witnesses have been personally questioned and that no further information can be given². The nature of the case which is being made against the applicant may be ordered to be set out in this affidavit³. If further facts become known before the hearing, the order directs that they be disclosed.

1 See *Hepworth v Hepworth* (1860) 30 LJPM & A 215.

2 *C v C and M* (1910) 55 Sol Jo 141.

3 See *Banks v Banks* [1952] P 249, [1952] 2 All ER 232, CA (cited in PARA 787 note 1).

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D. CROSS-PETITIONS AND CROSS-PRAYERS

793. Counter-charges to be in answer.

If a spouse or civil partner who has been served with a petition desires (in addition to resisting, by an answer, the prayer of such petition) to obtain affirmative relief, the purpose should be effected by a prayer for relief in the answer, and not by a separate petition¹ except in a nullity suit².

¹ *Norton v Norton* [1945] P 56, [1945] 2 All ER 122; *Practice Direction* [1945] WN 234. See also *Robertson v Robertson* [1954] 3 All ER 413n, [1954] 1 WLR 1537 (where a cross-petition, alleging desertion for three years prior to cross-prayer in the answer, was permitted by way of amendment to the answer); *Blacker v Blacker* [1960] P 146, [1960] 2 All ER 291, CA; *Tulley v Tulley* [1967] P 285, [1967] 1 All ER 639.

² See PARA 795.

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794. Separation.

Judicial separation or a separation order may be prayed in the answer to a petition for judicial separation or a separation order¹, or for dissolution of marriage or civil partnership².

¹ *Hunt v Hunt* (1856) Dea & Sw 121; *Eldred v Eldred* (1840) 2 Curt 376; and see *Best v Best* (1823) 1 Add 411.

² See the Matrimonial Causes Act 1973 s 20; the Civil Partnership Act 2004 s 62; and PARA 347. Cf *Schira v Schira and Sampajo* (1868) LR 1 P & D 466.

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795. Nullity.

It is the established practice for a respondent to a nullity suit to put forward a charge of a matrimonial or civil partnership offence by way of a separate petition, for such a charge has no connection with the substance of the petition either as a plea in law or by way of mitigation. In order to save expense, however, there is no objection to an answer and a cross-petition containing such a charge being contained in one and the same document¹.

¹ *Pickett v Pickett (otherwise Moss)* [1951] P 267, [1951] 1 All ER 614, following *Humphrey v Williams (falsely calling herself Humphrey)* (1860) 29 LJP & A 62, and *Anon* (1857) Dea & Sw 295. The issue of nullity should be tried first: *S (otherwise P) v S* [1970] P 208, [1970] 2 All ER 251.

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796. Petition not proceeded with.

If a petitioner gives notice before trial that the petition will not be proceeded with¹, this does not preclude the respondent from obtaining the relief sought in a cross-prayer, or from obtaining leave to amend the answer by adding a cross-prayer². Where a petition is not proceeded with, the petitioner may apply for its dismissal, or any party who has filed an answer may apply for its dismissal for want of prosecution³. If relief is claimed in the answer, application should be made to stay the prayer of the petition, thus keeping alive the framework of the petition, and enabling the respondent to proceed on his or her answer⁴.

¹ In which case a fresh suit may be presented on the same facts: *Hall v Hall and Richardson* (1879) 48 LJP 57.

² *Firminger v Firminger and Ollard* (1869) 17 WR 335. When amending an answer, an affidavit in support is required in the same way as an amendment to a petition: *Cheetham v Cheetham* [1954] 2 All ER 535n, [1954] 1 WLR 990, CA. As to amendments to a petition see PARA 769.

³ See PARA 855.

⁴ *Volkers v Volkers* [1935] P 33.

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E. REPLY TO ANSWER

797. Filing of reply and subsequent pleadings.

A petitioner may file a reply to an answer within 14 days after he has received¹ a copy of the answer². If the petitioner does not file a reply to an answer he is deemed, unless the answer prays for a decree or civil partnership order, on making a request for directions for trial³, to have denied every material allegation of fact made in the answer⁴.

No pleading subsequent to a reply may be filed without leave⁵.

1 Ie pursuant to the Family Proceedings Rules 1991, SI 1991/1247, r 2.17: see PARA 798.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.13(1). Where an answer is filed under r 2.12(1) (see PARA 779) which prays for a decree of nullity of marriage or civil partnership on the ground that an interim gender recognition certificate under the Gender Recognition Act 2004 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) has, after the time of the marriage or the formation of the civil partnership, been issued to either party to the marriage or civil partnership (ie under the Matrimonial Causes Act 1973 s 12(g) or the Civil Partnership Act 2004 s 50(1)(d): see PARA 334; and see also, in connection with marriages celebrated before 1971, PARA 344) or on the grounds that the respondent is a person whose gender had become the acquired gender under the Gender Recognition Act 2004 at the time of the marriage or civil partnership (ie under the Matrimonial Causes Act 1973 s 12(h) or the Civil Partnership Act 2004 s 50(1)(e): see PARA 334) and a full gender recognition certificate has been issued to the petitioner, there must be filed with petitioner's answer under the Family Proceedings Rules 1991, SI 1991/1247, r 2.13(1) a copy of that interim or full certificate unless otherwise directed on an application made without notice: r 2.13A (added by SI 2005/559; amended by SI 2005/2922).

3 As to directions for trial see PARA 814.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.13(2) (amended by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.13(3).

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798. Service of pleadings.

A party who files an answer, reply or subsequent pleading must at the same time file a copy for service on every opposite party; and thereupon the proper officer¹ must annex to every copy for service on a party cited in the pleading a notice in the prescribed form² with an acknowledgment of service in the prescribed form³ attached and must send a copy to every other opposite party⁴.

1 As to the meaning of 'proper officer' see PARA 461 note 5.

2 For the prescribed forms of notice see the Family Proceedings Rules 1991, SI 1991/1247, r 2.6(6), Appendix 1, Forms M5, M5A (Form M5 amended by SI 1992/456; SI 1992/2067; SI 1993/295; SI 1994/3155; SI 1996/816; SI 1998/1901; SI 2001/821; SI 2003/2839; SI 2005/264; SI 2005/559; Form M5A added by SI 2005/2922).

3 For the prescribed form of acknowledgment of service see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Forms M6, M6A (Form M6 amended by SI 1993/295; SI 2001/821; SI 2005/264; Form M6A added by SI 2005/2922).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.17 (amended by SI 2005/2922).

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(iv) Preparations and Arrangements for Trial

A. DISCOVERY AND INTERROGATORIES

799. Discovery of documents in defended causes.

The provisions of the Rules of the Supreme Court relating to the discovery and inspection of documents¹ apply with modifications² to a defended cause³ begun by petition, whether pending in the High Court or county court, as they apply to an action begun by writ⁴.

Within 14 days after the pleadings are deemed to be closed as between him and any other party, each party to such a cause must make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to⁵ any matters in question between them in the action⁶. For these purposes, pleadings are deemed to be closed at the expiration of 14 days after service of the answer, and are deemed to be closed then notwithstanding that any request or order for particulars previously made has not been complied with⁷. The petitioner and any party who has filed an answer is entitled to have a copy of any list of documents⁸ served on any other party; and the copy must on request be supplied to him free of charge by the party who served the list⁹. The court may order the discovery of documents relating to adultery¹⁰. In causes commenced by originating summons there is no discovery without order and an order must be applied for if the circumstances of the case justify discovery¹¹.

1 Ie RSC Ord 24: see the text and notes 6-11. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005. Note that owing to this continued application and the disapplication of the Civil Procedure Rules for these purposes, the pre-CPR terminology of 'discovery' and 'interrogatories' (now 'disclosure' and 'requests for information' under the CPR) is used in these paragraphs.

2 As to the modifications see the Family Proceedings Rules 1991, SI 1991/1247, r 2.20(1).

3 As to the meaning of 'defended cause' see PARA 812.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.20(1).

5 As to the meaning of 'relating to' see *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 62-64, CA per Brett LJ; *O'Rourke v Darbishire* [1920] AC 581 at 615, 616, HL per Lord Sumner and at 627-630 per Lord Wrenbury.

6 RSC Ord 24 r 2(1); Family Proceedings Rules 1991, SI 1991/1247, r 2.20(2).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.20(2).

8 For these purposes 'list of documents' includes an affidavit verifying the list: Family Proceedings Rules 1991, SI 1991/1247, r 2.20(3).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.20(3).

10 See the Civil Evidence Act 1968 s 16(5) (which abrogated the statutory privilege in respect of questions as to adultery); and **CIVIL PROCEDURE** vol 11 (2009) PARA 970; and see also *Skone v Skone* [1971] 2 All ER 582 at

587, [1971] 1 WLR 812 at 816, 817, HL per Lord Hodson; *Nast v Nast and Walker* [1972] Fam 142 at 150, 151, [1972] 1 All ER 1171 at 1174, 1175, CA per Lord Denning MR.

11 See RSC Ord 24 r 3(1).

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800. Discovery by interrogatories in defended causes.

The provisions of the Rules of the Supreme Court dealing with discovery by interrogatories¹ apply with modifications² to a defended cause³ begun by petition and pending in the High Court⁴.

A copy of the proposed interrogatories must be filed when they are served⁵ or a summons for an order⁶ is issued⁷. Leave to serve interrogatories will be given in respect only of such of the interrogatories as are necessary either for disposing fairly of the case or for saving costs⁸; and, in deciding whether to give leave, the district judge will take into account any offer by the party to be interrogated to give particulars or to make admissions or to produce documents relating to the matter in question⁹. The court will permit an interrogatory as to the contents of a written document to be administered only if secondary evidence of that document would be admissible at the trial or hearing¹⁰. An interrogatory will not be permitted if it is not necessary either for disposing fairly of the case or for saving costs¹¹. Interrogatories may be ordered as to adultery¹²; and there is no reason why an interrogatory should not require an answer to the question whether adultery has been committed¹³. Interrogatories must be answered within such period, not being less than 28 days from the date of service, as may be specified in a note at the end of the interrogatories¹⁴.

1 le RSC Ord 26: see the text and notes 5-9, 14. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005. Note that owing to this continued application and the disapplication of the Civil Procedure Rules for these purposes, the pre-CPR terminology of 'discovery' and 'interrogatories' (now 'disclosure' and 'requests for information' under the CPR) is used in these paragraphs.

2 As to the modifications see the Family Proceedings Rules 1991, SI 1991/1247, r 2.21(1).

3 As to the meaning of 'defended cause' see PARA 812.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.21(1); and see *B v B (matrimonial proceedings: discovery)* [1978] Fam 181, [1979] 1 All ER 801. Where a defended cause is pending in a designated county court, RSC Ord 26 as applied by CCR Ord 14 r 11 applies; and references in the Family Proceedings Rules 1991, SI 1991/1247, r 2.21 to provisions of RSC Ord 26 are to be construed as references to those provisions as so applied: Family Proceedings Rules 1991, SI 1991/1247, r 2.21(3) (amended by SI 2005/2922). As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005. As to the meaning of 'designated county court' see PARA 737 note 3.

5 le under RSC Ord 26 r 3(1).

6 le an order under RSC Ord 26 r 1(2).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.21(2).

8 RSC Ord 26 r 1(1); and see the cases cited in note 13.

9 RSC Ord 26 r 4(2).

10 *Ramsey v Ramsey* [1956] 2 All ER 165, [1956] 1 WLR 542.

11 *Ramsey v Ramsey* [1956] 2 All ER 165, [1956] 1 WLR 542; *Hulbert v Hulbert* [1957] P 174, [1957] 2 All ER 226, CA; and see *Practice Direction* [1966] 2 All ER 638, [1966] 1 WLR 1007.

12 See the Civil Evidence Act 1968 s 16(5); and PARA 799 note 10.

13 *Nast v Nast and Walker* [1972] Fam 142, [1972] 1 All ER 1171, CA, and see *C v C* [1973] 3 All ER 770, [1973] 1 WLR 568.

14 RSC Ord 26 r 2(1)(a). Objections to answer on the ground of privilege may be taken in the affidavit (RSC Ord 26 r 5(1)); and, where the interrogatories are answered insufficiently, an order for a further answer by affidavit or on oral examination may be made (RSC Ord 26 r 5(2)).

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801. Exemptions from discovery.

The Queen's Proctor¹ is not exempt from disclosure in matrimonial and civil partnership proceedings²; nor is a respondent who is a minor exempt and the necessary affidavit in such a case must be sworn by the minor and not by the litigation friend³. The litigation friend of a person suffering from mental disorder can be ordered to disclose documents and in such a case the guardian swears the affidavit⁴. Disclosure has been refused against the doctor of a party⁵.

1 As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545; and as to interventions by the Queen's Proctor see PARA 852 et seq.

2 See the Crown Proceedings Act 1947 s 28; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 130.

3 See *Redfern v Redfern* [1891] P 139, CA (where the court appears to have accepted the view expressed, at 141, by counsel that, if an affidavit had been ordered to be made, it would have been the minor who would have had to make it). See also RSC Ord 80 r 9, by which RSC Ords 24, 26 (see PARAS 799-800) apply to a person under disability and to his litigation friend; and **CIVIL PROCEDURE**. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

4 *Paspati v Paspati* [1914] P 110.

5 *D v D* (1911) 55 Sol Jo 331.

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802. Notice to produce or admit.

Notices to produce or to admit documents at the hearing must be served where necessary in matrimonial and civil partnership proceedings¹, as in other proceedings in the High Court². Notice to the respondent to produce documents should be served on the respondent in undefended suits³. If documents are called for from an opposite party at the hearing whether or not under a notice to produce, and looked at by counsel calling for them, it has been held that they must be put in evidence as part of his case⁴, but this proposition is to be doubted⁵. A party may look at a note, made at the time of an incident with a view to intended legal proceedings, in order to refresh his memory⁶.

The court will sometimes direct documents to be brought into the registry for its inspection so that it may decide whether an applicant ought to see them⁷.

1 *Case v Case* (1860) 2 Sw & Tr 65. As to the mode of service see PARA 776 et seq.

2 See RSC Ord 27 r 5. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

3 *Clark v Clark* [1953] 1 All ER 704n, [1953] 1 WLR 490. As to the importance of documents in undefended cases see eg *Forte v Forte* (1966) 110 Sol Jo 52 (corroboration of desertion).

4 See *Stroud v Stroud* [1963] 3 All ER 539 at 540-542, [1963] 1 WLR 1080 at 1081, 1082 per Wrangham J, citing *Wilson v Bowie* (1823) 1 C & P 8; *Calvert v Flower* (1836) 7 C & P 386; *Palmer v Maclear and M'Grath* (1858) 1 Sw & Tr 149.

5 'In my view, the mere inspection of a document does not render it evidence which counsel inspecting it is bound to put in. I think the true rules are as follows. Where a document is used to refresh a witness's memory, cross-examining counsel may inspect that document in order to check it without making it evidence. Moreover he may cross-examine on it without making it evidence, provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness: see *Gregory v Tavernor* (1833) 6 C & P 280'. *Senat v Senat* [1965] P 172 at 177, [1965] 2 All ER 505 at 511, 512 per Sir Jocelyn Simon P. If, however, a party calls for and inspects a document held by the other party, he is bound to put it in evidence if he is required to do so: *Wharam v Routledge* (1805) 5 Esp 235. The distinction is shown clearly in the ruling in *Palmer v Maclear and M'Grath* (1858) 1 Sw & Tr 149 at 151.

6 *Buckeridge v Buckeridge* (1962) 106 Sol Jo 471.

7 *Pollard v Pollard and Hemming* (1864) 3 Sw & Tr 613 (application by co-respondent, against whom damages were claimed, to inspect letters from respondent to petitioner).

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B. MEDICAL INSPECTIONS

803. Incapacity to consummate.

In proceedings for nullity on the ground of incapacity to consummate a marriage¹ the petitioner² must apply to the district judge³ to determine whether medical inspectors should be appointed to examine the parties⁴. Such an application must not, however, be so made in an undefended cause⁵ if the husband or, in certain circumstances⁶, the wife is the petitioner, unless in any such case the petitioner is alleging his or her own incapacity⁷.

An application by the petitioner is to be made:

- 1038 (1) where the respondent has not given notice of intention to defend, after the time limited for giving the notice has expired⁸; or
- 1039 (2) where the respondent has given notice of intention to defend, after the expiration of the time allowed for filing his answer or, if he has filed an answer, after it has been filed⁹,

and an application by the respondent is to be made after he has filed an answer¹⁰. Where the party required to make an application fails to do so within a reasonable time, the other party may, if he is prosecuting or defending the cause, make an application¹¹.

If the district judge hearing an application¹² considers it expedient to do so, he must appoint a medical inspector or, if he thinks it necessary, two medical inspectors to examine the parties and report to the court¹³ the result of the examination¹⁴. Ordinarily it is sufficient to appoint only one inspector¹⁵. Where a party is unfit to undergo the examination, it may be dispensed with if there is evidence available from other sources¹⁶.

1 As to nullity on this ground see PARA 336 et seq.

2 For these purposes, and for the purposes of the Family Proceedings Rules 1991, SI 1991/1247, r 2.22(2) (see the text and notes 5-7), references to the 'petitioner' are to be construed, where the cause is proceeding only on the respondent's answer or where the allegation of incapacity is made only in the respondent's answer, as references to the respondent: r 2.22(3).

3 As to the meaning of 'district judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(1). If the respondent has not given notice of intention to defend, an application by the petitioner under r 2.22(1) may be made ex parte: r 2.22(7). As to the meaning of 'notice of intention to defend' see PARA 779.

5 As to the meaning of 'undefended cause' see PARA 812.

6 If it appears from the petition that the wife was either a widow or divorced at the time of the marriage in question, it appears from the petition or otherwise that she has borne a child, or a statement by the wife that she is not a virgin is filed: Family Proceedings Rules 1991, SI 1991/1247, r 2.22(2)(b).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(2). As to the 'petitioner' see note 2.

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(4)(a).

- 9 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(4)(b).
- 10 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(4).
- 11 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(5).
- 12 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.22(1): see the text and notes 1-4.
- 13 As to the meaning of 'court' see PARA 747 note 7.
- 14 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(8). As to notice of the time and place of inspection see PARA 805; and as to the conduct of medical examinations and the attendance of inspectors at the trial see PARAS 806-808. At the hearing of any proceedings for nullity on the ground of incapacity to consummate a marriage the court may also, if it thinks fit, appoint a medical inspector or two medical inspectors to examine any party who has not been examined or to examine further any party who has been examined: r 2.22(9). As to the notices of the time and place of examination see PARA 805.
- 15 *Practice Direction* [1971] 2 All ER 1310, [1971] 1 WLR 1193. Where, however, a woman objects to being examined by a man, she may request that a female doctor be appointed to examine her. Her solicitor should inform her of her right to request such an appointment, and should satisfy the district judge at the hearing that she has been so informed. A woman doctor is not to be appointed to examine the husband if he or the inspector objects: *Practice Direction* [1971] 2 All ER 1310, [1971] 1 WLR 1193. Although *Practice Direction* [1971] 2 All ER 1310, [1971] 1 WLR 1193 relates only to defended causes, it is thought that the same procedure would be followed in those undefended causes in which a medical examination is ordered.
- 16 *Intract v Intract (otherwise Jacobs)* [1933] P 190.

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804. Wilful refusal to consummate.

In proceedings for nullity on the ground that a marriage has not been consummated owing to the wilful refusal of the respondent to consummate it¹ either party may apply to the district judge² for the appointment of medical inspectors to examine the parties³. If the district judge hearing an application considers it expedient to do so, he must appoint a medical inspector, or, if he thinks it necessary, two medical inspectors, to examine the parties and report to the court the result of the examination⁴.

1 As to this ground for nullity see PARA 342.

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(6). If the respondent has not given notice of intention to defend, an application by the petitioner under r 2.22(6) may be made ex parte: r 2.22(7).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(8). Ordinarily it is sufficient to appoint only one inspector: see PARA 803 text and note 15. As to notice of the time and place of inspection see PARA 805; and as to conduct of medical examinations and the attendance of inspectors at the trial see PARAS 806-808.

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805. Notice of trial and place of inspection.

The party on whose application a medical examination has been ordered by the district judge¹ or who has the conduct of proceedings in which the court² has ordered an examination³ must serve on the other party notice of the date, time and place appointed for his or her examination⁴.

1 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.22(8): see PARAS 803-804.

2 As to the meaning of 'court' see PARA 747 note 7.

3 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.22(9): see PARA 803.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.22(10). As to the place of examination see PARA 806.

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806. Place of examination.

Every medical examination in proceedings for nullity¹ must be held at the consulting room of the medical inspector or, as the case may be, of one of the medical inspectors appointed to conduct the examination²; but, on the application of a party, the district judge³ may direct that the examination of that party is to be held at the court office or at such other place as the district judge thinks convenient⁴.

1 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.22: see PARAS 803-804.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.23(1). As to the appointment of medical inspectors see PARAS 803-804. As to the circumstances in which a woman doctor may be appointed see PARA 803 note 15.

3 As to the meaning of 'district judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.23(1) proviso.

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807. Identification of parties and reports.

Every party presenting himself for a medical examination¹ must sign a statement, in the presence of the inspector or inspectors, that he is the person referred to as the petitioner or respondent, as the case may be, in the order for the examination; and at the conclusion of the examination the inspector or inspectors must certify on the statement that it was signed in his or their presence by the person who has been examined². Every report³ must be filed and either party is entitled to be supplied with a copy on payment of the prescribed fee⁴. The inspector should not discuss the case with one side in the absence of the other as he is a neutral witness⁵. Medical inspectors should not act in cases in which they have previously advised professionally either of the parties, nor, either previously to or on a medical inspection, should they peruse or have regard to any medical report on the person to be examined or under examination⁶.

1 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.22: see PARAS 803-805.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.23(2).

3 le every report made in pursuance of Family Proceedings Rules 1991, SI 1991/1247, r 2.22.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.23(3).

5 *Thompson v Thompson* (1960) 105 Sol Jo 108, CA.

6 *Thompson v Thompson* (1960) 105 Sol Jo 108, CA.

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808. Attendance of inspectors at the trial.

In an undefended cause¹ it is not necessary for the inspector or inspectors² to attend and give evidence at the trial, unless so directed³. In a defended cause, if the report of the result of the examination⁴ is accepted by both parties, notice to that effect must be given by the parties to the district judge⁵ and to the inspector or inspectors not less than seven clear days⁶ before the date fixed for the trial; and, where such notice is given, it is not necessary for the inspector or inspectors to attend or give evidence at the trial⁷. Where⁸ the evidence of the inspector or inspectors is not given at the trial, his or their report is to be treated as information furnished to the court by a court expert and to be given such weight as the court thinks fit⁹.

1 As to the meaning of 'undefended cause' see PARA 812.

2 As to the appointment of inspectors for the purposes of medical examination see PARAS 803-804.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.23(4).

4 I.e. the report made in pursuance of Family Proceedings Rules 1991, SI 1991/1247, r 2.22: see PARA 803.

5 As to the meaning of 'district judge' see PARA 737 note 3.

6 As to the meaning of 'clear days' see **TIME** vol 97 (2010) PARA 335.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.23(5).

8 I.e. pursuant to Family Proceedings Rules 1991, SI 1991/1247, r 2.23(4) or (5).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.23(6).

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809. Respondent outside jurisdiction.

Where the respondent is outside the jurisdiction, an order may be obtained, in special circumstances, for the appointment of an inspector or inspectors abroad, as well as of the inspector or inspectors within the jurisdiction for the examination of the petitioner¹.

¹ Direction dated 26 May 1936. The applicant's solicitor must ascertain whether the person nominated to act is willing to act, and to inform him of the procedure; the nomination is usually left to an officer of the appropriate foreign courts: Direction dated 26 May 1936. As to the procedure to be followed as regards the medical inspection of parties who are in Her Majesty's Forces serving out of the United Kingdom see Direction dated 12 April 1949. As to the appointment of inspectors generally see PARAS 803-804.

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810. Refusal of or dispensing with inspection.

The refusal of a respondent to submit to medical inspection¹ does not prevent the progress of a suit². If a party refuses to be medically examined, the court may infer that some impediment exists pointing to an incapacity³. Inspection of the person is not universally obligatory and the court has a discretion in a proper case to dispense with this step in procedure⁴.

1 As to orders for medical inspection see PARA 803 et seq.

2 *W v S (otherwise W)* [1905] P 231; *S v B (falsely called S)* (1905) 21 TLR 219. At one time the respondent's absence from the jurisdiction seems to have had the effect of preventing progress of the suit: *T v M (falsely called T)* (1865) LR 1 P & D 31; *B v L (falsely called B)* (1869) LR 1 P & D 639 (where it was said that attachment would be granted if the respondent attempted to leave the jurisdiction), but see *Sparrow (falsely called Harrison) v Harrison* (1841) 3 Curt 16; affd sub nom *Harrison v Harrison* 4 Moo PCC 96, PC (where the respondent had not undergone an examination and had disappeared but a decree was granted). As to inspection abroad see PARA 809.

3 *W v W (otherwise L)* [1912] P 78, applied in *Re L (an infant)* [1968] P 119 at 159, [1968] 1 All ER 20 at 26, CA per Lord Denning MR. Cf the effect of refusal to take a blood test in paternity issues: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 116.

4 *Intract v Intract (otherwise Jacobs)* [1933] P 190 (woman respondent of unsound mind, other medical evidence available).

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C. SETTING DOWN OF CAUSES AND DIRECTIONS

811. Designated courts.

Certain county courts are designated by order as 'divorce county courts' and 'civil partnership proceedings county courts' and any court so designated may hear and determine any matrimonial or civil partnership cause, except that it has jurisdiction to try such a cause only if it is also designated in the order as a court of trial¹.

¹ See PARA 732.

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812. Meanings of 'undefended cause' and 'defended cause'.

'Undefended cause' means:

- 1040 (1) a cause¹ in which no answer has been filed or any answer filed has been struck out²;
- 1041 (2) a cause which is proceeding only on the respondent's answer and in which no reply or answer to the respondent's answer has been filed or any such reply or answer has been struck out³;
- 1042 (3) a cause in which relief is sought on the ground that either party, though capable of giving a valid consent, was at the time of the marriage or civil partnership suffering, whether continuously or intermittently, from mental disorder of such a kind or extent as to be unfitted for marriage or civil partnership⁴ and in which the applicable notice⁵ has not been given or any notice so given has been withdrawn⁶;
- 1043 (4) a cause in which an answer has been filed claiming relief but in which no pleading has been filed opposing the grant of a decree or civil partnership order on the petition or answer or any pleading or part of a pleading opposing the grant of such relief has been struck out⁷; or
- 1044 (5) any cause not within heads (1) to (4) above in which a decree or civil partnership order has been pronounced⁸.

'Defended cause' means a cause not being an undefended cause⁹.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

3 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

4 I.e. a cause to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.12(4) applies: see PARA 779.

5 I.e. under the Family Proceedings Rules 1991, SI 1991/1247, r 2.12(4).

6 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

7 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

8 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

9 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

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813. Exercise of district judge's jurisdiction in causes set down for trial.

The district judge¹ of the registry for the divorce town or the dissolution town² at which a cause³ has been set down for trial or, in the case of a cause set down for trial at the Royal Courts of Justice⁴, a district judge of the Principal Registry⁵ may, if it appears to him to be desirable having regard to the proximity of the date of trial or otherwise, exercise in the cause any jurisdiction of the district judge of the registry in which the cause is proceeding⁶.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 'Divorce town' and 'dissolution town' mean a place at which sittings of the High Court are authorised to be held outside the Royal Courts of Justice for the hearing of such proceedings or proceedings of the class to which they belong: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

3 As to the meaning of 'cause' see PARA 321 note 1.

4 'Royal Courts of Justice', in relation to matrimonial or civil partnership proceedings pending in a divorce or civil partnership proceedings county court, means such place, being the Royal Courts of Justice or elsewhere, as may be specified in directions given by the Lord Chancellor pursuant to the Matrimonial and Family Proceedings Act 1984 s 42(2)(a): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

5 As to the meaning of 'Principal Registry' see PARA 737 note 3.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.34(1) (amended by SI 2005/2922). RSC Order 34 r 5(3) applies, with the necessary modifications, to a defended cause pending in the High Court as it applies to an action begun by writ: Family Proceedings Rules 1991, SI 1991/1247, r 2.34(2). As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

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814. Directions for trial.

On the written request of the petitioner or of any party who is defending a cause¹ begun by petition, the district judge² must give directions for the trial of the cause if he is satisfied:

- 1045 (1) that a copy of the petition, including any supplemental or amended petition, and any subsequent pleading have been duly served on every party required to be served and, where that party is a child or protected party³, that any affidavit required⁴ has been filed⁵;
- 1046 (2) if no notice of intention to defend⁶ has been given by any party entitled to give it, that the time limited for giving such notice has expired⁷;
- 1047 (3) if notice of intention to defend has been given by any party, that the time allowed him for filing an answer has expired⁸;
- 1048 (4) if an answer has been filed, that the time allowed for filing any subsequent pleading has expired⁹;
- 1049 (5) in proceedings for nullity of marriage:
 - .2
 - 1. (a) that any application to determine whether medical inspectors should be appointed¹⁰ has been made¹¹; and
 - 2. (b) where an order for the examination of the parties has been made¹², that the notice of the date, time and place for the examination¹³ has been served and that the report of the inspector or inspectors has been filed¹⁴.
- .3

Where the cause is pending in a designated county court¹⁵ other than the Principal Registry¹⁶ and is to be tried at that court, the district judge must¹⁷, if he considers it practicable to do so, give directions for trial¹⁸.

Where the cause is an undefended cause¹⁹ for divorce, judicial separation, dissolution or separation or an undefended cause for nullity of marriage or civil partnership on the ground that an interim gender recognition certificate²⁰ has, after the time of the marriage or the formation of the civil partnership, been issued to either party to the marriage or civil partnership²¹, then, unless otherwise directed, there must be filed with the request for directions for trial an affidavit by the petitioner:

- 1050 (i) containing the information required by the prescribed form of affidavit in support of the petition or application²² as near as may be in the order there set out, together with any corroborative evidence on which the petitioner intends to rely²³; and
- 1051 (ii) verifying, with such amendments as the circumstances may require, the contents of any statement of arrangements filed²⁴ by the petitioner²⁵,

and the district judge must give directions for trial by entering the cause in a list to be known as the 'special procedure list'²⁶.

In the case of a defended cause²⁷ the district judge may treat the request for directions for trial as a summons or application for directions so as to enable him to give such directions with regard to:

- 1052 (A) the future course of the cause²⁸;
- 1053 (B) any application made therein for financial relief or for an order relating to a child²⁹; and
- 1054 (C) the provision of evidence relating to the arrangements or proposed arrangements for the children of the family³⁰,

as appear to be necessary or desirable for securing the just, expeditious and economical disposal of the cause or application; and the proper officer³¹ must give the parties notice of a date, time and place at which the request will be considered³².

In any other case the district judge must give directions for trial by requiring the proper officer to set the cause down for trial and give notice that he has done so to every party to the cause³³.

Except where evidence has been provided under head (ii) above, directions for trial under these provisions must, unless the court orders otherwise, include a direction to the petitioner to file an affidavit verifying, with such amendments as the circumstances may require, the contents of any statement of arrangements filed by the petitioner³⁴.

1 As to the meaning of 'cause' see PARA 321 note 1. The fee payable on a request for directions for trial, other than in uncontested divorce or in dissolution proceedings, where no fee is payable, is £40: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 4.2.

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 As to the meanings of 'child' and 'protected party' see PARA 765 note 1.

4 Is any affidavit required by the Family Proceedings Rules 1991, SI 1991/1247, r 9.3(2): see PARA 1019.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(1)(a) (amended by SI 2007/2187).

6 As to the meaning of 'notice of intention to defend' see PARA 779 note 1.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(1)(b).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(1)(c).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(1)(d).

10 Is any application required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.22(1): see PARA 803.

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(1)(e)(i) (amended by SI 2005/2922).

12 Is an application under the Family Proceedings Rules 1991, SI 1991/1247, r 2.22: see PARA 803 et seq.

13 Is the notice required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.22(10): see PARA 805.

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(1)(e)(ii) (amended by SI 2005/2922).

15 As to the meaning of 'designated county court' see PARA 737 note 3.

16 As to the meaning of 'Principal Registry' see PARA 737 note 3.

17 Is subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3): see the text and note 22.

18 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(2) (amended by SI 2005/2922).

19 As to the meaning of 'undefended cause' see PARA 812.

20 Ie under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

21 Ie a petition for a decree of nullity under the Matrimonial Causes Act 1973 s 12(g) or an application for a nullity order under the Civil Partnership Act 2004 s 50(1)(d): see PARA 334. For this purpose, if the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition or application (ie the Matrimonial Causes Act 1973 s 1(2)(d) or the Civil Partnership Act 2004 s 44(5)(d) (see PARAS 347, 407 et seq) applies), the respondent must have filed a notice under the Family Proceedings Rules 1991, SI 1991/1247, r 2.10(1) (see PARA 786) that he consents to the grant of a decree or a civil partnership order: Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3) (substituted by SI 2005/2922). In the case of an undefended cause proceeding on the respondent's answer, the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3) has effect as if for the references to the petitioner and respondent there were substituted references to the respondent and the petitioner respectively: Family Proceedings Rules 1991, SI 1991/1247, r 2.24(7) (amended by SI 2005/2922).

22 Ie the information required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3), Appendix 1, Form M7(a), Form M7(b), Form M7(c), Form M7(d), Form M7(e), Form M7(f), or Form M7(g), whichever is appropriate.

23 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3A)(a) (r 2.24(3A) added by SI 2005/2922). In the case of an undefended cause proceeding on the respondent's answer, the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3A) has effect as if for the references to the petitioner and respondent there were substituted references to the respondent and the petitioner respectively: Family Proceedings Rules 1991, SI 1991/1247, r 2.24(7) (amended by SI 2005/2922).

24 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.2(2): see PARA 767.

25 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3A)(b) (as added: see note 23).

26 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3) (as substituted: see note 21). As to disposal of causes in the special procedure list generally see PARA 815.

27 As to the meaning of 'defended cause' see PARA 812.

28 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(4)(a).

29 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(4)(b).

30 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(4)(c). As to the meaning of 'child of the family' see PARA 707 note 9.

31 As to the meaning of 'proper officer' see PARA 461 note 5.

32 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(4).

33 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(5). All such requests for directions are now referred to a district judge for pre-trial review: see *Practice Direction* [1979] 1 All ER 112, [1979] 1 WLR 2.

34 Family Proceedings Rules 1991, SI 1991/1247, r 2.24(6) (amended by SI 2005/2922). In the case of an undefended cause proceeding on the respondent's answer, the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(6) has effect as if for the references to the petitioner and respondent there were substituted references to the respondent and the petitioner respectively: Family Proceedings Rules 1991, SI 1991/1247, r 2.24(7) (amended by SI 2005/2922).

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815. Disposal of causes in special procedure list.

As soon as practicable after a cause¹ has been entered in the special procedure list², the district judge³ must consider the evidence filed by the petitioner and:

- 1055 (1) if he is satisfied that the petitioner has sufficiently proved the contents of the petition and is entitled to a decree or a civil partnership order, must so certify⁴;
or
- 1056 (2) if he is not so satisfied, may either give the petitioner an opportunity of filing further evidence or remove the cause from the special procedure list⁵.

On the making of a certificate, a date must be fixed for the pronouncement of a decree or order by a judge⁶ or district judge in open court, and the proper officer⁷ must send to each party notice of the date and place so fixed and a copy of the certificate (although it is not necessary⁸ for any party to appear on that occasion)⁹.

Where the district judge makes a certificate and the petition contains a prayer for costs, the district judge may:

- 1057 (a) if satisfied that the petitioner is entitled to such costs, include in his certificate a statement to that effect¹⁰; or
- 1058 (b) if not so satisfied, give to any party who objects to paying such costs notice that, if he wishes to proceed with his objection, he must attend before the court on the date duly fixed¹¹.

Within 14 days after the pronouncement of a decree or order in accordance with such a certificate, any person may inspect the certificate and the evidence filed¹², except the statement of arrangements¹³, and may bespeak copies on payment of the prescribed fee¹⁴.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 As to the meaning of 'special procedure list' see PARA 814.

3 As to the meaning of 'district judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.36(1)(a) (amended by SI 2005/2922). The certificate, once granted, cannot be set aside unless it is shown that the decree has been obtained contrary to the justice of the case: *Moosa v Moosa* (1982) 4 FLR 131, 12 Fam Law 181, CA.

The objectives of the special procedure list are simplicity, speed and economy; accordingly, the district judge should not approach a special procedure matter in an over-meticulous or over-technical manner and should prefer substance to mere form. Provided that the petition and affidavit in support fulfil the essential statutory requirements, it is irrelevant that there are surplus matters in the petition or affidavit: *R v Nottingham County Court, ex p Byers* [1985] 1 All ER 735, [1985] 1 WLR 403.

As to the principles to be applied in deciding whether to grant an application by a respondent to file an answer out of time when a cause is entered in the special procedure list see *Day v Day* [1980] Fam 29, [1979] 2 All ER 187, CA; *Mitchell (formerly Puhlhofer) v Mitchell (formerly Puhlhofer)* [1984] Fam 1, sub nom *Mitchell v Mitchell* [1983] 3 All ER 621, CA.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.36(1)(b). Thereupon r 2.24(3) (see PARA 814) ceases to apply: r 2.36(1)(b).

6 As to the meaning of 'judge' see PARA 737 note 3.

7 As to the meaning of 'proper officer' see PARA 461 note 5.

8 Is subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.36(3): see the text and note 10.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.36(2) (amended by SI 2005/2922). Whatever the merits of the particular case, a court may not grant a decree nisi or a provisional order under the special procedure without giving notice to the respondent, quite apart from its duty under the Family Proceedings Rules 1991, SI 1991/1247, r 2.36(2) to do so; any other course of action is a breach of the rules of natural justice, and accordingly, the court may under its inherent jurisdiction set aside an order obtained without notice being duly given to the respondent: *Walker v Walker* [1987] 1 FLR 31, [1987] Fam Law 50, CA.

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.36(3)(a).

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.36(3)(b). The 'date duly fixed' is the date fixed pursuant to r 2.36(2): see the text and note 9.

12 Is under Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3): see PARA 814.

13 As to the statement of arrangements see PARA 767.

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.36(4) (amended by SI 1997/1893; SI 2005/2922). This does not apply to a certificate which relates to a decree of nullity of marriage under the Matrimonial Causes Act 1973 s 12(g) or a nullity order under the Civil Partnership Act 2004 s 50(1)(d) (nullity on gender reassignment grounds: see PARA 334; and see also, in connection with marriages celebrated before 1971, PARA 344): Family Proceedings Rules 1991, SI 1991/1247, r 2.36(5) (added by SI 2005/2922).

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816. Contents of request for directions.

In the case of an undefended cause¹ not entered in the special procedure list², the request for directions must state:

- 1059 (1) the place of trial desired³;
- 1060 (2) the place where the witnesses whom it is proposed to call at the trial reside⁴;
- 1061 (3) an estimate of the probable length of the trial⁵; and
- 1062 (4) any other fact which may be relevant in determining the place of trial⁶.

In the case of a defended cause⁷, the party intending to make a request for directions must, not less than eight days before making his request, give notice of the place of trial desired to every other party who has given notice of intention to defend⁸ and, if the party intending to make the request is the respondent, to the petitioner⁹. If any party to whom such notice is given does not consent to the place of trial specified in the notice, he may, within eight days after receiving it, apply to the district judge¹⁰ to direct trial at some other place; and, if he does consent to the place so specified, he must within that period send to the party by whom the notice was given a statement signed by his solicitor (or by him, if he is acting in person) indicating that the notice has been received¹¹.

Where no application for trial at some other place has been made within the eight-day period, the party making the request for directions must state in his request:

- 1063 (a) the place of trial desired¹²;
- 1064 (b) the number of witnesses to be called on his behalf and the places where he and his witnesses reside¹³;
- 1065 (c) if it be the case, that no statement has been received from any party (naming him) to whom notice was given¹⁴ of the place of trial desired¹⁵; and
- 1066 (d) an estimate of the probable length of the trial¹⁶,

and must file with the request any statement sent to him¹⁷ by any other party¹⁸.

Where in a defended cause the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent¹⁹, the district judge may, of his own motion on giving directions for trial or on the application of any party made at any time before the trial, order or authorise the party who has made the request for or obtained such directions to file a schedule of the allegations and counter-allegations made in pleadings or particulars²⁰.

1 As to the meaning of 'undefended cause' see PARA 812.

2 I.e. an undefended cause to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3) (see PARA 814) does not apply.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(2)(a).

- 4 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(2)(b).
- 5 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(2)(c). If circumstances arise tending to show that the estimate of the probable length of the trial so given is inaccurate, a further estimate must be filed: r 2.25(6).
- 6 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(2)(d).
- 7 As to the meaning of 'defended cause' see PARA 812.
- 8 As to the meaning of 'notice of intention to defend' see PARA 779 note 1.
- 9 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(3). The notice must state the number of witnesses to be called on behalf of the party giving the notice and the places where he and his witnesses reside: r 2.25(3).
- 10 As to the meaning of 'district judge' see PARA 737 note 3.
- 11 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(4). The notice must specify the number of witnesses to be called on that person's behalf and the places where he and his witnesses reside: r 2.25(4). If circumstances arise tending to show that the estimate of the probable length of the trial made on an application under r 2.25(4) is inaccurate, a further estimate must be filed: r 2.25(6).
- 12 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(5)(a).
- 13 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(5)(b).
- 14 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.25(3): see the text and notes 7-9.
- 15 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(5)(c).
- 16 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(5)(d). If circumstances arise tending to show that the estimate of the probable length of the trial so given is inaccurate, a further estimate must be filed: r 2.25(6).
- 17 Ie in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.25(4): see the text and notes 10-11.
- 18 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(5).
- 19 See the Matrimonial Causes Act 1973 s 1(2)(b); the Civil Partnership Act 2004 s 44(5)(a); and PARAS 347, 359, 360.
- 20 Family Proceedings Rules 1991, SI 1991/1247, r 2.26(1). Where such an order is made or authority given, the allegations and counter-allegations must, unless otherwise directed, be listed concisely in chronological order, each counter-allegation being set out against the allegation to which it relates, and the party filing the schedule must serve a copy of it on any other party to the cause who has filed a pleading: r 2.26(2).

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817. Directions for trial where there are concurrent proceedings in another jurisdiction.

Any party who makes a request for directions for trial in matrimonial or civil partnership proceedings¹ must, if there has been a change in the information given by him², file a statement giving particulars of the change³.

Where, on giving directions for trial, it appears to the district judge⁴ from any information given⁵ that any proceedings which are in respect of the marriage or civil partnership in question or which are capable of affecting its validity or subsistence are continuing in any country outside England and Wales⁶ and he considers that the question whether the proceedings on the petition should be stayed⁷ ought to be determined by the court, he must fix a date, time and place for the consideration of that question by a judge⁸ and give notice thereof to all parties⁹.

1 le within the meaning of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 2 (see PARA 840) or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1.2 (see PARA 840).

2 le pursuant to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j) (see PARA 756) and r 2.15(4) (see PARA 780).

3 Family Proceedings Rules 1991, SI 1991/1247, rr 2.27(4), 2.27AA(5) (r 2.27AA added by SI 2005/2922).

4 As to the meaning of 'district judge' see PARA 737 note 3.

5 le pursuant to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j) (see PARA 756) and r 2.15(4) (see PARA 780) or the Family Proceedings Rules 1991, SI 1991/1247, rr 2.27(4), 2.27AA(5) (see the text and notes 1-3).

6 For these purposes, 'proceedings continuing in any country outside England and Wales' has the same meaning as in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 2 para 1(j) (see PARA 756): rr 2.27(3), 2.27AA(4) (as added: see note 3).

7 le under the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9 (see PARA 842) or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4 (see PARA 842).

8 As to the meaning of 'judge' see PARA 737 note 3.

9 Family Proceedings Rules 1991, SI 1991/1247, rr 2.27(3), 2.27AA(3) (as added: see note 3).

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818. Determination of place of trial.

Directions for trial determine¹ the place of trial². In determining the place of trial, the district judge³ must have regard to all the circumstances of the case so far as it is possible for him to do so on the basis of the information available to him, including the convenience of the parties and their witnesses, the costs likely to be incurred, the date on which the trial can take place and the estimated length of the trial⁴.

1 le except where given under the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(3): see PARA 814.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(1).

3 As to the meaning of 'district judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(7).

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819. Varying directions as to place of trial.

Directions determining the place of trial of any cause¹ may be varied by the district judge² of the court or registry in which the cause is proceeding on the application of any party to the cause³.

1 See PARA 818.

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.25(8).

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820. Time of trial.

Except with the consent of the parties or by leave of a judge, no cause¹, whether defended or undefended², may be tried until after the expiration of ten days from the date on which directions for trial were given³; although this provision does not apply to a cause entered in the special procedure list⁴.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 As to the meanings of 'defended cause' and 'undefended cause' see PARA 812.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.35. As to the giving of directions for trial see PARA 814.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.35 proviso. As to the special procedure list see PARA 814.

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821. Place of trial.

Any cause¹ begun by petition, except one entered in the special procedure list², which is pending in a designated county court³ may be tried at any court of trial⁴. Any cause begun by petition which is pending in the High Court may be tried at the Royal Courts of Justice or at any divorce or dissolution town⁵. A judge⁶ or the district judge⁷ of the registry for the divorce or dissolution town⁸ at which any cause has been set down for trial may, where it appears to him that the cause cannot conveniently be tried at that town, order that it be tried at some other divorce or dissolution town⁹.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 As to the special procedure list see PARA 814.

3 As to the meaning of 'designated county court' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.32(2) (r 2.32(2), (3), (4), (6) amended, r 2.32(3A), (4A) added, by SI 2005/2922). For these purposes, unless the context otherwise requires, 'court of trial' means a divorce or civil partnership proceedings county court designated by the Lord Chancellor as a court of trial pursuant to the Matrimonial and Family Proceedings Act 1984 s 33(1) or s 36A(1)(b) (see PARA 732): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922). In matrimonial proceedings pending in a divorce county court, the Principal Registry is to be treated as a court of trial having its place of sitting at the Royal Courts of Justice: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (as so amended). As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732; as to the meaning of 'Principal Registry' see PARA 737 note 3; and as to the meaning of 'Royal Courts of Justice' see PARA 813 note 4.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.32(3), (3A) (as amended and added: see note 4). As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2.

6 As to the meaning of 'judge' see PARA 737 note 3.

7 As to the meaning of 'district judge' see PARA 737 note 3.

8 For these purposes, any reference to the registry for the divorce or dissolution town at which a cause is to be tried is, in relation to a divorce or dissolution town in which there is no district registry, to be construed as a reference to such district registry as the Lord Chancellor may designate for the purpose or, if the divorce or dissolution town is not situated within the district of any district registry, as a reference to the Principal Registry: Family Proceedings Rules 1991, SI 1991/1247, r 2.32(6) (as amended: see note 4). As to the meaning of 'district registry' see PARA 737 note 3.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.32(4), (4A) (as amended and added: see note 4). Rule 10.10(4), (5) (see PARA 747) applies to such an order as it applies to an order under r 10.10(1) (see PARA 747): r 2.32(4), (4A) (as so amended and added).

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822. Notice of hearing.

As soon as practicable after a cause¹ pending in a designated county court² has been set down for trial, the proper officer³ of the court of trial⁴ must fix the date, place and, as nearly as may be, the time of the trial and give notice thereof to every party to the cause⁵. In general, a cause may not be tried until after the expiration of ten days from the date on which the directions for trial were given⁶.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 As to the meaning of 'designated county court' see PARA 737 note 3.

3 As to the meaning of 'proper officer' see PARA 461 note 5.

4 As to the meaning of 'court of trial' see PARA 821 note 4.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.32(5) (amended by SI 2005/2922).

6 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.35; and PARA 820.

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D. MODE OF TRIAL

823. Trial ordinarily by judge without jury.

Unless otherwise directed, and subject to the provisions as to the disposal of causes in the special procedure list¹, every cause² and any issue arising in it must be tried by a judge³ without a jury⁴.

1 le subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.36: see PARA 815.

2 As to the meaning of 'cause' see PARA 321 note 1.

3 As to the meaning of 'judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.32(1).

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824. Separate trial of issues.

Where directions are given for the separate trial of any issue, and those directions have been complied with, the district judge¹ must:

- 1067 (1) if the issue arises on application for financial relief or on an application with respect to any child² or alleged child of the family³, proceed as if the issue were a question referred to a judge⁴ on application for financial relief⁵; and
1068 (2) in any other case, set the issue down for trial⁶.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 As to the meaning of 'child' see PARA 765 note 1.

3 As to the meaning of 'child of the family' see PARA 707 note 9.

4 As to the meaning of 'judge' see PARA 737 note 3.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.33(a). Rule 2.65 (see PARA 936) applies accordingly: r 2.33(a).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.33(b). Thereupon r 2.32(5), (6) (see PARAS 821-822) applies as if the issue were a cause: r 2.33(b). As to the meaning of 'cause' see PARA 321 note 1.

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(v) Witnesses and Evidence

825. Evidence in matrimonial and civil partnership proceedings generally.

Defended divorces and dissolutions are generally dealt with under the special procedure list¹, which is more an administrative than a judicial process. Hence evidential questions arise only to a limited extent: however any fact required to be proved by the evidence of witnesses at the trial of a cause² begun by petition must³ be proved by the examination of the witnesses orally and in open court⁴. The evidence of a petitioner must be adduced at the hearing but the court has jurisdiction to determine the issue before it in favour of a party who is not called as a witness and who does not otherwise give evidence, although this jurisdiction will be exercised in only the most exceptional cases⁵.

The judge⁶ at the trial has power⁷ to refuse to admit any evidence if in the interest of justice he thinks fit to do so⁸.

1 As to the special procedure list see PARAS 814-815.

2 As to the meaning of 'cause' see PARA 321 note 1.

3 I.e. subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.28(2)-(5) (see PARA 837), r 2.29 (see PARA 838), r 10.14 (see PARA 835) and the Civil Evidence Act 1995 (see **CIVIL PROCEDURE**).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(1) (amended by SI 1997/1056).

5 *Black v Black (May intervening)* [1960] 1 All ER 251, [1960] 1 WLR 182 (wife, an American citizen resident in the United States of America, ought not to be put to additional expense, she having already obtained a divorce in the United States which was not recognised in England: held this was such an 'exceptional case'); *R v R (by her guardian)* (1965) 109 Sol Jo 154 (wife, because of mental incapacity, not able to understand the court proceedings: husband gave evidence: decree to wife); cf *Webster v Webster (by her guardian)* [1967] 3 All ER 560n, [1968] 1 WLR 372n. Where, in an undefended case on the ground of adultery, the petitioner could speak to nothing but the marriage, persons who were present could, in his unavoidable absence, be permitted to prove its celebration: *Nicolson v Nicolson and Fairley* (1892) 68 LT 28. In addition to the evidence of the petitioner, the production of a regular certificate of a marriage has been held to be usual, but not essential: *Woods v Woods* (1840) 2 Curt 516. As to proof of marriage generally see PARA 21 et seq; and as to proof of marriages celebrated outside England and Wales see PARAS 27-30, 835. As to the admissibility of hearsay evidence see **CIVIL PROCEDURE** vol 11 (2009) PARA 808 et seq.

6 As to the meaning of 'judge' see PARA 737 note 3.

7 I.e. notwithstanding the Family Proceedings Rules 1991, SI 1991/1247, r 2.28 (see PARAS 825, 837), r 2.29 (see PARA 838) and r 10.14 (see PARA 835).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(2).

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826. Issue of witness summons or subpoena.

A witness summons in a cause¹ pending in a designated county court² may be issued in that court or in the court of trial³ at which the cause is to be tried⁴.

A writ of subpoena in a cause pending in the High Court may issue out of:

- 1069 (1) the registry in which the cause is proceeding⁵;
- 1070 (2) if the cause is to be tried at the Royal Courts of Justice⁶, the Principal Registry⁷; or
- 1071 (3) if the cause is to be tried at a divorce town or a dissolution town⁸, the registry for that town⁹.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 As to the meaning of 'designated county court' see PARA 737 note 3.

3 As to the meaning of 'court of trial' see PARA 821 note 4.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.30(1) (substituted by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.30(2)(a).

6 As to the meaning of 'Royal Courts of Justice' see PARA 813 note 4.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.30(2)(b). As to the meaning of 'Principal Registry' see PARA 737 note 3.

8 As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.30(2)(c) (amended by SI 2005/2922).

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827. Expert evidence.

In certain cases a party will need to call an expert or experts in support of his case¹, and it is desirable, in any case in which expert evidence is to be adduced, that a report should be produced to the other side for agreement, if possible². If the expert evidence is that of a doctor, it may often be expedient to incorporate or exhibit any relevant clinical notes, where necessary similarly explained and where each side has an expert and a report cannot be agreed, reports should at least be exchanged³.

In family proceedings it is wholly inappropriate for one party to instruct an expert witness without the knowledge of the court or the other party's advisers and contrary to good practice to seek to avoid obtaining the court's permission by providing information anonymously, nor should experts accept instructions unless explicitly informed that the court has given permission for them to be instructed and what the terms of the court order relating to their instructions are⁴.

1 As to expert witnesses see **CIVIL PROCEDURE** vol 11 (2009) PARA 835 et seq.

2 *Practice Direction* [1967] 3 All ER 208, [1967] 1 WLR 1240.

3 *Practice Direction* [1967] 3 All ER 208, [1967] 1 WLR 1240.

4 *Re A (children) (contact: expert evidence)* (2001) Times, 27 February. As to expert witnesses in proceedings for financial relief see PARAS 914, 932.

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828. Competence and compellability of parties.

The parties to any civil proceedings, and the spouses and civil partners of such parties, are competent to give evidence in the proceedings¹. A witness in any proceedings instituted in consequence of adultery, whether a party to the proceedings or not, is not excused from answering any question by reason that it tends to show that he or she had been guilty of adultery².

1 See the Evidence Act 1851 s 2; the Evidence Amendment Act 1853 s 1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 966. As to the competence and compellability of spouses and civil partners as witnesses in civil proceedings generally see PARA 212.

2 See the Civil Evidence Act 1968 s 16(5); and **CIVIL PROCEDURE** vol 11 (2009) PARA 970. In proceedings not founded on adultery, such questions could be asked even before the coming into operation of the Civil Evidence Act 1968 s 16(5): see eg *Lewis v Lewis* [1958] P 193, [1958] 1 All ER 859, CA; *Clifford v Clifford* [1961] 3 All ER 231, [1961] 1 WLR 1274. As to the discovery of documents relating to adultery and interrogatories relating to adultery see PARA 799.

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829. Cases where adultery is alleged.

A witness is no longer protected against questions relating to adultery¹. The use of a confession as evidence of adultery², the proof of adultery by evidence of the birth of a child of which the husband cannot be the father³, and other ways of proving adultery⁴ are dealt with elsewhere⁵.

1 See PARA 828.

2 See PARA 354.

3 See PARA 355.

4 See PARA 352 et seq.

5 For interrogatories as to adultery see PARA 354.

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830. Evidential effect of other proceedings.

On any petition for divorce or dissolution, if the petitioner or respondent has at any time been granted, on the same or substantially the same facts as those proved in support of the petition for divorce or dissolution:

- 1072 (1) a decree of judicial separation or a separation order¹;
- 1073 (2) an order for financial relief during the subsistence of a marriage or a civil partnership²; or
- 1074 (3) in the case of civil partnerships only, an occupation order³ or an order that neither civil partner is entitled to occupy the civil partnership home⁴,

the court⁵ may treat the applicable decree or order as sufficient proof of the fact by reference to which it was granted, although it must not grant a decree of divorce or make a dissolution order without receiving evidence from the petitioner⁶. Although evidence of the findings of the court in the previous proceedings is admissible in the proceedings for the divorce or dissolution, the court hearing the divorce or dissolution proceedings is not bound to accept the earlier judgment as conclusive and no doctrine of estoppel operates to abrogate the duty of the court to inquire into the truth of the petition⁷.

Convictions are also admissible as evidence in any civil proceedings⁸, but spent convictions may not as a general rule be mentioned in evidence⁹.

1 As to judicial separation and separation orders see PARA 346 et seq.

2 As to orders for financial relief during the subsistence of a marriage or a civil partnership see the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35); the Civil Partnership Act 2004 Sch 6; and PARA 553 et seq. As to the duty of justices' chief executives to supply properly authenticated copies of orders see *Hearn and Jarvis* [1953] 1 All ER 797n.

3 I.e. an order under the Family Law Act 1996 s 33: see PARA 292 et seq.

4 I.e. an order under the Family Law Act 1996 s 37: see PARA 305 et seq.

5 As to the meaning of 'court' see PARA 346 note 2.

6 See the Matrimonial Causes Act 1973 s 4(1), (2); Civil Partnership Act 2004 s 46(1)-(3); and PARA 758. These provisions apply also to orders made under, or having effect as if made under, the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (repealed) or any corresponding enactments in force in Northern Ireland, the Isle of Man or any of the Channel Islands. See also *Ellis v Ellis and Wilby* [1962] 1 All ER 797, [1962] 1 WLR 450, CA (magistrates' order adduced against petitioner).

7 See *Hudson v Hudson* [1948] P 292, [1948] 1 All ER 773, applying dicta in *Harriman v Harriman* [1909] P 123 at 143, CA; *Kara v Kara and Holman* [1948] P 287, [1948] 2 All ER 16, CA; cf *Winter v Winter* [1942] P 151, [1942] 2 All ER 390 (rehearing ordered where respondent had not contested first hearing); *Lake v Lake* [1955] P 336, [1955] 2 All ER 538, CA (finding that adultery had been committed but condoned); *Turner v Turner* [1962] P 283, [1961] 3 All ER 944, CA (appeal allowed on ground which included failure of judge to give proper weight to findings of magistrate). See further PARA 734.

8 See the Civil Evidence Act 1968 s 11(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1208.

9 See the Rehabilitation of Offenders Act 1974 s 4(1); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660. Section 4(1) is limited in its effect by the provisions of s 7: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660.

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831. Cross-examination.

The rules as to cross-examination are the same in the Family Division as in other divisions. In certain circumstances it is competent for a party to seek to prove that his own witness has formerly made a statement inconsistent with his present testimony¹. The answers of a party cross-examined as to credit, on matters not in issue, are in general conclusive². A petitioner can be cross-examined as to his alleged conduct though the answer is a bare denial³.

The court may limit the issues on which an officer of the service or a Welsh family proceedings officer⁴ may be cross-examined⁵.

1 See the Criminal Procedure Act 1865 s 3; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1436; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 1047-1048. See also s 4 (proof of contradictory statement of adverse witness: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1445; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1049); s 5 (cross-examination as to previous statements in writing: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1445; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1049); *Ryberg v Ryberg and Smith* (1863) 32 LJPM & A 112. The provisions of the Criminal Procedure Act 1865 ss 4, 5 apply to civil, as well as criminal proceedings: s 1.

Without prejudice to any provision made by rules of court under the Civil Evidence Act 1995 s 3 (power to call witness for cross-examination on hearsay statement: see **CIVIL PROCEDURE** vol 11 (2009) PARA 814), where, in the case of civil proceedings, the Criminal Procedure Act 1865 s 3, s 4 or s 5 applies, the Civil Evidence Act 1995 does not authorise the adducing of evidence of a previous inconsistent or contradictory statement otherwise than in accordance with the Criminal Procedure Act 1865 s 3, s 4 or s 5: Civil Evidence Act 1995 s 6(3).

2 *Baker v Baker* (1863) 3 Sw & Tr 213; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1433, 1504; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1050. See also *Edwards v Edwards and Wilson* (1899) Times, 17, 20 June, in which it was held that a wife who has made a confession which is not believed nor acted on by her husband could not be cross-examined on behalf of the man against whom she made it if he was not a party to the suit. As to cross-examination as to previous inconsistent statements see the enactments cited in note 1.

3 *Finch v Finch (Hayes intervening)* [1960] 2 All ER 52, [1960] 1 WLR 429.

4 'Officer of the service' has the same meaning as in the Criminal Justice and Court Services Act 2000 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 230) and 'Welsh family proceedings officer' has the same meaning as in the Children Act 2004 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 230): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2001/821; SI 2005/559).

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.14A (added by SI 2001/821; amended by SI 2005/559).

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832. Conflicting testimony.

Where the evidence of the parties is conflicting and, where applicable, the medical evidence inconclusive, the court is not relieved from the duty of weighing the evidence and may act on the evidence of the petitioner, even if it is contradicted by the respondent¹. Corroboration of the evidence of a petitioner or other witness in matrimonial or civil partnership proceedings is not required as a matter of law². Any fact will be corroboration which renders it more probable that the witness's testimony is true on any material point³.

1 *C (otherwise H) v C* [1921] P 399; and see *U (falsely called J) v J* (1867) LR 1 P & D 460; *Cuno v Cuno* (1873) LR 2 Sc & Div 300, HL.

2 See *Hodgkins v Hodgkins* [1950] P 183, [1950] 1 All ER 619, CA (no corroboration; decree). See also PARAS 354, 370 note 2.

3 *Senat v Senat* [1965] P 172 at 175, [1965] 2 All ER 505 at 507 per Sir Jocelyn Simon P.

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833. Matters in respect of which privilege may be claimed.

Communications made in the course of negotiations for reconciliation are privileged and cannot generally be admitted in evidence without the parties' consent¹; the privilege is that of the parties, not of the conciliator². The rule applies to communications made, with a view to reconciliation, between the parties themselves without intermediaries³, as well as to cases where negotiations are made through probation officers, clergy, doctors, marriage guidance counsellors and the like; the fact that the communications are made without prejudice need not be expressly stated, but may be a matter of tacit understanding⁴. Privilege attaches whether the initiative for reconciliation comes from one of the parties or from the conciliator himself⁵.

Medical practitioners cannot refuse to give evidence, even if treating a patient under a national scheme which promises secrecy⁶, and they must produce letters written by a party to them, if called on to do so⁷. A medical practitioner is not justified in refusing to disclose confidential information to a named person when asked by his patient to do so⁸.

A communication made by a party to a matrimonial or civil partnership cause to his solicitor is generally privileged⁹.

It has been held that a justices' clerk (now a designated officer for a magistrates' court) could not claim privilege to refuse to give evidence of proceedings at which he was present if the evidence was admissible and relevant¹⁰.

1 This exclusion is analogous to the exclusion of communications made 'without prejudice'. As to the exclusion of such communications see **CIVIL PROCEDURE** vol 11 (2009) PARAS 804, 805. As to reconciliation generally see PARA 414 et seq.

2 *McTaggart v McTaggart* [1949] P 94, [1948] 2 All ER 754, CA (where the privilege was held to have been waived by the parties); *Pais v Pais* [1971] P 119, [1970] 3 All ER 491. In *Major v Major* (9, 10 March 1959, unreported), a claim of privilege was made by the National Society for the Prevention of Cruelty to Children in respect of a report made by one of the officers of the society; the report was not in any way connected with reconciliation; it was held by Hewson J that the claim of privilege could not be sustained, and the report was admitted in evidence.

3 *Theodoropoulos v Theodoropoulos* [1964] P 311, [1963] 2 All ER 772.

4 *McTaggart v McTaggart* [1949] P 94, [1948] 2 All ER 754, CA; *Mole v Mole* [1951] P 21, [1950] 2 All ER 328, CA, doubting *Bostock v Bostock* [1950] P 154, [1950] 1 All ER 25 (where a meeting between the parties and their solicitors with a view to reconciliation was held not to be without prejudice unless expressly stated to be so); and see *Pool v Pool* [1951] P 470, [1951] 2 All ER 563 (meetings between counsel and solicitors of parties in presence of husband but not wife; it was held that there was tacit understanding that the meetings were without prejudice and that the meetings were privileged), not following *Bostock v Bostock*.

In *Broome v Broome (Edmundson cited)* [1955] P 190, [1955] 1 All ER 201, the privilege attaching to communications in the course of negotiations for reconciliation was treated as extending to an attempt at reconciliation by an officer of the Soldiers', Sailors' and Airmen's Families Association, but a claim by the Crown to exclude all evidence desired to be adduced by that officer, on the ground that such exclusion was necessary to maintain the morale of the forces, and so was a matter of public interest, was not accepted on procedural grounds. As to Crown privilege in respect of documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 574 et seq; **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 130.

5 *Henley v Henley (Bligh cited)* [1955] P 202, [1955] 1 All ER 590n (clergyman taking initiative towards reconciliation).

6 *Garner v Garner* (1920) 36 TLR 196; *Nuttall v Nuttall and Twyman* (1964) 108 Sol Jo 605.

7 *Atkinson v Atkinson* (1825) 2 Add 468. It seems that the decision in *Witt v Witt and Klindworth* (1862) 3 Sw & Tr 143, that letters to a medical adviser should not be admitted, cannot be supported. Steps should be taken to ensure that relevant medical records are available in court: *Abell v Abell* (1965) 109 Sol Jo 873n. The correct procedure is for a subpoena to be served on the doctor to produce medical records; on production to the court, the court then makes those records available for inspection by the party issuing the subpoena: *Corbett v Corbett (otherwise Ashley)* (1969) 113 Sol Jo 982. For cases in which Crown privilege was claimed in respect of medical records see *Anthony v Anthony* (1919) 35 TLR 559 (army medical history sheets); *Gain v Gain* [1962] 1 All ER 63, [1961] 1 WLR 1469 (naval medical records). Those cases must be considered in conjunction with the decision in *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL, that a Minister's certificate claiming privilege is not conclusive against disclosure: see **CIVIL PROCEDURE** vol 11 (2009) PARA 579. As to notices to produce documents see PARA 802.

8 *C v C* [1946] 1 All ER 562 (doctor refused to disclose information except in court).

9 *Mole v Mole* [1951] P 21, [1950] 2 All ER 328, CA; *Pool v Pool* [1951] P 470, [1951] 2 All ER 563 (both cases relating to negotiations for reconciliation and disapproving *Bostock v Bostock* [1950] P 154, [1950] 1 All ER 25; see note 4); *Branford v Branford* (1879) 4 PD 72; and see *Harris v Harris* [1931] P 10. The basis of privilege in discovery of documents covers foreign legal advisers as it does English lawyers, provided that the relationship of lawyer and client subsists: *Re Duncan, Garfield v Fay* [1968] P 306, [1968] 2 All ER 395. As to privilege in adultery cases see PARA 828. As to the confidentiality of communications between a legal adviser and his client see **CIVIL PROCEDURE** vol 11 (2009) PARAS 558 et seq, 972; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 740.

10 *McKinley v McKinley* [1960] 1 All ER 476, [1960] 1 WLR 120.

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834. Sexual capacity in nullity cases.

In any proceedings for nullity of marriage¹, evidence on the question of sexual capacity must be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court².

1 As to proceedings for nullity of marriage see PARA 319 et seq.

2 See the Matrimonial Causes Act 1973 s 48(2); and PARA 336.

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835. Proof of marriages or overseas relationships celebrated outside England and Wales.

The celebration of a marriage or an overseas relationship other than marriage outside England and Wales and its validity under the law of the country where it was celebrated or formed may, in any family proceedings in which the existence and validity of the marriage or relationship are not disputed, be proved by the evidence of one of the parties to the marriage or relationship and the production of a document purporting to be:

- 1075 (1) a certificate or similar document issued under the law in force in that country evidencing its celebration or formation¹; or
- 1076 (2) a certified copy of an entry in a register of marriages or register of such relationships kept under the law in force in that country².

Where a document so produced is not in English, it must, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit³.

These provisions are not to be construed as precluding the proof of a marriage or the existence of an overseas relationship which is not marriage in accordance with the Evidence (Foreign, Dominion and Colonial Documents) Act 1933⁴ or in any other manner authorised apart from these provisions⁵.

1 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(1)(a), (1A)(a) (r 10.14(1A) added, r 10.14(2), (3) amended, by SI 2005/2922).

2 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(1)(b), (1A)(b) (r 10.14(1A) as added: see note 1).

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(2) (as amended: see note 1).

4 As to the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 see **CIVIL PROCEDURE** vol 11 (2009) PARAS 922, 923.

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(3) (as amended: see note 1).

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836. Evidence of identity.

In a matrimonial or civil partnership cause it is necessary to establish the identity of the person to whom the evidence relates¹.

¹ *Rooker v Rooker and Newton* (1863) 3 Sw & Tr 526. As to bigamy cases see *Searle v Price (falsely called Searle)* (1816) 2 Hag Con 187. As to proof of service see PARA 776.

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837. Evidence by affidavit.

On any application made in a county court¹ or in the High Court², evidence may be given by affidavit unless otherwise provided³ or otherwise directed by the court, although the court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit and where after such an order has been made that person does not attend, his affidavit may not be used as evidence without the leave of the court⁴.

The court may order:

1077 (1) that the affidavit of any witness may be read at the trial on such conditions as the court thinks reasonable⁵;

1078 (2) that the evidence of any particular fact is to be given at the trial in such manner as may be specified in the order and in particular:

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3. (a) by statement on oath of information or belief⁶;
4. (b) by the production of documents or entries in books⁷;
5. (c) by copies of documents or entries in books⁸; or
6. (d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of a specified newspaper containing a statement of that fact⁹; and

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1079 (3) that not more than a specified number of expert witnesses may be called¹⁰.

An application to the district judge for such an order must:

1080 (i) if no notice of intention to defend¹¹ has been given¹²;

1081 (ii) if the petitioner and every party who has given notice of intention to defend consents to the order sought¹³; or

1082 (iii) if the cause is undefended¹⁴ and directions for trial have been given,

be made without notice by filing an affidavit stating the grounds on which the application is made¹⁵.

Where an application is made before the trial for an order that the affidavit of a witness may be read at the trial or that evidence of a particular fact may be given at the trial by affidavit, the proposed affidavit or a draft thereof must be submitted with the application; and, where the affidavit is sworn before the hearing of the application and sufficiently states the ground on which the application is made, no other affidavit is¹⁶ required¹⁷.

1 le by originating application or in accordance with CCR Ord 13 r 1 (applications in the course of proceedings): Family Proceedings Rules 1991, SI 1991/1247, r 10.12(a). As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

2 le by originating summons, notice or motion: Family Proceedings Rules 1991, SI 1991/1247, r 10.12(b).

3 le by the Family Proceedings Rules 1991, SI 1991/1247.

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.12. In relation to family proceedings pending or treated as pending in a designated county court, an affidavit may be sworn before the judge or district judge of any court, any justice of the peace, an officer of any court appointed by the judge of that court for the purpose, a commissioner for oaths or any other person authorised to take affidavits under the Commissioners for Oaths Acts 1889 and 1891 (see **CIVIL PROCEDURE** vol 11 (2009) PARAS 1026-1027), a district judge of the Principal Registry, any officer of the Principal Registry authorised by the President under the Commissioners for Oaths Act 1889 s 2 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 1026), or any clerk in the Central Office of the Royal Courts of Justice authorised to take affidavits for the purposes of proceedings in the Supreme Court: County Courts Act 1984 s 58(1) (amended by the Administration of Justice Act 1985 Sch 7 para 8, Sch 8 Pt II; and the Courts and Legal Services Act 1990 s 74(1), (3)); Family Proceedings Rules 1991, SI 1991/1247, r 10.13. As to the meaning of 'designated county court' see PARA 737 note 3. As to the meanings of 'district judge' and 'Principal Registry' see PARA 737 note 3.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(3)(a).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(3)(b)(i).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(3)(b)(ii).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(3)(b)(iii).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(3)(b)(iv).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(3)(c).

11 As to the meaning of 'notice of intention to defend' see PARA 779.

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(4)(a).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(4)(b).

14 As to the meaning of 'undefended cause' see PARA 812.

15 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(4)(c).

16 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.28(4) (see the text and notes 11-15).

17 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(5).

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838. Examination of witnesses out of court.

On the application of any party to a cause¹ begun by petition, the court may make an order² for the examination on oath of any person³.

1 As to the meaning of 'cause' see PARA 321 note 1.

2 I.e. under CCR Ord 20 r 13 or, if the cause is pending in the High Court, under RSC Ord 39 r 1. As to the continued application of the Rules of the Supreme Court and the county court rules in matrimonial and civil partnership proceedings see PARA 1005.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.29 (amended by SI 1997/1893). Accordingly, the cited rules have effect with the appropriate modifications: Family Proceedings Rules 1991, SI 1991/1247, r 2.29.

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(vi) Stay of Proceedings

A. STAY OF PROCEEDINGS PENDING ACTIONS IN OTHER JURISDICTIONS

839. Pending actions in other jurisdictions.

Where proceedings for divorce, dissolution, legal separation or annulment¹ between the same parties are brought before courts² of different member states³, the court second seised⁴ must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established⁵. Where the jurisdiction of the court first seised is established, the court second seised must decline jurisdiction in favour of that court; and, in that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised⁶.

An application for an order under these provisions must be made to a district judge⁷, who may determine the application or refer the application, or any question arising thereon, to a judge⁸ for his decision as if the application were an application for financial relief⁹. Where, at any time after the presentation of a petition, it appears to the court that the court does not have jurisdiction¹⁰ to hear the petition and is required or may be required to stay the proceedings, the court must stay the proceedings and fix a date for a hearing to determine the questions of jurisdiction and whether there should be a stay or other order and must serve notice of the hearing on the parties to the proceedings¹¹. The court must give reasons for its decision¹² and, where it makes a finding of fact, state such finding of fact¹³. An order¹⁴ that the court has no jurisdiction over the proceedings must be recorded by the court or the proper officer¹⁵ in writing¹⁶. If all parties agree, the court may deal with any question about the jurisdiction of the court without a hearing¹⁷.

Where recognition is sought of a judgment given in civil partnership (or corresponding) proceedings in a member state and an appeal against that judgment has been lodged in a member state, the court may stay the proceedings¹⁸.

1 Although EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, from which this paragraph largely derives, is concerned only with proceedings involving marriage and does not explicitly refer to civil partnerships or similar relationships, it may be inferred that these provisions apply equally to both marriages and civil partnerships.

2 As to the meaning of 'court' see PARA 751 note 1.

3 As to the meaning of 'member state' see PARA 751 note 1.

4 For these purposes, a court is deemed to be seised: (1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or (2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court: EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 16(1).

5 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 19(1). With regard to the application and scope of these provisions see *Chorley v Chorley* [2005] EWCA Civ 68, [2005] 1 WLR 1469, [2005] 2 FLR 38.

6 EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 19(3).

7 As to the meaning of 'district judge' see PARA 737 note 3.

8 As to the meaning of 'judge' see PARA 737 note 3.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.27A(1) (r 2.27A added by SI 2001/821; Family Proceedings Rules 1991, SI 1991/1247, r 2.27A(1)-(4) amended by SI 2005/264). With regard to the application and scope of the Family Proceedings Rules 1991, SI 1991/1247, r 2.27A, see *Chorley v Chorley* [2005] EWCA Civ 68, [2005] 1 WLR 1469, [2005] 2 FLR 38.

10 Ie under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 16 (see note 4), art 17 (see PARA 754), art 18 (see PARA 754) or art 19 (see the text and notes 1-6).

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.27A(2) (as added and amended: see note 9).

12 See note 10.

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.27A(3) (as added and amended: see note 9).

14 Ie under EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) art 17.

15 As to the meaning of 'proper officer' see PARA 461 note 5.

16 Family Proceedings Rules 1991, SI 1991/1247, r 2.27A(4) (as added and amended: see note 9).

17 Family Proceedings Rules 1991, SI 1991/1247, r 2.27A(5) (as added: see note 9).

18 Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005, SI 2005/3334, reg 12.

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840. Duty to furnish particulars of concurrent proceedings in another jurisdiction.

Where matrimonial or civil partnership proceedings¹ are pending in the court² in respect of a marriage or civil partnership and the trial in those proceedings³ has not begun, it is the duty of the petitioner, or a respondent who has included a prayer for relief in his answer, to provide to the court particulars as to whether there are any proceedings continuing⁴ in any country outside England and Wales which relate to the marriage or civil partnership or are capable of affecting its validity or subsistence⁵.

1 'Matrimonial proceedings' and 'civil partnership proceedings' mean any proceedings so far as they are one or more of the five following kinds, namely:

- 193 (1) proceedings for divorce or a dissolution order (Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 1, 2; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(a), (b)(i));
- 194 (2) proceedings for judicial separation or a separation order (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 2; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(b)(ii));
- 195 (3) proceedings for nullity of marriage or a nullity order (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 2; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(b)(iii));
- 196 (4) proceedings for a declaration as to the validity of a marriage or a civil partnership of the petitioner (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 2; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(b)(iv)); or
- 197 (5) proceedings for a declaration as to the subsistence of a marriage or a civil partnership (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 2; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(b)(v)).

As to proceedings for divorce or a dissolution order see PARA 346 et seq; as to proceedings for judicial separation or a separation order see PARA 346 et seq; as to proceedings for nullity of marriage or a nullity order see PARA 863; as to proceedings for a declaration as to the validity of a marriage or a civil partnership see PARA 421; and as to proceedings for a declaration as to the subsistence of a marriage or a civil partnership see PARA 421.

The Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, are made under the Civil Partnership Act 2004 s 223, which provides that rules of court may make provision in relation to civil partnerships corresponding to the provision made in relation to marriages, in particular:

- 198 (a) for the provision of information by applicants and respondents in proceedings for dissolution, nullity or separation orders where proceedings relating to the same civil partnership are continuing in another jurisdiction (s 223(2)(a)), and;
- 199 (b) for proceedings before the court to be stayed by the court where there are concurrent proceedings elsewhere in respect of the same civil partnership (s 223(2)(b)).

2 As to the meaning of 'court' see PARA 750 note 1.

3 ie the trial of issues in the main suit and not to a hearing relating to custody or ancillary relief: see *Thyssen-Bornemisza v Thyssen-Bornemisza* [1986] Fam 1, [1985] 1 All ER 328, CA. References to the trial in

any proceedings are, where there is more than one trial, references to the first trial in those proceedings, but do not include the separate trial of an issue as to jurisdiction only: see the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 4(1) and the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(e).

4 Proceedings are 'continuing' if they are pending and not stayed: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 4(2); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(h).

5 Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 5, 7; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 2. These are the particulars required by the Family Proceedings Rules 1991, SI 1991/2754, Appendix 2 para 1(j) (see PARA 756), and where they are to be provided by the respondent they need only be provided to the extent that they have not been provided by the petitioner: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 7; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 2. If, at any time after the beginning of the trial (see note 3) in any matrimonial or civil partnership proceedings which are pending in the court, the court declares by order that it is satisfied that a person has failed to perform the duty imposed on him by the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 7 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 2, the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1) and the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(1), (2) (discretionary stays: see PARA 842) have effect, with appropriate modifications, in relation to those proceedings and to the other proceedings by reference to which the declaration is made (although no action lies in respect of the failure of a person to perform such a duty): Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(4); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(5)-(7).

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841. Obligatory stays.

Where, before the beginning of the trial in any proceedings¹ for divorce or a dissolution order which are continuing² in the court³, it appears to the court on the application of a party to the marriage or civil partnership⁴:

- 1083 (1) that in respect of the same marriage or civil partnership proceedings for divorce, dissolution or annulment are continuing in a related jurisdiction⁵;
- 1084 (2) that the parties to the marriage or civil partnership have lived together after its celebration or formation⁶;
- 1085 (3) that the place where they lived together when the proceedings in the court were begun or, if they did not then live together, where they last lived together before those proceedings were begun, is in that jurisdiction⁷; and
- 1086 (4) that either of the parties was habitually resident⁸ in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the court were begun⁹,

it is the duty of the court¹⁰ to order that the proceedings in the court be stayed¹¹.

These provisions do not affect any power of the court to stay proceedings apart from that provided by these provisions¹².

1 See PARA 840 note 3.

2 As to when proceedings are 'continuing' see PARA 840 note 4.

3 Where the proceedings before the court are also proceedings other than for a divorce or a dissolution order, these provisions apply only to the proceedings so far as they are for a divorce or dissolution order: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3(2). As to the meaning of 'court' see PARA 750 note 1.

4 An application to the court by the petitioner or respondent in proceedings for divorce or a dissolution order for an order under these provisions must be made to the district judge, who may determine the application or refer the application, or any question arising thereon, to a judge for his decision as if the application were an application for financial relief: Family Proceedings Rules 1991, SI 1991/1247, rr 2.27(1), 2.27AA(1) (r 2.27AA added by SI 2005/2922). As to the meanings of 'district judge' and 'judge' see PARA 737 note 3.

5 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(a); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3(1)(a). For these purposes, 'related jurisdiction' means any of the following countries, namely Scotland, Northern Ireland, Jersey, Guernsey and the Isle of Man, the reference to Guernsey being treated as including Alderney and Sark: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 3(2); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(2)(d).

6 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3(1)(b).

7 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(c); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3(1)(c).

8 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59.

9 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(d); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3(1)(d).

10 le subject to the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 10(2) and the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 5(3): see PARA 843.

11 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(1); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3(1); and see *T v T (custody: jurisdiction)* [1992] 1 FCR 329, [1992] 1 FLR 43; *A v A (forum conveniens)* [1999] 3 FCR 376, [1999] 1 FLR 1 (where there are divorce or dissolution proceedings current in both England and Wales and in Scotland, the potential conflict of jurisdiction is to be resolved according to the provisions of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 and the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921; but, if the obligatory stay imposed by the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3 does not apply, the court must consider under the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4 (see PARA 842) which forum is more suitable or appropriate).

12 Domicile and Matrimonial Proceedings Act 1973 s 5(6)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 10.

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842. Discretionary stays.

Where, before the beginning of the trial¹ in any matrimonial or civil partnership proceedings², it appears to the court³ that any relevant proceedings⁴ are continuing⁵ in another jurisdiction⁶ and that the balance of fairness, including convenience, as between the parties to the marriage or civil partnership makes it appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial or civil partnership proceedings⁷, the court may, if it thinks fit, order⁸ that the proceedings in the court be stayed or, as the case may be, that those proceedings be stayed so far as they consist of proceedings of that kind⁹.

In the case of any proceedings so far as they are proceedings for divorce or dissolution, the court must not exercise these powers while an application for an obligatory stay¹⁰ in respect of the proceedings is pending¹¹.

These provisions do not affect any power of the court to stay proceedings apart from that provided by these provisions¹².

1 See PARA 840 note 3.

2 Ie other than proceedings governed by EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility: see the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1) (amended by SI 2001/310); and PARA 839 note 1. As to the meanings of 'matrimonial proceedings' and 'civil partnership proceedings' see PARA 840 note 1.

3 As to the meaning of 'court' see PARA 750 note 1.

4 Ie proceedings in respect of the marriage or civil partnership in question or capable of affecting its validity or subsistence: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1)(a); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(1)(i).

5 As to when proceedings are continuing see PARA 840 note 4.

6 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1)(a); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(1)(a). 'Another jurisdiction' means any country or jurisdiction outside England and Wales; references to 'proceedings in another jurisdiction' are references to proceedings in a court of that jurisdiction and to any proceedings which are instituted before a tribunal or other authority having power under the law having effect there to determine questions of status; and references to proceedings which are 'continuing' in another jurisdiction are references to proceedings which have been begun and have not been finally disposed of: Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 3(1), 5; Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 1(c), (f), (g).

7 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(1)(b). In considering the balance of fairness and convenience for these purposes the court must have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed or not stayed: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(2); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(3); and see *R v R (divorce: stay of proceedings)* [1995] 1 FCR 745, [1994] 2 FLR 1036; *T v T (jurisdiction: forum conveniens)* [1995] 1 FCR 478, [1995] 2 FLR 660; *W v W (financial relief: appropriate forum)* [1997] 2 FCR 659, [1997] 1 FLR 257; *S v S (matrimonial proceedings: appropriate forum)* [1997] 1 WLR 1200, sub nom *S v S (divorce: staying proceedings)* [1997] 3 FCR 272; *Butler v Butler* [1997] 2 All ER 822, [1998] 1 WLR 1208, CA, applying *de Dampiere v de*

Dampiere [1988] AC 92, [1987] 2 All ER 1, HL; *C v C (divorce: stay of English proceedings)* [2001] 1 FLR 624; *Otobo v Otobo* [2002] EWCA Civ 949, [2002] 3 FCR 123, [2003] 1 FLR 192; and the earlier cases (*Shemshadfard v Shemshadfard* [1981] 1 All ER 726, 10 Fam Law 189; *Gadd v Gadd* [1985] 1 All ER 58, [1984] 1 WLR 1435, CA; *Thyssen-Bornemisza v Thyssen-Bornemisza* [1986] Fam 1, [1985] 1 All ER 328, CA) which must be read in the light of that decision.

8 An application for such an order must be made to a judge: Family Proceedings Rules 1991, SI 1991/1247, rr 2.27(2), 2.27AA(2) (r 2.27AA added by SI 2005/2922). As to the meaning of 'judge' see PARA 737 note 3.

9 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1) (as amended: see note 2); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(2). A stay should always be applied for as soon as possible and practitioners must appreciate that, if a stay is not promptly applied for, there is a considerable risk that one will not later be granted: *Kreng v Kreng* [1999] 1 FLR 969, [1999] Fam Law 304, per curiam. *W v W (financial relief: appropriate forum)* [1997] 2 FCR 659, [1997] 1 FLR 257 cannot be relied on to justify delayed applications for a stay: *Kreng v Kreng* per curiam.

10 See under the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3: see PARA 841.

11 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(3); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4(4).

12 Domicile and Matrimonial Proceedings Act 1973 s 5(6)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 10.

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843. Discharge of order.

Where an order staying any proceedings is in force¹, the court² may, if it thinks fit, on the application of a party to the proceedings³, discharge the order if it appears to the court that the other proceedings by reference to which the order was made are stayed or concluded, or that a party to those other proceedings has delayed unreasonably in prosecuting them⁴.

If the court discharges an order staying any proceedings which it is obliged to make⁵, it must not again⁶ stay those proceedings⁷.

These provisions do not affect any power of the court to stay proceedings apart from that provided by these provisions⁸.

¹ In pursuance of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3 (see PARA 841) or in pursuance of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 4 (see PARA 842).

² As to the meaning of 'court' see PARA 750 note 1.

³ An application by a party to the proceedings for such an order may be made to the district judge, and he may determine the application or may refer the application, or any question arising thereon, to a judge as if the application were an application for financial relief: Family Proceedings Rules 1991, SI 1991/1247, rr 2.27(5), 2.27AA(6) (r 2.27AA added by SI 2005/2922). As to the meanings of 'district judge' and 'judge' see PARA 737 note 3.

⁴ Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 10(1); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 5(1), (2).

⁵ In pursuance of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 3 (see PARA 841).

⁶ See note 5.

⁷ Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 10(2); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 5(3).

⁸ Domicile and Matrimonial Proceedings Act 1973 s 5(6)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 10.

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844. Consequences of stay.

Where any proceedings for divorce, dissolution, separation or nullity are stayed by reference to proceedings in a related jurisdiction¹ for divorce, dissolution, separation or nullity:

- 1087 (1) the court² must not make a relevant order³ or a lump sum order⁴ in connection with the stayed⁵ proceedings except in pursuance of head (3) below⁶; and
- 1088 (2) subject to head (3) below, any relevant order made in connection with the stayed proceedings ceases to have effect, unless the stay is previously removed or the order previously discharged, on the expiration of the period of three months beginning with the date on which the stay was imposed⁷; but
- 1089 (3) if the court considers that, for the purpose of dealing with circumstances needing to be dealt with urgently, it is necessary during or after that period to make a relevant order or a lump sum order in connection with the stayed proceedings or to extend or further extend the duration of a relevant order made in connection with the stayed proceedings, the court may do so and the order does not cease to have effect by virtue of head (2) above⁸.

Where any proceedings for divorce, dissolution, separation or nullity are stayed by reference to proceedings in a related jurisdiction for divorce, dissolution, separation or nullity and at the time when the stay is imposed an order is in force, or at a subsequent time an order comes into force, which was made in connection with the other proceedings⁹ and provides for any of the following matters, namely periodical payments for a spouse or civil partner of the marriage or civil partnership in question, periodical payments for a child or any provision which could be made under the Children Act 1989¹⁰, then, on the imposition of the stay in a case where the order is in force when the stay is imposed and on the coming into force of the order in any other case:

- 1090 (a) any relevant order made in connection with the stayed proceedings ceases to have effect in so far as it makes for a spouse, civil partner or child any provision for any of those matters as respects which the same or a different provision for that spouse, civil partner or child is made by the other order¹¹;
- 1091 (b) the court does not have power in connection with the stayed proceedings to make a relevant order containing for a spouse, civil partner or child provision for any of those matters as respects which any provision for that spouse, civil partner or child is made by the other order¹²; and
- 1092 (c) if the other order contains provision for periodical payments for a child, the court does not have power in connection with the stayed proceedings to make a lump sum order for that child¹³.

Where any order made that a party to the marriage or civil partnership secure to such person as may be specified for the benefit of a child, or to a child, to the satisfaction of the court, such periodical payments, for such term as may be specified¹⁴, ceases to have effect¹⁵, any order

made for the sale of property¹⁶ which requires the proceeds of sale to be used for securing periodical payments under the first-mentioned order also ceases to have effect¹⁷.

If any proceedings are stayed so far as they consist of matrimonial or civil partnership proceedings¹⁸ of a particular kind but are not stayed so far as they consist of matrimonial or civil partnership proceedings of a different kind, these provisions¹⁹ do not apply to the proceedings but the court does not have power to make a relevant order or a lump sum order in connection with the proceedings so far as they are stayed²⁰.

As from a day to be appointed²¹, where any matrimonial proceedings are stayed as described above²² and at the time when the stay is imposed, a contact order²³ made in connection with the stayed proceedings is in force the court may not, while the stay applies to the proceedings, make an enforcement order²⁴ in relation to the contact order, or as regards an enforcement order already made in relation to the contact order, exercise its powers²⁵ in relation to the enforcement order²⁶.

Other than in stayed proceedings where a contact order is in force²⁷, nothing in the above provisions affects any power of the court:

- 1093 (i) to vary or discharge a relevant order so far as the order is for the time being in force²⁸;
- 1094 (ii) to enforce a relevant order as respects any period when it is or was in force²⁹; or
- 1095 (iii) to make a relevant order or a lump sum order in connection with proceedings which were but are no longer stayed³⁰.

These provisions also do not affect any power of the court to stay proceedings apart from that provided by these provisions³¹.

1 As to the meaning of 'related jurisdiction' see PARA 841 note 5.

2 As to the meaning of 'court' see PARA 750 note 1.

3 For these purposes 'relevant order' means:

200 (1) an order for maintenance for a spouse or civil partner pending the outcome of proceedings under the Matrimonial Causes Act 1973 s 22 or the Civil Partnership Act 2004 Sch 5 para 38 (see PARA 456) (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(c)(i));

201 (2) an order for the making of periodical payments for the benefit of children under the Matrimonial Causes Act 1973 s 23(1)(d) or (e) or the Civil Partnership Act 2004 Sch 5 para 2(1)(d) or (e) (see PARA 492) (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(c)(ii));

202 (3) an order for the making of periodical payments for the benefit of a child under the Children Act 1989 Sch 1 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 539 et seq), if made in equivalent circumstances to the above and being of a kind mentioned in Sch 1 para 1(2)(a) or (b) (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1) (amended by the Children Act 1989 Sch 13 para 33); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(c)(iii));

203 (4) a section 8 order under the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 247 et seq) (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1) (as so amended); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(c)(iv)); and

204 (5) except for the purposes of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3) or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI

2005/2921, r 8 (see the text and note 11-13), any order restraining a person from removing a child out of England and Wales or out of the care of another person (Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1) (as so amended); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(c)(v)).

4 For these purposes 'lump sum order' means such an order as is mentioned in the Matrimonial Causes Act 1973 s 23(1)(f) or the Civil Partnership Act 2004 Sch 5 para 2(1)(f) (lump sum for a child: see PARA 492), being an order made under the Matrimonial Causes Act 1973 s 23(1) or (2)(a) or the Civil Partnership Act 2004 Sch 5 para 1, or an order made in equivalent circumstances under the Children Act 1989 Sch 1 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 539 et seq) of a kind mentioned in Sch 1 para 1(2)(c): Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1) (as amended: see note 3); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(a).

5 For these purposes 'stayed' means stayed in pursuance of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921 (see PARA 840 et seq): Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(d).

6 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2)(a); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 7(1)(a).

7 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 7(1)(b).

8 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2)(c); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 7(2)-(4). This provision is without prejudice to the effect of the stay apart from the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2) or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 7: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 7(5).

9 For these purposes the 'other proceedings', in relation to any stayed proceedings, means the proceedings in another jurisdiction by reference to which the stay was imposed: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(3)(b). As to the meaning of 'another jurisdiction' see PARA 842 note 6.

10 *le* under the Children Act 1989 s 8: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 247 et seq.

11 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3)(a) (amended by the Children Act 1989 Sch 13 para 33); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 8(1)-(3). (6).

12 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 8(4).

13 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3)(c); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 8(5).

14 *le* any such order as is mentioned in the Matrimonial Causes Act 1973 s 23(1)(e), being an order made under s 23(1) or (2)(a), or an order made under the Civil Partnership Act 2004 Sch 5 para 1, of a kind mentioned in Sch 5 para 2(1)(e) (see PARAS 458 et seq, 492).

15 *le* by virtue of the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2) or (3) or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 7 or r 8: see the text and notes 1-13.

16 *le* any order made under the Matrimonial Causes Act 1973 s 24A(1) or the Civil Partnership Act 2004 Sch 5 Pt 3 (paras 10-14): see PARAS 520-521.

17 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3A) (added by the Matrimonial Homes and Property Act 1981 s 8(3)); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 8(7), (8).

18 As to the meanings of 'matrimonial proceedings' and 'civil partnership proceedings' see PARA 840 note 1. For these purposes only, references to 'matrimonial proceedings' and 'civil partnership proceedings' do not include references to proceedings for a declaration: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 9(1)(a).

19 le the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2), (3) and the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, rr 7, 8: see the text and notes 1-13.

20 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 9(1), (2).

21 The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4A), (4B) (see the text and notes 22-26) are added, and s 11(5) (see the text and notes 28-30) is amended, by the Children and Adoption Act 2006 Sch 2 para 1, as from a day to be appointed. At the date at which this volume states the law no day had been appointed for the coming into force of these provisions. No corresponding amendment is made to the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, in respect of civil partnerships.

22 le as described in the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1) or (4): see the text and notes 1-20.

23 As to the meaning of 'contact order' see the Children Act 1989 s 8(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 251 (definition applied by the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4A)(b) (prospectively added: see note 21)).

24 As to the meaning of 'enforcement order' see the Children Act 1989 s 11j; and **CHILDREN AND YOUNG PERSONS** (definition applied by the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4B)(a) (prospectively added: see note 21)).

25 le the court's powers under the Children Act 1989 Sch A1 para 9(2) (see **CHILDREN AND YOUNG PERSONS**).

26 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4A), (4B) (prospectively added: see note 21).

27 le except as provided by the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4B) (see the text and notes 21-26).

28 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(5)(a) (s 11(5) prospectively amended: see note 21); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(4)(a).

29 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(5)(b) (s 11(5) prospectively amended: see note 21); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(4)(b).

30 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(5)(c) (s 11(5) prospectively amended: see note 21); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 6(4)(c).

31 Domicile and Matrimonial Proceedings Act 1973 s 5(6)(b); Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, r 10.

UPDATE

844 Consequences of stay

NOTE 21--Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(4A), (4B), and amendment of Sch 1 para 11 in force on 8 December 2008: SI 2008/2870.

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B. STAY OF PROCEEDINGS FOR PROCEDURAL REASONS

845. Irregularity or failure to comply with order.

If the name of a party is omitted from the printed list, or if a previous petition against a spouse or civil partner which has been struck out remains on the file, the suit may be stayed until the matters are adjusted¹. Where a spouse or civil partner disobeys an order to pay maintenance pending suit or costs to the other spouse or civil partner, the second spouse or civil partner may apply to have the petition dismissed², or to have the suit stayed³.

¹ *Onslow v Onslow, Jones and Campbell* (1889) 60 LT 680. There may be two pending petitions by the same person on the file at once: see PARA 755.

² *Curtis v Curtis* (1868) 38 LJP & M 9. That was not the case, however, where the delay occurred through the wife's laches: *Bridgman v Bridgman and Puckrin* (1869) 20 LT 87.

³ *Curtis v Curtis* (1868) 38 LJP & M 9; *P v P and T* (1910) 26 TLR 607. Postponement is not granted: *Hepworth v Hepworth* (1861) 2 Sw & Tr 414. See also *Joseph v Joseph and Burnhill* (1897) 76 LT 236; *Annesley v Annesley* (1913) 47 ILT 38; *Smith v Smith and Rutherford* [1920] P 206 at 207.

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846. Stay under court's inherent jurisdiction and mental illness.

Under the inherent jurisdiction of the court a stay of matrimonial or civil partnership proceedings will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the suit and there are no special circumstances by reason of which justice requires that the trial should take place in the United Kingdom¹.

The fact that the respondent is or becomes mentally ill does not mean that the proceedings are necessarily to be stayed².

1 *D v P (forum conveniens)* [1998] 3 FCR 403, [1998] 2 FLR 25.

2 See *Hackney v Hackney* (1973) 117 Sol Jo 224 (petition by husband based on wife's behaviour; cross-prayer by wife based on husband's behaviour; husband admitted to hospital, suffering severe obsessional neurosis; since both husband and wife agreed marriage had irretrievably broken down, prayer of petition stayed, wife permitted to proceed with her prayer, the husband being protected by the Official Solicitor as litigation friend in any subsequent proceedings).

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847. When stay refused.

The court may refuse a stay:

- 1096 (1) where a spouse or civil partner, not having paid the costs of one suit, brings another for a different cause of action¹;
- 1097 (2) pending a spouse or civil partner's appeal as to their answer being taken off the file²;
- 1098 (3) where the costs in question are 'extra costs'³; and
- 1099 (4) in a suit for judicial separation, a separation order, divorce or dissolution, where one spouse or civil partner's petition for divorce or dissolution is pending abroad⁴.

1 *Abdy v Abdy* (1896) 12 TLR 524; *Sanders v Sanders* [1911] P 101 at 104, CA.

2 *Wilson v Wilson and Howell* (1871) LR 2 P & D 292.

3 *Keane v Keane* (1873) LR 3 P & D 52.

4 *Thornton v Thornton* (1886) 11 PD 176, CA; *Von Eckhardstein v Von Eckhardstein* (1907) 23 TLR 539; *Hemain v Hemain* [1988] 2 FLR 388, [1988] Fam Law 432, CA. See also *Christian v Christian* (1897) 78 LT 86 (wife's suit for judicial separation, injunction to restrain husband's suit for desertion in Scotland). The power of the court to stay proceedings in such circumstances has to be exercised with very great caution: see *Sealey (otherwise Callan) v Callan* [1953] P 135 at 146, [1953] 1 All ER 942 at 948 (court refused to stay wife's petition for dissolution based on three years' residence under the Matrimonial Causes Act 1950 s 18(1)(b) (repealed), where the husband had, subsequent to the filing of the wife's petition in England, filed a petition for dissolution in the country where he was domiciled).

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(vii) Disposal of Causes

A. DISPOSAL BY TRIAL

848. Methods of trial.

Unless otherwise directed, every cause and any issue arising in the cause are heard¹ by a judge in open court², subject to provisions as to the special procedure list³. The law as it exists when the suit commences governs the rights of the parties, unless fresh legislation expressly provides otherwise⁴.

1 As to the time of trial see PARA 820.

2 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.32(1); and PARA 823. As to arrangements for hearing generally see PARA 811 et seq.

3 As to the special procedure list see PARAS 814-815.

4 *Ansdell v Ansdell* (1880) 5 PD 138.

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849. Right to begin; order of witnesses; previous judgment.

In the ordinary course of events the person on whom the burden of proof lies has the right to begin¹; but, where there are cross-petitions or cross-prayers, the earlier in date has the preference, unless the allegations in the petition are not traversed, in which case a respondent, who has made counter-charges, proceeds to prove them².

Where the respective claims are for nullity and for divorce or dissolution, the question of nullity is tried first since the issue of divorce or dissolution arises only on the assumption of the validity of the marriage or civil partnership³. Where the Queen's Proctor intervenes⁴, although it is usual for him briefly to state the issues before the court, the burden of proof may be such that it is for the petitioner to begin⁵.

Counsel has a discretion to call such witnesses as he pleases and in the order he chooses⁶. Where a previous petition between the same parties has been dismissed, the judge on the hearing of the second suit may look at the previous judgment to ascertain the findings of fact leading to the first judge's conclusions⁷.

1 *Arding v Arding* [1954] 2 All ER 671n, [1954] 1 WLR 944 (duty of petitioner to begin the suit for dissolution); and see *Hewitt v Hewitt* [1948] P 150 at 156, [1948] 1 All ER 242 at 244, CA per Tucker LJ.

2 *Bacon v Bacon and Bacon* (1859) 29 LJPM & A 61.

3 *S (otherwise P) v S* [1970] P 208, [1970] 2 All ER 251; *M (otherwise D) v D* (1885) 10 PD 175; *S (otherwise G) v S* [1907] P 224; cf *Pickett v Pickett (otherwise Moss)* [1951] P 267, (1951) 1 All ER 614. Cf *L v L (otherwise M)* (1908) 25 TLR 43 (wife's petition for judicial separation amended to nullity for which husband also petitioned; burden of proof on wife, who therefore began).

4 See PARA 852. As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

5 *Bluff v Bluff (otherwise Kelly)* [1946] 2 All ER 63 (wilful refusal to consummate; decree; intervention; petitioner to begin and make out case again); cf *Ostick v Ostick* [1917] P 20 (petitioner admitted adultery; prayed for discretion). It is no longer necessary to pray for discretion.

6 *Briscoe v Briscoe* [1968] P 501, [1966] 1 All ER 465, DC.

7 *Sharma v Sharma and Davis* [1959] 3 All ER 321, [1959] 1 WLR 1035, CA.

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850. Order of speeches.

The order of speeches, as between respondents, is a matter of arrangement between counsel¹; but it is usual for the co-respondent (if more than one, then in the order on the record) to follow the respondent in opening, and for the parties to address the court after the evidence is closed in the inverse order². It is convenient but not essential for a party in person to call evidence at once, reserving any comment for his final address³. It is sometimes the practice, but no longer usual, for a co-respondent to be called immediately after the respondent; at the end of the co-respondent's evidence the respondent's and then the co-respondent's witnesses would be called⁴.

1 See *Hewitt v Hewitt* [1948] P 150 at 156, [1948] 1 All ER 242 at 244, CA per Tucker LJ.

2 *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362; and see *Glennie v Glennie and Bowles* (1862) 32 LJP & A 17.

3 In relation to public proceedings and non-private chamber proceedings, a litigant in person should be allowed to have the assistance of another person (a 'McKenzie friend'), whether he is a professional person or not, to take notes and quietly to make suggestions and give advice to that party, so long as he does not take part in the proceedings as an advocate, unless the judge is satisfied that fairness and the interests of justice do not require a litigant in person to have the assistance of a McKenzie friend: *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034, CA; *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751, [1999] 1 WLR 1807, CA per curiam. A person who chooses regularly to appear as a McKenzie friend because he earns his living that way, especially one who is also a clerk to a practising solicitor, must exercise considerable restraint; and, if he fails to do so, he will cease to conduct himself as an assistant and will indirectly run the case, using the litigant in person in the same manner as a puppet. Such behaviour can provide a firm foundation for a judge not wishing him to be present as a McKenzie friend: *R v Bow County Court, ex p Pelling* per curiam.

A judge should give reasons for refusing a litigant in person the assistance of a McKenzie friend, that obligation being owed to the litigant in person, not to the McKenzie friend: *R v Bow County Court, ex p Pelling*. Where in such circumstances a person is wrongly excluded from the proceedings are not a nullity, but the onus is on the opposite party to show that the error did not cause prejudice: *McKenzie v McKenzie* at 41 and at 1039 per Sachs LJ.

Where the proceedings are in private, the nature of the proceedings which make it appropriate for a litigant in person to be heard in private makes it undesirable in the interest of justice for a McKenzie friend to assist: *R v Bow County Court, ex p Pelling*.

4 *Curtis v Curtis* (1858) 27 LJP & M 73; affd (1859) 4 Sw & Tr 234.

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851. Adjournments and further evidence.

If it thinks it expedient in the interests of justice, the court may at any time adjourn the hearing for such time and to such place and on such terms, if any, as it thinks fit¹; and it may require further evidence². In addition to any other power which the court has to adjourn proceedings, it may adjourn divorce proceedings for such period as it thinks fit to enable attempts to be made to effect a reconciliation, if it appears to the court that there is a reasonable possibility thereof³.

Where at the trial of a cause⁴ any application is adjourned by the court for hearing in chambers, it may be restored:

- 1100 (1) in the High Court, by notice without a summons⁵;
- 1101 (2) in a designated county court⁶, on notice⁷; or
- 1102 (3) in the High Court or a designated county court, by notice given by the registrar when in his opinion the matter ought to be further considered⁸,

and the notice must state the place and time for the hearing of the restored application and be served on every party concerned⁹.

Where adultery is alleged in a matrimonial cause and the alleged adulterer is made a party to the suit in proceedings for divorce or judicial separation, the court may, at the close of the evidence on the part of the person making the allegation of adultery, dismiss the alleged adulterer from the suit if of the opinion that there is not sufficient evidence against that party (although this provision does not apply to the husband or wife against whom adultery is alleged)¹⁰.

Where, at the close of the evidence for the petitioner, counsel for one of the other parties submits that there is no case for that other party to answer, the judge may refuse to rule on the submission unless counsel makes it clear that he is going to call no evidence¹¹. The court has a discretion, however, not first to require counsel for the respondent to elect whether he will call evidence and this discretion, although once exercised only sparingly and in exceptional circumstances¹², is now exercised more freely¹³. Where, through an oversight, counsel has not been put to an election not to call evidence, he is not prevented from calling such evidence, should the submission fail¹⁴.

Where a judge rules against a submission of no case to answer and the party making the submission then calls evidence, on appeal all the evidence is considered, even if the judge's decision in rejecting the submission was wrong¹⁵. In proceedings begun by originating summons, where an affidavit sworn by a party has been read to the court, the other party has the right to cross-examine on it; a submission of no case to answer will not be entertained¹⁶.

1 See RSC Ord 35 r 3 (High Court) and CCR Ord 13 r 4 (divorce or dissolution county court). As to the continued application of the Rules of the Supreme Court and the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

2 This power was originally given under the Matrimonial Causes Act 1857 s 44 (repealed by the Statute Law Revision Act 1950 and preserved by s 1(1) proviso): see *Ward v Ward* (1858) 1 Sw & Tr 185 (as to desertion). As to the duty of counsel where an adjournment is refused see *Greenfield v Greenfield* (1955) Times, 24 May, CA (adjournment refused; retrial granted); and *Pearson v Pearson* (1955) Times, 13 July, CA (adjournment refused;

retrial refused); *Austin v Austin* (1961) 105 Sol Jo 950 (wife within precincts of court; upset at sight of husband, she refused to enter court; short adjournment for her to obtain medical evidence; no medical evidence forthcoming; while the case was an ordeal for her, it was one she had to face, particularly in view of the public interest in divorce proceedings; her application for a further adjournment was dismissed, and the trial proceeded). When a suit has been adjourned for the purpose of enlarging the allegations in the petition, the whole of the evidence will usually be heard on the second occasion: *Walker v Walker* (1862) 31 LJPM & A 117. As to argument by the Queen's Proctor see PARA 852.

3 See the Matrimonial Causes Act 1973 s 6(2); the Civil Partnership Act 2004 s 42(3); and PARA 414.

4 As to the meaning of 'cause' see PARA 321 note 1.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.41(a).

6 As to the meaning of 'designated county court' see PARA 732.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.41(b) (amended by SI 2005/2922). The appropriate notice is a notice under CCR Ord 13 r 1 (applications in the course of proceedings).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.41(b) (amended by SI 2005/2922).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.41 (amended by SI 2005/2922).

10 See the Matrimonial Causes Act 1973 s 49(3); and PARA 760. Where a submission of no case to answer is made on behalf of a party such as a co-respondent or intervener, the court is more inclined to allow the submission to be made without putting counsel to his election as to whether he would rest on his submission or call evidence than where such a submission is made in action in other divisions of the High Court or on behalf of parties to a divorce suit other than those visualised by s 49(3): *Preston v Preston and Alcock (No 2)* (1963) 107 Sol Jo 157. See also *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362; *Rutherford v Richardson* [1923] AC 1, HL (where, a decree nisi having been pronounced on the ground of the respondent's adultery with the intervener, the intervener appealed and was dismissed from the suit; the respondent did not appeal, but it was held, in the circumstances, that the decree against him could not stand); *Beal v Beal (Reade cited)* [1953] 2 All ER 1228n, [1953] 1 WLR 1365; *Gilbert v Gilbert and Abdon (Adams intervening)* [1958] P 131, [1957] 3 All ER 604; *Lance v Lance and Gardiner* [1958] P 134n, [1958] 1 All ER 388n; *Meyer v Meyer (Hodge cited)* [1959] 2 All ER 633n, [1959] 1 WLR 957; *Clifford v Clifford* (1963) 107 Sol Jo 515, DC; *Vye v Vye* [1969] 2 All ER 29, [1969] 1 WLR 588, DC. Where a co-respondent has been dismissed from the suit because there has been no appearance by the petitioner when the case has come on for hearing, the court has power to set aside the order, if it has not been drawn up and sealed: *Geering v Geering and Mockford* (1921) 38 TLR 109; *Spicer v Spicer (Ryan intervening)* [1954] 3 All ER 208, [1954] 1 WLR 1051 (husband's petition on ground of cruelty alleging unnatural practices between respondent and intervener; no actual finding of lesbianism between them and so the intervener was dismissed from the suit); *Myatt v Myatt and Parker* [1962] 2 All ER 247, [1962] 1 WLR 570 (the proper moment to dismiss a co-respondent from the suit is after the conclusion of the evidence and not before the hearing, notwithstanding that the petitioner has given particulars of the charge of adultery disclosing a case which in all probability will not be provable against the co-respondent); *L v L and B* (1963) 107 Sol Jo 872. In *Inglis v Inglis and Baxter* [1968] P 639, [1967] 2 All ER 71, Sir Jocelyn Simon P held that the question whether the co-respondent should be dismissed from the suit was one of discretion for the court, and, in view of the likelihood that the respondent wife would go into the witness box and give evidence of adultery which would be evidence against the co-respondent, an application by the co-respondent, at the close of the husband's case, that he should be dismissed from the suit was refused; and see *Holzer v Holzer* [1964] 3 All ER 989, [1964] 1 WLR 1478.

11 *Yuill v Yuill* [1945] P 15 at 18, [1945] 1 All ER 183 at 184, CA per Lord Greene MR (explaining *Alexander v Rayson* [1936] 1 KB 169, CA; *Parry v Aluminium Corpn Ltd* (1940) 162 LT 236, CA; *Laurie v Raglan Building Co* [1942] 1 KB 152, [1941] 3 All ER 332, CA); and see *Beal v Beal (Reade cited)* [1953] 2 All ER 1228n, [1953], 1 WLR 1365 (party cited was deliberately not put to his election, and he was allowed to be called although his submission failed); and see the cases cited in note 10.

12 *Wilson v Wilson* [1958] 3 All ER 195, [1958] 1 WLR 1090 (put to election); *Horton v Horton* [1960] 1 All ER 503, [1960] 1 WLR 987, DC; *Storey v Storey* [1961] P 63, [1960] 3 All ER 279, CA (in considering the exercise of that discretion, the tribunal will have the question of status in mind).

13 See *Preston v Preston and Alcock (No 2)* (1963) 107 Sol Jo 157; and note 9.

14 *Yuill v Yuill* [1945] P 15, [1945] 1 All ER 183, CA.

15 *Horton v Horton (No 2)* [1961] 1 QB 215, [1960] 3 All ER 649, CA; *Storey v Storey* [1961] P 63, [1960] 3 All ER 279, CA (on rehearing, party no longer bound by previous election); *Payne v Harrison* [1961] 2 QB 403, [1961] 2 All ER 873, CA.

16 *Lindwall v Lindwall* [1967] 1 All ER 470, [1967] 1 WLR 143, CA.

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852. Intervention by Queen's Proctor.

In the case of a petition for divorce or dissolution¹, nullity² or presumption of death³ the court⁴, including the Court of Appeal⁵, may, if it thinks fit, direct all necessary papers in the matter to be sent to the Queen's Proctor⁶ who, under the directions of the Attorney General, must instruct counsel to argue before the court any question in relation to the matter which the court considers it necessary or expedient to have fully argued⁷. Where the Queen's Proctor so argues, he is entitled to charge as part of the expenses of his office the cost of any proceedings⁸.

The Attorney General also has the right to intervene in a private suit whenever it may affect the prerogatives of the Crown, including its relation with foreign States, or where there is any question of public policy on which the executive may have a view which it may desire to bring to the notice of the court⁹.

The court has jurisdiction on an interlocutory application to direct that the assistance of the Queen's Proctor be invoked, but this jurisdiction should only be exercised in exceptional circumstances¹⁰.

Where the Queen's Proctor is invited to assist the court by arguing a question of law as amicus curiae, as distinct from his intervening, he has no right of appeal if the court decides the question in favour of the petitioner¹¹.

1 As to divorce and dissolution see PARA 346 et seq.

2 As to nullity see PARA 319 et seq.

3 As to presumption of death see PARA 415 et seq.

4 As to the meaning of 'court' see PARA 346 note 2.

5 *Le Sueur v Le Sueur* (1877) 2 PD 79, CA; *Harriman v Harriman* [1909] P 123, CA; *Rutherford v Rutherford (Richardson intervener)* [1922] P 144, CA; affd sub nom *Rutherford v Rutherford* [1923] AC 1, HL.

6 As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

7 Matrimonial Causes Act 1973 ss 8(1)(a), 15, 19(4); Civil Partnership Act 2004 s 39(1), (2). See *Stevens v Stevens and Field* (1889) 61 LT 844 (where a decree nisi was pronounced but the papers were sent to the Queen's Proctor); it is open to doubt, whether the Queen's Proctor is entitled to call evidence in such circumstances. In *Gaskill v Gaskill* [1921] P 425 Lord Birkenhead LC, sitting as divorce judge, called on the Attorney General to assist in bringing expert evidence as to the period of gestation, but only as amicus curiae; and in *Keyes v Keyes and Gray* [1921] P 204 at 205, counsel for the Secretary for India was heard as amicus curiae. As to an application by the Queen's Proctor, intervening under the Matrimonial Causes Act 1973 s 8, for a decree to be declared null and void on the ground of fraud see *Moynihan v Moynihan (Nos 1 and 2)* [1997] 2 FCR 105, [1997] 1 FLR 59.

For cases in which the services of the Queen's Proctor in this respect were formally invoked, however, see *Tickner v Tickner* [1924] P 118 at 119; *Apted v Apted and Bliss* [1930] P 246; *Clayton v Clayton and Sharman* [1932] P 45; *Weatherley v Weatherley* [1946] 2 All ER 1, CA (on appeal [1947] AC 628, [1947] 1 All ER 563, HL); *Dredge v Dredge (otherwise Harrison)* [1947] 1 All ER 29; *Baxter v Baxter* [1947] 1 All ER 387, CA (on appeal [1948] AC 274, [1947] 2 All ER 886, HL); *Apt v Apt* [1947] P 127, [1947] 1 All ER 620 (on appeal [1948] P 83, [1947] 2 All ER 677, CA); *Findlay v Findlay* [1947] P 122, [1947] 2 All ER 71, CA; *S v S (otherwise C)* [1956] P 1, [1954] 3 All ER 736; *Leeser (otherwise May) v Leeser (otherwise Bohrer)* (1955) Times, 5 February; *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 at 285, [1955] 3 All ER 129, CA; *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325. See also *Pakenham v Pakenham* [1937] 3 All ER 549 (right of Queen's Proctor to interview a party direct and not through the party's solicitor).

8 Matrimonial Causes Act 1973 s 8(3)(a); Civil Partnership Act 2004 s 39(5)(a).

9 *Adams v Adams (A-G intervening)* [1971] P 188 at 197, 198, [1970] 3 All ER 572 at 576, 577 per Sir Jocelyn Simon P.

10 *Lee v Lau* [1967] P 14, [1964] 2 All ER 248.

11 *Day v Day* [1957] P 202, [1957] 1 All ER 848.

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853. Intervention during progress of suit.

At any time during the progress¹ of a suit for divorce or dissolution², nullity³ or presumption of death⁴, or before the decree nisi is made absolute or the conditional order made final, the Queen's Proctor⁵ may, on the information of any person⁶ on any matter material to the due decision of the case, take such steps as the Attorney General considers necessary or expedient⁷.

Where the Queen's Proctor intervenes or shows cause against a decree nisi or the making of a conditional order in any proceedings for divorce or dissolution, the court⁸ may make such order as may be just as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of those parties by reason of his so doing⁹; and, where his reasonable costs of intervening or showing cause are not thereby fully satisfied, he is entitled to charge the balance as part of the expenses of his office and the Treasury may order that any costs which the Queen's Proctor pays to any parties under an order of the court may be charged as part of the expenses of his office¹⁰. The court has an absolute discretion in dealing with the costs of all parties and the discretion is to be exercised in each case on consideration of the facts of that case¹¹.

1 For these purposes, proceedings are 'in progress' after the filing of a valid petition for divorce or dissolution until such steps have been taken to dispose of the petition either by withdrawal, discontinuance or dismissal or by an order made on it, and until then the Queen's Proctor is entitled to intervene on any matter material to the decision of the case: *Ebrahim v Ali (otherwise Ebrahim) (Queen's Proctor intervening)* [1983] 3 All ER 615, sub nom *Ali Ebrahim v Ali Ebrahim (Queen's Proctor intervening)* [1983] 1 WLR 1336, CA.

2 As to divorce and dissolution see PARA 346 et seq.

3 As to nullity of marriage see PARA 319 et seq.

4 As to presumption of death and dissolution of marriage see PARA 415 et seq.

5 As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

6 'Any person' includes a respondent or co-respondent (*St Paul v St Paul and Farquhar (Queen's Proctor intervening)* (1869) LR 1 P & D 739 at 743) or a party (*Squires v Squires* [1959] 2 All ER 85, [1959] 1 WLR 483). Where the court supplies the information, the convenient course, save in exceptional circumstances, is to supply it after the evidence has been heard: *Middlebrook v Middlebrook* [1965] P 262, [1965] 1 All ER 404.

7 Matrimonial Causes Act 1973 ss 8(1)(b), 15, 19(4); Civil Partnership Act 2004 s 39(3). Where a valid divorce or dissolution petition has been filed but not served on the respondent, and no order has been made dispensing with service or making alternative provision for service on the respondent, a decree absolute granted to the petitioner or final order made is void rather than merely voidable and, therefore, notwithstanding the granting of the decree or the making of the order, the Queen's Proctor may make an application to the court for relief pursuant to the Matrimonial Causes Act 1973 s 8(1)(b) or the Civil Partnership Act 2004 s 39(3), since the void order cannot dispose of the proceedings: *Ebrahim v Ali (otherwise Ebrahim) (Queen's Proctor intervening)* [1983] 3 All ER 615, [1983] 1 WLR 1336, CA. As to an application under the Matrimonial Causes Act 1973 s 8 for a decree to be declared null and void on the ground of fraud see *Moynihan v Moynihan (Nos 1 and 2)* [1997] 2 FCR 105, [1997] 1 FLR 59.

8 As to the meaning of 'court' see PARA 346 note 2.

9 Matrimonial Causes Act 1973 s 8(2); Civil Partnership Act 2004 s 39(4). See *Newman v Newman, McLean v McLean, Jones v Jones (Queen's Proctor intervening)* [1984] FLR 835, [1985] Fam Law 52 (petitioners had deliberately misled the court; subject to assessment of means, they were ordered to pay costs).

10 Matrimonial Causes Act 1973 s 8(3)(b), (c); Civil Partnership Act 2004 s 39(5)(b), (c). The Queen's Proctor, being ensured of the loyal support of the Treasury, should, in the proper conduct of his office, be fearless as to costs (*Higgins v King's Proctor*, *King's Proctor v Carter* [1910] P 151 at 164, CA per Buckley LJ approving the decision of Bargarve Deane J in *Carter v Carter (King's Proctor intervening)* [1910] P 4, in condemning the King's Proctor in costs of an unsuccessful intervention; *Westcott v Westcott* [1908] P 250).

11 *Higgins v King's Proctor*, *King's Proctor v Carter* [1910] P 151, CA. See also *Hedderwick v Hedderwick* (1930) 74 Sol Jo 863; *Thompson (otherwise Hulton) v Thompson* [1939] P 1, [1938] 4 All ER 1, CA; *Underwood v Underwood and Haigh* [1939] 3 All ER 1001.

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854. Judgment.

When the judge has heard the evidence and addresses of counsel, he delivers his judgment¹.

¹ There must be a finding of the facts by the trial judge: *Craven v Craven and Johnson* (1957) 107 L Jo 505, CA. If he reserves judgment, the judge may, before delivering the same, hear further evidence at the request of one of the parties: *Talbrys v Talbrys* (28 May 1959, unreported), CA.

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B. DISPOSAL WITHOUT HEARING OR TRIAL

(A) DISMISSAL FOR WANT OF PROSECUTION

855. Dismissing suit.

Where a suit is not duly prosecuted, any party may apply for the petition to be dismissed¹; but it will not be dismissed as against the co-respondent only². The petitioner may satisfy the court that he intends to prosecute it despite delay, and on the hearing of the application the court may give leave to file pleadings out of time. A petitioner is not required to give notice of intention to proceed³.

A petition may be dismissed⁴ if a petitioner gives notice of abandoning his petition and takes no further steps⁵, or if no one appears to support the petition when a case is called on for hearing⁶. Before a petition is served on any person, the petitioner may file a notice of discontinuance and the cause thereupon stands dismissed⁷. Where there is a cross-prayer for relief, application should be made not to dismiss but to stay the petition⁸.

1 As to the application see PARA 857.

2 *Hancock v Hancock and Smith* (1867) LR 1 P & D 334; *Gold v Gold* (1908) 52 Sol Jo 715.

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.18.

4 *Desmarest v Desmarest* (1861) 31 LJPM & A 34; *Potts v Potts and Bateman* (1862) 32 LJPM & A 32; *Round v Round*, *Ginn v Ginn* (1869) 20 LT 87.

5 *Symons v Symons and Pike* (1862) 2 Sw & Tr 435; and see PARA 796.

6 The cause may be struck out: see PARA 862.

7 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.8; and PARA 755.

8 *Volkers v Volkens* [1935] P 33; and see PARA 796.

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856. Notice to respondent.

Once the petition is served, a petitioner may not have a petition dismissed without notice to the respondent¹; but, if the procedure is formal and in order², a spouse or civil partner cannot successfully resist the other spouse or civil partner's application for dismissal, on the second spouse or civil partner paying all of the first's costs, even if the first spouse or civil partner has applied for maintenance pending suit or the outcome of proceedings³.

1 *Lutwyche v Lutwyche and Cox* (1859) 28 LJP & M 56; *Ryder v Ryder* (1861) 30 LJPM & A 164; *Troward v Troward* (1884) 32 WR 864 (reconciliation after decree nisi; decree rescinded on wife's motion); cf *Lewis v Lewis* (1861) 2 Sw & Tr 394 (a similar case, where the court refused to dismiss, but by consent granted a stay).

2 *Stuart v Stuart* (1862) 3 Sw & Tr 219.

3 *Twisleton v Twisleton and Kelly* (1872) LR 2 P & D 339; but see *Southern v Southern* (1890) 62 LT 668; and cf *P v P and T* (1910) 26 TLR 607.

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857. Application to dismiss.

An application to dismiss must be made by summons, if the proceedings are pending in the High Court, or on notice, if they are pending in a divorce or dissolution county court, to a district judge¹; and, when an order has been made for dismissal of a petition on payment of costs, the cause remains in the list until the district judge, on proof that the costs have been paid, orders its removal².

¹ See the Family Proceedings Rules 1991, SI 1991/1247, r 10.9; and PARA 1006. See also *Slater v Slater and Bolderson* (1900) 69 LJP 48.

² *Warwick v Warwick* (1901) 85 LT 173.

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858. 'Withdrawing' petition.

In a technical sense a petition cannot be withdrawn¹, for, once on the file, it must remain there²; but the term 'withdrawal' is often used wrongly to imply dismissal or the stay of all proceedings. If the parties to a suit have become reconciled and have agreed that the petition is to be 'withdrawn', the fact that the necessary steps have not been taken will not prevent the court from carrying out the intention of the parties, should one of them seek to revive the suit after a long interval³.

1 *Ryder v Ryder* (1861) 30 LJPM & A 164. Before a petition is served on any person, the petitioner may, however, file a notice of discontinuance, whereupon the cause stands dismissed: see PARA 755.

2 See *Brocas v Brocas* (1861) 2 Sw & Tr 383.

3 *Scharrer v Scharrer* (1909) Times, 7 July, CA.

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(B) COMPROMISE

859. Agreement or arrangement for opinion of court.

Provision may be made by rules of court for enabling the parties to a marriage or a civil partnership, or either of them, on application made either before or after the commencement of proceedings for divorce, dissolution or separation, to refer to the court¹ any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings which are contemplated, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit². An agreement may be reached that is binding on the parties although a clause of it requires the agreement to be brought to the attention of the court³.

¹ As to the meaning of 'court' see PARA 346 note 2.

² Matrimonial Causes Act 1973 ss 7, 17(3); Civil Partnership Act 2004 s 43. At the date at which this volume states the law no such rules have been made.

³ *Smallman v Smallman* [1972] Fam 25, [1971] 3 All ER 717, CA, applied in *Soulsbury v Soulsbury* [2007] EWCA Civ 969, [2008] Fam 1, [2007] 3 FCR 811. As to agreements which may be contrary to public policy see **CONTRACT** vol 9(1) (Reissue) PARA 841 et seq.

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860. Reaching and disclosure of compromise agreement.

Parties are entitled to settle their arrangements in a civilised manner, provided that there is full disclosure and no deception of the court¹. It is undesirable that agreements which affect the future status of the parties and also regulate their financial position should be reached in a hurry; there should be opportunity for reflection, particularly where one party has opposed a divorce or dissolution and then has come round to the idea of acceptance². Counsel requires express authority to give undertakings on behalf of a client³.

1 *Thomas v Thomas* (1972) 117 Sol Jo 88, CA. For cases under former law, when the courts were concerned as to collusion, see *Hooper v Hooper* (1861) 3 Sw & Tr 251 (the full court, in a suit for judicial separation, held that the petitioner could not repudiate except on the ground of fraud etc); *Brown v Brown and Shelton* (1874) LR 3 P & D 202 at 203. In *Rowley v Rowley* (1864) 3 Sw & Tr 338; affd (1866) LR 1 Sc & Div 63, HL, the House of Lords recognised a compromise; and in *Stanes v Stanes* (1877) 3 PD 42, Hannen P remarked that compromises were binding on suitors in divorce, there being no distinction between restitution and separation suits. See also *Sterbini v Sterbini* (1870) 39 LJP & M 82 (agreement to withdraw from suit for dissolution, for good consideration, in the absence of fraud or duress); *De Ricci v De Ricci* [1891] P 378 (the court sent a deed back to the registrar, who had, under the terms, prepared it, for revision); *Graves v Graves* (1893) 69 LT 420; *Howard v Howard* (1897) 77 LT 140. For a deed containing 'the usual clauses' under a rule of court see *Gipps v Hume* (1861) 31 LJ Ch 37; *Hart v Hart* (1881) 18 ChD 670; *Smythe v Smythe* (1887) 18 QBD 544; *Weekes v Weekes*, *Weekes v Weekes and Marshall* (1905) 21 TLR 227; *Brailey v Brailey* [1922] P 15, CA; *Willis v Willis* [1928] P 10, CA; *Peel v Drummond* (1932) Times, 9, 10 December; on appeal (1933) Times, 8 March, CA (wife petitioner's agreement to make an allowance to her husband in consideration of his making no counter-charges against her held, after decree absolute, to be void, as a collusive agreement); *Schlesinger v Schlesinger* [1959] 1 All ER 155, [1959] 1 WLR 92, CA.

2 *Lyle v Lyle* (1972) 117 Sol Jo 70. For the practice where it is desired that agreed terms should be embodied in an order see *Practice Direction* [1972] 3 All ER 704, sub nom *Practice Direction (decrees and orders: agreed terms)* [1972] 1 WLR 1313.

3 *Marsden v Marsden* [1972] Fam 280, [1972] 2 All ER 1162 (financial undertakings not authorised).

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(C) ABATEMENT AND STRIKING OUT

861. Death of party.

Although the death of a party to divorce or dissolution proceedings before a decree is pronounced or an order is made deprives the court of jurisdiction to grant a decree or make an order in the proceedings, because the death itself ends the marriage or civil partnership, there is no general rule that divorce or dissolution proceedings automatically abate when one of the parties dies¹. The real question in such cases is whether, where one of the parties has died, further proceedings in the suit can or cannot be taken².

If a co-respondent dies before the hearing, the petitioner must apply to strike out his name from the title of the suit³.

1 *Purse v Purse* [1981] Fam 143, [1981] 2 All ER 465, CA; *Barder v Barder (Caluori intervening)* [1988] AC 20, [1987] 2 All ER 440, HL. The proposition in *Maconochie v Maconochie* [1916] P 326 at 328 per Shearman J, that a divorce suit abates on the death of a party, cannot be supported. For cases where it was held that the death of a petitioner before a decree nisi was made absolute caused a suit to abate see *Bevan v McMahon and Bevan (falsely called McMahon)* (1859) 2 Sw & Tr 58 (father's suit for nullity of daughter's marriage; on his death his widow and executrix could not continue); *Brocas v Brocas* (1861) 2 Sw & Tr 383 (death of husband before hearing; evidence produced to registrar); *Grant v Grant and Bowles and Pattison* (1862) 2 Sw & Tr 522 (guardian of children could not intervene to make decree absolute, so as to vary settlements); *Stanhope v Stanhope* (1886) 11 PD 103, CA (petitioner's executor could not intervene to make decree absolute, so as to defeat respondent's rights under a will); *Schenck v Schenck* (1908) 24 TLR 739 (executor of wife who died before hearing, after obtaining orders for alimony pendente lite and costs, could not become a petitioner).

2 *Barder v Barder (Caluori intervening)* [1988] AC 20 at 37, [1987] 2 All ER 440 at 449, HL per Lord Brandon of Oakbrook; *Harb v King Fahd Bin Abdul Aziz (Secretary of State for Constitutional Affairs Intervening)* [2005] EWCA Civ 1324, [2006] 1 WLR 578, [2006] 1 FLR 825.

3 *Sutton v Sutton and Peacock* (1863) 32 LJP & A 156; *Walpole v Walpole and Chamberlain* [1901] P 86; *Delahunty v Delahunty* [1961] 1 All ER 923, [1961] 1 WLR 515. The petition against the wife respondent may, however, be proceeded with: *Wigglesworth v Wigglesworth, Bennett and Smith* (1911) 27 TLR 463.

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862. Failure to appear.

If no one appears to support a petition, other than one listed in the special procedure list¹, when it is called on, it may be struck out of the list, or in a defended case it may proceed on the respondent's cross-prayer². Striking out of the list when there is no appearance is only equivalent to adjourning it sine die, and the cause may be reinstated³ on personal explanation by counsel or by affidavit. It is occasionally reinstated only on condition that the solicitor or the party in fault pays the costs thrown away⁴; or the cause may be set down again for hearing or trial by filing a notice to restore, in which case directions for trial do not need to be renewed unless a stay for renewal has been imposed.

1 As a general rule, where causes are disposed of in the special procedure list, it is not necessary for any party to appear in court when the decree is pronounced or the order is made: see PARA 815.

2 *Haydon v Haydon and Cooke* (1860) 30 LJPM & A 112.

3 Reinstatement is by summons to a judge, or by application with or without notice in open court.

4 See *Holden v Holden and Pearson* (1910) 102 LT 398, DC (where a rehearing was ordered); *Geering v Geering and Mockford* (1921) 38 TLR 109 (non-appearance due to inadvertence; solicitor to pay costs thrown away); cf *Greenfield v Greenfield* (1955) Times, 24 May, CA (adjournment refused; rehearing ordered); *Pearson v Pearson* (1955) Times, 13 July, CA (adjournment refused; rehearing refused).

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(viii) Decrees and Orders

A. DECREES NISI AND ABSOLUTE, AND CONDITIONAL AND FINAL ORDERS

863. Decrees nisi and conditional orders for divorce, dissolution, nullity and presumption of death.

If on a petition for divorce or an application for a dissolution order the court is satisfied on the evidence of any fact which entitles it to hold that the marriage or civil partnership has broken down irretrievably¹, it must², unless it is satisfied on all the evidence that the marriage or civil partnership has not broken down irretrievably, grant a decree of divorce or a dissolution order³.

Every decree of divorce, nullity, or presumption of death in matrimonial proceedings must in the first instance be a decree nisi and every dissolution, nullity or presumption of death order in civil partnership proceedings must in the first instance be a conditional order⁴. A decree nisi must not be made absolute, and a conditional order must not be made final, before the expiration of six weeks from its pronouncement⁵.

The court should only make such findings as are necessary to its judgment⁶. Where in matrimonial proceedings there are cross-prayers for a decree of nullity on the ground of incapacity, the court may pronounce a decree nisi on the petitions of both without finding which party is incapable⁷. Where both incapacity and wilful refusal are alleged, the court must still ascertain the cause of the non-consummation, and must consider the questions of incapacity and wilful refusal separately⁸.

It is not appropriate for the court to grant simultaneous decrees of dissolution to one party and of separation to the other⁹.

1 le any such fact as is mentioned in the Matrimonial Causes Act 1973 s 1(2) or the Civil Partnership Act 2004 s 44(5): see PARA 347.

2 le subject to Matrimonial Causes Act 1973 s 5 and the Civil Partnership Act 2004 s 47 (grave hardship to respondent in five years' separation cases: see PARA 411).

3 Matrimonial Causes Act 1973 s 1(4); Civil Partnership Act 2004 s 44(4). A copy of every decree or civil partnership order must be sent by the proper officer to every party to the cause: Family Proceedings Rules 1991, SI 1991/1247, r 10.16(1) (amended by SI 2005/2922). A sealed or other copy of a decree, civil partnership order or other order made in open court must be issued to any person requiring it on payment of the prescribed fee: Family Proceedings Rules 1991, SI 1991/1247, r 10.16(2) (amended by SI 2005/2922). For the prescribed fee for a copy of a document see the Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fees 7.1-7.2.

A mistake in a decree or order, such as an error as to the date or place of the marriage or the formation of the civil partnership, may be corrected by the court: *Skeats v Skeats and White* (1865) 35 LJP & M 47; *Schlesinger v Schlesinger* [1959] 1 All ER 155, [1959] 1 WLR 92, CA; *Baker v Pritchett (formerly Baker) and Pritchett* (1963) 108 Sol Jo 37. Equally, a decree in matrimonial proceedings may be corrected to record the judge's finding in full stating with whom adultery was found to have been committed: *Miller (formerly Kozubowski) v Kozubowski* [1956] 1 All ER 177n, [1956] 1 WLR 93; *Schlesinger v Schlesinger* [1959] 1 All ER 155, [1959] 1 WLR 92, CA. See also PARA 879; *Gipps v Gipps and Hume* (1863) 32 LJPM & A 179. The substantive law as it exists when the suit commences governs the rights of the parties, unless fresh legislation expressly provides otherwise: *Ansdell v*

Ansdell (1880) 5 PD 138. As to bars to relief where a marriage or civil partnership is voidable see PARA 321; and as to the granting or making of a decree or order of nullity and its effects see PARA 319 et seq.

4 Matrimonial Causes Act 1973 ss 1(5), 15, 19(4); Civil Partnership Act 2004 s 37(2)(a). See further PARA 864. A marriage or civil partnership does not come to an end on the decree nisi or the making of the conditional order but remains subsisting until the decree absolute or the final order: *Biggs v Biggs and Wheatley* [1977] Fam 1, [1977] 1 All ER 20. If the party against whom a decree has been pronounced or an order has been made applies for it to be made absolute prematurely, any decree absolute made on such an application is void: *Manchanda v Manchanda* [1996] 1 FCR 733, [1995] 2 FLR 590, CA, applying *Woolfenden (otherwise Clegg) v Woolfenden* [1948] P 27, [1947] 2 All ER 653.

5 Matrimonial Causes Act 1973 s 1(5); Civil Partnership Act 2004 ss 37(2)(b), 38(1)(a), (2)-(4); Matrimonial Causes (Decree Absolute) General Order 1972, art 2(2) (amended by the Matrimonial Causes (Decree Absolute) General Order 1973). Provision is also made, if the six week period would end on a day on which the office or registry of the court dealing with the case is closed, for the period to be extended to the end of the first day on which the office or registry is next open (Matrimonial Causes (Decree Absolute) General Order 1972, art 2(2) (as so amended); Civil Partnership Act 2004 s 38(1)(b)). The court's power to shorten the period was exercised, when the general statutory period in matrimonial proceedings was six months, in *Fitzgerald v Fitzgerald* (1874) LR 3 P & D 136 (changed to three months, after long litigation); *Sheffield v Sheffield and Paice* (1881) 29 WR 523 (after second trial; recital of both decrees nisi); *Rogers v Rogers* (1894) 6 R 589 (in three months after second decree nisi, the first having been rescinded on the ground of collusion); *Edwards v Edwards and Wilson* (1899) Times, 17, 20 June; and in an unreported case in July 1909 (in less than six months, after petitioner's application in chambers, the King's Proctor attending and not objecting, to enable the husband to marry a woman who was about to be confined). The discretion was refused where the application was merely on the ground of convenience (*Rippingall v Rippingall and Lockhart* (1882) 48 LT 126); or on the ground of bad health and anxiety (*Shelton v Shelton and Campbell* (1869) 38 LJP & M 34; and see *M v B* (1874) LR 3 P & D 200). Where a decree has been held up owing to no fault of the petitioner, the court has occasionally allowed it to be made absolute in the following week; in *Osborn v Osborn (otherwise Ivil)* (1926) 70 Sol Jo 388, only a month's interval was required. See also *Henley v Henley and Davies* (1954) Times, 12 November ('condition' that wife should marry co-respondent before decree absolute not a condition in real sense; impossibility; decree expedited to be effective same day); *Hayward v Hayward* (1969) Times, 4 June, CA (expedition of decree absolute by abridgment of the period to 14 days by reason of wife's acute anxiety and poor health consequent on her marital experiences severely criticised); *S v S and W* (1966) 110 Sol Jo 686; *Russell v Russell* (1972) Times, 20 April (five years' separation case; not in itself reason for expediting a decree absolute); *Torok v Torok* [1973] 3 All ER 101, [1973] 1 WLR 1066 (wife stood to suffer severe injustice by non-expedition of decree absolute; decree made absolute forthwith).

In order to enforce an ante-nuptial agreement wherein a husband has agreed to obtain a get but fails to do so, it would be within the proper exercise of the court's jurisdiction: (1) to allow the wife petitioner to delay making the decree nisi absolute, and then decline to give leave for the decree nisi to be made absolute on the husband's application until such time as he has honoured the agreement; and (2) on the husband's application to dismiss a wife's claims for ancillary relief, to decline to exercise its jurisdiction until the husband has complied with the agreement: *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583, sub nom *N v N (jurisdiction: pre-nuptial agreement)* [1999] 2 FLR 745.

6 *Lake v Lake* [1955] P 336, [1955] 2 All ER 538, CA.

7 *G v G* [1912] P 173 at 174 per Bargrave Deane J; *H v H (otherwise N)* (1929) 98 LJP 155 per Swift J.

8 *S v S (otherwise C)* [1956] P 1, [1954] 3 All ER 736; cf the observations of Denning LJ in *Morgan v Morgan* [1949] WN 250, which were not applied.

9 *Lawry v Lawry* [1967] 2 All ER 1131, [1967] 1 WLR 789, CA, disapproving *Muscato v Muscato* (1967) 111 Sol Jo 332.

UPDATE

863 Decrees nisi and conditional orders for divorce, dissolution, nullity and presumption of death

NOTE 3--SI 2008/1054 Sch 1, Fee 7.1 amended: SI 2009/1499.

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864. Decree nisi and conditional orders usually made absolute or final in six weeks.

In the absence of want of jurisdiction on the part of the court pronouncing a decree absolute or any procedural irregularity rendering the decree voidable, a decree absolute is unimpeachable and stands against all the world¹.

It will rarely be necessary to make a special order giving leave for a decree absolute or order final to be applied for in less than the prescribed period of six weeks². If, exceptionally, such an order for expedition is sought in a special procedure case, application should be made to the judge on summons or by way of notice of application, as appropriate, and should be supported by any necessary evidence. Notice of the application should be served on the other parties to the cause³. Wherever it is possible, the application will be listed for hearing as soon as convenient after the pronouncement of the decree nisi or conditional order⁴. In cases proceeding otherwise than under the special procedure, wherever it is possible, there should be an application to expedite the hearing of the suit in preference to an application at or after the trial for expedition of the decree absolute or final order⁵. Where, nevertheless, an application to expedite a decree absolute or final order is necessary, it should normally be made to the trial judge at the hearing of the suit⁶. The petitioner or respondent, as the case may be, should then have available all such evidence (including, where appropriate, a medical certificate as to the expected date of birth of a child) as is necessary to enable the judge to rule whether the decree absolute or final order should be expedited⁷. If some matter arises after decree nisi or conditional order making it desirable that the decree absolute or final order should be expedited, a party may apply to a judge in chambers for an order to that effect or for directions⁸.

Special protection is afforded to respondents in separation cases⁹.

1 *Callaghan v Hanson Fox* [1992] Fam 1, sub nom *Callaghan v Andrew-Hanson* [1992] 1 All ER 56 (husband having consented to the decree and the decree having been recognised by the husband and the world at large until the wife's death, it was not open to the husband to challenge its validity and binding effect). As to the making of decrees and the granting of orders see PARA 863 et seq.

2 *Practice Direction* [1977] 2 All ER 714, [1977] 1 WLR 759.

3 *Practice Direction* [1977] 2 All ER 714, [1977] 1 WLR 759.

4 *Practice Direction* [1977] 2 All ER 714, [1977] 1 WLR 759.

5 *Practice Direction* [1964] 3 All ER 775, [1964] 1 WLR 1473. The practice of referring cases to the Queen's Proctor (see PARA 852) will not be followed, unless the judge specifically so directs: *Practice Direction* [1964] 3 All ER 775, [1964] 1 WLR 1473.

6 *Practice Direction* [1964] 3 All ER 775, [1964] 1 WLR 1473.

7 *Practice Direction* [1964] 3 All ER 775, [1964] 1 WLR 1473.

8 *Practice Direction* [1964] 3 All ER 775, [1964] 1 WLR 1473.

9 See PARAS 409, 873.

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865. Right of respondent or other civil partner to apply for decree absolute or final order.

Where a decree nisi or a conditional order has been granted or made and no application for it to be made absolute or final has been made by the party to whom it was granted or in favour of whom it was made, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application¹, the other party may make an application to the court²; and, on that application, the court may:

- 1103 (1) make the decree absolute or the order final³;
- 1104 (2) rescind the decree nisi or the conditional order⁴;
- 1105 (3) require further inquiry⁵; or
- 1106 (4) otherwise deal with the case as it thinks fit⁶.

The respondent thus has an accruing right to be heard on the merits of making the decree nisi absolute or the conditional order final and the right accrues on the expiration of the three months' period after the granting of the decree nisi or the making of the conditional order⁷.

1 In *Griffiths v Griffiths* (1976) unreported, it was held that a respondent may apply to the court for a decree nisi pronounced against him to be made absolute three months after the expiration of the normal six weeks' period; it is not correct that the three months' period runs from the date when the court certifies as to the arrangements for the children under the Matrimonial Causes Act 1973 s 41 (as substituted: see PARA 884), when that date is later than the date when the normal six weeks' period expires: see Registrar's Circular dated 15 December 1976.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Matrimonial Causes Act 1973 s 9(1)(a), (2); Civil Partnership Act 2004 s 40(2), (3)(a). This applies notwithstanding the Matrimonial Causes Act 1973 s 1(5) and the Civil Partnership Act 2004 s 37(2) (see PARA 863), but subject to the Matrimonial Causes Act 1973 ss 10(2)-(4), 41 and the Civil Partnership Act 2004 s 48(4) (see PARAS 873, 884): Matrimonial Causes Act 1973 s 9(1)(a); Civil Partnership Act 2004 s 40(4).

4 Matrimonial Causes Act 1973 s 9(1)(b); Civil Partnership Act 2004 s 40(3)(b).

5 Matrimonial Causes Act 1973 s 9(1)(c); Civil Partnership Act 2004 s 40(3)(c).

6 Matrimonial Causes Act 1973 s 9(1)(d), Civil Partnership Act 2004 s 40(3)(d). As to the procedure see PARA 868. See also *Chappell v Chappell* [1938] 4 All ER 814 (respondent had not complied with order for alimony and costs; application refused though respondent desired to marry before birth of child); *Woolfenden v Woolfenden* [1948] P 27, [1947] 2 All ER 653 (time provision absolute; decree absolute obtained before expiration of period a nullity); *Edwards v Edwards* [1951] P 228, [1951] 1 All ER 63, DC; *Dennis v Dennis* [2000] Fam 163, [2000] 3 WLR 1443; *O v O (jurisdiction: jewish divorce)* [2000] 2 FLR 147 (court refused application by husband until get obtained).

7 *Dove v Dove* [1963] P 321, [1963] 2 All ER 10, CA.

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866. Decree absolute or final order on lodging notice.

An application by a spouse or civil partner to make absolute or final a decree nisi pronounced or a conditional order made in his favour may¹ be made by lodging with the court a notice in the prescribed form². On the lodging of such a notice, the district judge³ must cause the records of the court to be searched and must make the decree absolute or the conditional order final⁴ if he is satisfied:

- 1107 (1) that no application for rescission of the decree or the conditional order, or for rehearing of the cause and no appeal against the decree or the conditional order or the dismissal of an application for rehearing of the cause, is pending⁵;
 - 1108 (2) that no order has been made by the court extending the time for making an application for rehearing of the cause or by the Court of Appeal extending the time for appealing against the decree or the conditional order or the dismissal of an application for rehearing of the cause or, if any such order has been made, that the time so extended has expired⁶;
 - 1109 (3) that no application for such an order as is mentioned in head (2) above is pending⁷;
 - 1110 (4) that no intervention⁸ is pending⁹;
 - 1111 (5) that the court has complied with its duty¹⁰ to protect the children of the family, if any, and has not given any direction¹¹ that the decree is not to be made absolute or the conditional order made final until the court orders otherwise¹²;
 - 1112 (6) where a certificate has been granted by the trial judge for leave to appeal to the House of Lords¹³ in respect of the decree:
- .6
- 7. (a) that no application for leave to appeal directly to the House of Lords is pending¹⁴;
 - 8. (b) that no extension of the time to apply for leave to appeal directly to the House of Lords has been granted, or if any such extension has been granted, that the time so extended has expired¹⁵; and
 - 9. (c) that the time for any appeal to the Court of Appeal has expired¹⁶;
- .7
- 1113 (7) that the statutory provisions relating to special protection for the respondent in separation cases¹⁷ do not apply or have been complied with¹⁸;
 - 1114 (8) in matrimonial proceedings, that any order¹⁹ delaying the making of a decree absolute pending certain religious usages has been complied with²⁰; and
 - 1115 (9) where the decree nisi was pronounced, or the conditional order made, owing to the issue of an interim gender recognition certificate²¹ to either party to the marriage or civil partnership²²:
- .8
- 10. (a) that there is not pending a reference²³ in respect of the application on which the interim gender recognition certificate to which the petition relates was granted²⁴;
 - 11. (b) that that interim certificate has not²⁵ been revoked²⁶; and
 - 12. (c) that no appeal is pending²⁷ against an order²⁸.
- .9

If, however, the notice is lodged more than 12 months after the granting of the decree nisi or the making of the conditional order there must be lodged with the notice an explanation in writing:

- 1116 (i) giving reasons for the delay²⁹;
- 1117 (ii) stating whether the parties have lived with each other since the decree nisi or the conditional order and, if so, between what dates³⁰; and
- 1118 (iii) stating whether the wife or either of the civil partners has, or the husband or either of the civil partners has reason to believe that his wife or civil partner has, given birth to any child since the decree nisi or the conditional order and, if so, stating the relevant facts and whether or not it is alleged that the child is or may be a child of the family³¹,

and the district judge may require the applicant to file an affidavit verifying such explanation and may make such order on the application as he thinks fit³².

1 le subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.50(1): see PARA 867.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(1) (substituted by SI 2005/2922). For the prescribed form of notice see Appendix 1, Form M8 (substituted by SI 2005/2922). The fee payable on an application to make a decree nisi absolute or a conditional order final is £40: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 4.1.

3 As to the meaning of 'district judge' see PARA 737 note 3.

4 The requirements of the Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2) (see the text and notes 5-10) are mandatory: *Dackham (Dackham intervening) v Dackham* [1987] 2 FLR 358, [1987] Fam Law 345, CA. As to whether a district judge is bound to make a decree absolute or a final order on being satisfied as to the matters set out in the Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2) see *Smith v Smith* [1990] FCR 790, [1990] 1 FLR 438.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(a) (r 2.49(2)(a), (b), (e), (f), (g), proviso (b), (c) amended, r 2.49(2)(ea), (ga), proviso (d) added, by SI 2005/2922).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(b) (as amended: see note 5).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(c).

8 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.46 (see PARA 875) or r 2.47 (see PARA 876).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(d).

10 le under the Matrimonial Causes Act 1973 s 41(1) or the Civil Partnership Act 2004 s 63(1): see PARA 884.

11 le under the Matrimonial Causes Act 1973 s 41(2) or the Civil Partnership Act 2004 s 63(2): see PARA 884.

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(e), (ea) (as amended and added: see note 5).

13 le under the Administration of Justice Act 1969 s 12: see **COURTS** vol 10 PARA 742.

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(f)(i) (as amended: see note 5).

15 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(f)(ii) (as amended: see note 5).

16 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(f)(iii) (as amended: see note 5).

17 le the Matrimonial Causes Act 1973 s 10(2)-(4) or the Civil Partnership Act 2004 s 48(2)-(5): see PARA 873.

18 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(g), (ga) (as amended and added: see note 5); and see *Dryden v Dryden* [1973] Fam 217 at 230, [1973] 3 All ER 526 at 534.

- 19 le under the Matrimonial Causes Act 1973 s 10A(2) (see PARA 874).
- 20 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(h) (added by SI 2003/184).
- 21 le under the Gender Recognition Act 2004: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 22 le on the grounds referred to in the Matrimonial Causes Act 1973 s 12(g) or the Civil Partnership Act 2004 s 50(1)(d): see PARA 334. See also, in connection with marriages celebrated before 1971, PARA 344.
- 23 le under the Gender Recognition Act 2004 s 8(5): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 24 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(i)(i) (r 2.49(2)(i) added by SI 2005/559).
- 25 le under the Gender Recognition Act 2004 s 8(6)(b): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 26 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(i)(ii) (as added: see note 24).
- 27 le under the Gender Recognition Act 2004 s 8(6)(a): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 28 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2)(i)(iii) (as added: see note 24).
- 29 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2) proviso (a).
- 30 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2) proviso (b) (as amended: see note 5).
- 31 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2) proviso (c), (d) (as amended and added: see note 5). As to the meaning of 'child of the family' see PARA 707 note 9.
- 32 Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2) proviso. Delay in applying for a decree to be made absolute or a conditional order made final after the lapse of 12 months from decree nisi or conditional order should not of itself prejudice the applicant if the court thinks it right on other grounds to make the decree absolute or the order final: *Savage v Savage* [1982] Fam 100, [1982] 3 All ER 49. Applications for decree absolute or final order lodged more than 12 months after decree nisi or conditional order and referred by the district judge to a judge should be heard in open court and not in chambers: *Biggs v Biggs and Wheatley* [1977] Fam 1, [1977] 1 All ER 20. The court may accept oral evidence from the applicant instead of an affidavit: see *Court v Court* [1982] Fam 105, [1982] 2 All ER 531. As to the effect of cohabitation after the grant of a decree nisi or a conditional order see *Court v Court*; *Savage v Savage*.

UPDATE

866 Decree absolute or final order on lodging notice

NOTE 2--SI 2008/1054 Sch 1, Fee 4.1 description amended: SI 2009/1499.

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867. Decree absolute or final order on application.

An application for a decree nisi to be made absolute or a conditional order to be made final must be made to a judge¹:

- 1119 (1) where the Queen's Proctor² gives to the court, and to the party in whose favour the decree was pronounced or the conditional order made, notice that he requires more time to decide whether to show cause against the decree being made absolute or the order made final and the notice has not been withdrawn³; and
- 1120 (2) where there are other circumstances which ought to be brought to the attention of the court before the decree nisi is made absolute or the conditional order is made final⁴.

Unless otherwise directed, the summons by which the application is made, or, where the cause is pending in a designated county court⁵, notice of the application, must be served on every party to the cause, other than the applicant, and, in a case to which head (1) applies, on the Queen's Proctor⁶.

An order granting such an application does not take effect until the district judge⁷ has caused the records of the court to be searched and is satisfied as to the matters mentioned⁸ in regard to decree absolute or final order on lodging notice⁹.

1 As to the meaning of 'judge' see PARA 737 note 3.

2 As to intervention by the Queen's Proctor see PARA 875; and as to the Queen's Proctor generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.50(1)(a), (aa) (r 2.50(1)(a) amended, r 2.50(1)(a), (aa) added, by SI 2005/2922).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.50(1)(b) (amended by SI 2005/2922).

5 As to the meaning of 'designated county court' see PARA 737 note 3.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.50(1) (amended by SI 2005/2922).

7 As to the meaning of 'district judge' see PARA 737 note 3.

8 As to the matters mentioned in the Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2): see PARA 866.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.50(3).

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868. Application by spouse or civil partner against whom decree nisi or conditional order was made.

An application by a spouse or civil partner for a decree nisi or a conditional order pronounced or made against him to be made absolute or final may be made to a judge¹ or the district judge²; and the summons by which the application is made or, where the cause is pending in a divorce county court or civil partnership proceedings court³, notice of the application, must be served on the other spouse or civil partner not less than four clear days⁴ before the day on which the application is heard⁵.

An order granting an application under these provisions does not take effect until the district judge has caused the records of the court to be searched and is satisfied as to the matters mentioned⁶ in regard to decree absolute or final order on lodging notice⁷.

1 As to the meaning of 'judge' see PARA 737 note 3.

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 As to the meanings of 'divorce county court' and 'civil partnership proceedings court' see PARA 732.

4 As to 'clear days' see **TIME** vol 97 (2010) PARA 335.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.50(2) (substituted by SI 2005/2922). Failure to serve a summons under the Family Proceedings Rules 1991, SI 1991/1247, r 2.50(2) is a mere technicality which renders a decree absolute voidable and not void: *Batchelor v Batchelor* [1983] 3 All ER 618, [1984] 1 WLR 1328 (court confirmed decree absolute because of the husband's subsequent marriage and because of the fact that the husband had made proper and generous provision for the wife, who would not, therefore, be disadvantaged if the decree absolute were confirmed).

6 I.e. the matters mentioned in the Family Proceedings Rules 1991, SI 1991/1247, r 2.49(2): see PARA 866.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.50(3).

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869. Rescission of decree nisi or conditional order by consent.

Where a reconciliation has been effected between the petitioner and the respondent after a decree nisi has been pronounced but before it has been made absolute, after a conditional order has been made but before it has been made final or, as the case may be, after a decree of judicial separation has been pronounced or a separation order made, either party may apply for an order rescinding the decree or order by consent¹. Where the cause is pending in a designated county court², the application must be made on notice to the other spouse or civil partner and to any other party against whom costs have been awarded or who is otherwise affected by the decree or order; and, where the cause is pending in the High Court, a copy of the summons by which the application is made must be served on every such person³.

The application must be made to a district judge⁴ and may be heard in chambers⁵.

1 Family Proceedings Rules 1991, SI 1991/1247, r 2.48(1) (substituted by SI 2005/2922).

2 As to the meaning of 'designated county court' see PARA 737 note 3.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.48(2) (amended by SI 2005/2922).

4 As to the meaning of 'district judge' see PARA 737 note 3.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.48(3).

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870. Rescission of divorce decree or dissolution order where respondent or other civil partner misled into giving consent.

An application by a respondent¹ for the rescission of a decree of divorce or a conditional order of dissolution must be made to a judge² and must be heard in open court, save that, where the decree or order was pronounced by a district judge³, the application must be made to a district judge⁴. The application must be supported by an affidavit setting out the allegations on which the applicant relies and a copy of the affidavit must be served on the petitioner⁵. Unless otherwise directed, the notice of the application must be served on the petitioner not less than 14 days before the day fixed for the hearing of the application⁶.

1 le under the Matrimonial Causes Act 1973 s 10(1) or the Civil Partnership Act 2004 s 48(1) (see PARA 409).

2 As to the meaning of 'judge' see PARA 737 note 3.

3 As to the meaning of 'district judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.44(1) (substituted by SI 2005/2922). Rule 2.42(3), (5) (see PARA 739) applies to an application under r 2.44 as it applies to an application under r 2.42: r 2.44(2).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.44(4).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.44(3).

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871. Effect of rescission.

A verdict or judgment against a respondent, once obtained, is not any the less *res judicata* because the decree or order which follows is rescinded¹ on the ground that material facts have been withheld from the court, if those facts do not show fraud or error rendering the verdict unsustainable but merely disentitle a party to reap benefit from the verdict².

1 See PARA 876 et seq.

2 *Butler v Butler* [1894] P 25, CA.

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872. Stay of application to make decree nisi absolute or conditional order final.

It appears that, on sufficient grounds being shown, the court, in exceptional circumstances, will order that the application to make a decree nisi absolute or a dissolution order final be stayed¹. If, however, the decree nisi or conditional order was granted as a result of proof of more than one of the facts constituting irretrievable breakdown of marriage or civil partnership², and a rehearing is sought and granted in respect of one of the facts found proved only, it seems that the court may allow the decree nisi to be made absolute or the conditional order made final by reason of proof of the other fact³.

1 *Bromberg v Bromberg and Gross* [1962] 3 All ER 289, [1962] 1 WLR 1143; approved in *England v England* (1979) 10 Fam Law 86, CA; and see *Smith v Smith* [1990] FCR 790, [1990] 1 FLR 438.

2 I.e. one of the facts mentioned in the Matrimonial Causes Act 1973 s 1(2) or the Civil Partnership Act 2004 s 44(5): see PARA 347.

3 *Langworthy v Langworthy and Storey* (1964) 108 Sol Jo 621, DC.

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873. Financial hardship and protection.

Where:

- 1121 (1) the respondent to a petition for divorce or an application for a dissolution order in which the petitioner alleged either two years' separation with the respondent's consent to a decree being granted or an order being made¹, or five years' separation², has applied to the court³ for consideration of his financial position after the divorce or dissolution⁴; and
- 1122 (2) the court has granted a decree or made a conditional order on the petition on the basis of a finding that the petitioner was entitled to rely in support of his petition on the fact of two years' or five years' separation, as the case may be, and has made no such finding as to any other fact constituting irretrievable breakdown of the marriage or civil partnership⁵,

the court must not make a decree of divorce absolute or a conditional order of dissolution final unless it is satisfied:

- 1123 (a) that the petitioner or applicant should not be required to make any financial provision for the respondent⁶; or
- 1124 (b) that the financial provision made⁷ by the petitioner or applicant for the respondent is reasonable and fair or the best that can be made in the circumstances⁸.

Nevertheless, if it thinks fit, the court may make the decree absolute or the order final if:

- 1125 (i) it appears that there are circumstances making it desirable that the decree or order should be made absolute or final without delay⁹; and
- 1126 (ii) the court has obtained a satisfactory undertaking from the petitioner or applicant that he will make such financial provision for the respondent as the court may approve¹⁰.

The court hearing an application¹¹ by the respondent under these provisions must consider all the circumstances, including the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties, and the financial position of the respondent as, having regard to the divorce or dissolution, it is likely to be after the death of the petitioner or applicant, should the petitioner or applicant die first¹².

Where a decree is made absolute or a conditional order made final without compliance with these requirements it is voidable not void; and the court retains a discretion to decide, after considering all the circumstances, including the financial provision which the court has power to order or which is offered, whether to declare that a decree or order so made is void or valid¹³.

¹ ie a petition on the ground in the Matrimonial Causes Act 1973 s 1(2)(d) or the Civil Partnership Act 2004 s 44(5)(b): see PARA 347.

2 le a petition on the ground in the Matrimonial Causes Act 1973 s 1(2)(e) or the Civil Partnership Act 2004 s 44(5)(c): see PARA 347.

3 le under the Matrimonial Causes Act 1973 s 10(3) or the Civil Partnership Act 2004 s 48(3) (see the text and notes 6-8). As to the meaning of 'court' see PARA 346 note 2. Applications must be made by notice in the form prescribed by the Family Proceedings Rules 1991, SI 1991/1247, r 2.45(1), Appendix 1A, Form B (added by SI 1999/3491; and amended by SI 2005/2922); see also *Griffiths v Dawson & Co* [1993] 2 FCR 515, [1993] 2 FLR 315 (responsibility of wife's solicitor to file application).

4 Matrimonial Causes Act 1973 s 10(2)(a); Civil Partnership Act 2004 s 48(2)(a).

5 Matrimonial Causes Act 1973 s 10(2)(b); Civil Partnership Act 2004 s 48(2)(b). Where the petitioner has relied on the fact of two or five years' separation and the court has granted a decree nisi or made a conditional order without making any finding as to any other fact mentioned in the Matrimonial Causes Act 1973 s 1(2) or the Civil Partnership Act 2004 s 44(5) (see PARA 347), the Family Proceedings Rules 1991, SI 1991/1247, rr 2.51D-2.71 (see PARA 902 et seq) and r 10.10 (see PARA 747) apply, with appropriate modifications, as if the application were an application for financial relief: r 2.45(5), (5A) (r 2.45(5) amended by SI 1999/3491; SI 2005/2922; SI 2006/352; Family Proceedings Rules 1991, SI 1991/1247, r 2.45(5A) added by SI 2005/2922 and amended by SI 2006/352).

A statement of any of the matters mentioned in the Matrimonial Causes Act 1973 s 10(3) or the Civil Partnership Act 2004 s 48(4) (see the text and notes 6-8, 11-12) with respect to which the court is satisfied, or, where the court has proceeded under the Matrimonial Causes Act 1973 s 10(4) or the Civil Partnership Act 2004 s 48(5) (see the text and notes 9-10), a statement that the conditions for which the Matrimonial Causes Act 1973 s 10(4) or the Civil Partnership Act 2004 s 48(5) provides have been fulfilled, must be entered in the records of the court: Family Proceedings Rules 1991, SI 1991/1247, r 2.45(6), (6A) (r 2.45(6) amended, r 2.45(6A) added, by SI 2005/2922).

6 Matrimonial Causes Act 1973 s 10(3)(a); Civil Partnership Act 2004 s 48(4)(a).

7 For these purposes 'made' does not include a proposal: *Wilson v Wilson* [1973] 2 All ER 17, [1973] 1 WLR 555, CA.

8 Matrimonial Causes Act 1973 s 10(3)(b); Civil Partnership Act 2004 s 48(4)(b).

9 Matrimonial Causes Act 1973 s 10(4)(a); Civil Partnership Act 2004 s 48(5)(a).

10 Matrimonial Causes Act 1973 s 10(4)(b); Civil Partnership Act 2004 s 48(5)(b). The undertaking must relate at least to an outline of the proposals and not to something unspecified: *Grigson v Grigson* [1974] 1 All ER 478, [1974] 1 WLR 228, CA. As to a decree being made absolute or an order being made final through no fault of the petitioner see *Dryden v Dryden* [1973] Fam 217, [1973] 3 All ER 526 (through no fault of the husband petitioner the wife, believing that her solicitors were dealing with the matter on her behalf, did not defend the case and the decree nisi was made absolute; the decree was voidable, not void, and the decree absolute was declared valid; the wife could apply for financial relief in the ordinary way). See also *Cumbers v Cumbers* [1975] 1 All ER 1, [1974] 1 WLR 1331, CA.

11 The powers of the court on hearing the application may be exercised by the district judge: Family Proceedings Rules 1991, SI 1991/1247, r 2.45(4). As to the meaning of 'district judge' see PARA 737 note 3.

12 Matrimonial Causes Act 1973 s 10(3); Civil Partnership Act 2004 s 48(3). The protection afforded by the Matrimonial Causes Act 1973 s 10(3) and the Civil Partnership Act 2004 s 48(3) is not confined to future financial provision but extends to remedying past injustice of a financial nature and unfulfilled past obligations, since the court's duty is to look at all the circumstances: *Garcia v Garcia* [1992] Fam 83, [1991] 3 All ER 451, CA.

13 *Wright v Wright* [1976] Fam 114, [1976] 1 All ER 796.

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874. Declaration of compliance with religious usages in divorce cases.

Where a decree of divorce has been granted but not made absolute and the parties to the marriage concerned:

- 1127 (1) were married in accordance with the usages of the Jews¹ or any other religious usages prescribed by the Lord Chancellor²; and
- 1128 (2) must co-operate if the marriage is to be dissolved in accordance with those usages³,

then, on the application of either party⁴ the court may, provided it is satisfied that in all the circumstances of the case it is just and reasonable to do so, order that a decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court⁵. Any such declaration must:

- 1129 (a) be made and signed by both parties⁶;
- 1130 (b) give particulars of the proceedings in which the order⁷ was obtained⁸;
- 1131 (c) confirm that steps as are required to dissolve the marriage in accordance with the religious usages⁹, appropriate to the parties, have been taken¹⁰;
- 1132 (d) unless the court orders otherwise, be accompanied by a certificate¹¹ from a relevant religious authority¹² that all such steps have been taken¹³; and
- 1133 (e) be filed at the court¹⁴.

The validity of a decree of divorce made by reference to such a declaration is not to be affected by any inaccuracy in that declaration¹⁵.

1 As to Jewish marriages see PARA 24.

2 Matrimonial Causes Act 1973 s 10A(1)(a), (6) (s 10A added by the Divorce (Religious Marriages) Act 2002 s 1(1); Matrimonial Causes Act 1973 s 10A(6) amended, s 10A(8) added, by the Constitutional Reform Act 2005 Sch 4 para 76). The Lord Chief Justice may nominate a judicial office holder to exercise his functions for these purposes under the Matrimonial Causes Act 1973 s 10A(8) (as so added). At the date at which this volume states the law no matters had been prescribed for these purposes.

3 Matrimonial Causes Act 1973 s 10A(1)(b) (as added: see note 2).

4 The application must be made:

205 (1) in the High Court, by a notice to attend before the judge on a day specified in the notice (Family Proceedings Rules 1991, SI 1991/1247, rr 2.42(3)(a), 2.45A(1), (2) (rr 2.45A, 2.45B added by SI 2003/184)); and

206 (2) in the county court, on notice in accordance with CCR Ord 13 r 1 (applications in the course of proceedings) (Family Proceedings Rules 1991, SI 1991/1247, r 2.42(3)(b)),

and the notice must state the grounds of the application (r 2.42(3)). The application must be supported by an affidavit setting out the grounds on which the applicant seeks the order and a copy of the affidavit must be

served with the notice on the other parties (r 2.45A(3) (as so added)), and the applicant must file a certificate that the notice has been duly served on each person required to be served therewith (r 2.42(5)). As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

5 Matrimonial Causes Act 1973 s 10A(2), (3)(a) (as added: see note 2). Such an order may be revoked at any time: s 10A(3)(b) (as so added).

6 Matrimonial Causes Act 1973 s 10A(4), (7) (as added: see note 2); Family Proceedings Rules 1991, SI 1991/1247, r 2.45B(1)(a) (as added: see note 4).

7 le the order under the Matrimonial Causes Act 1973 s 10A(2) (see the text and notes 4-5).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.45B(1)(b) (as added: see note 4).

9 le the usages referred to in the Matrimonial Causes Act 1973 s 10A(1)(a) (see the text and notes 1-2).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.45B(1)(c) (as added: see note 4).

11 Where the certificate is not in English the declaration must also be accompanied by a translation of that certificate into English, certified by a notary public or authenticated by affidavit: Family Proceedings Rules 1991, SI 1991/1247, rr 2.45B(3) (as added: see note 4).

12 For this purpose a religious authority is 'relevant' if the party who made the application for the order under the Matrimonial Causes Act 1973 s 10A(2) (see the text and notes 4-5) considers that authority competent to confirm that the steps referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 2.45B(1)(c) (see the text and notes 9-10) have been taken (r 2.45B(2) (as added: see note 4)).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.45B(1)(d) (as added: see note 4). If the court dispenses with the need for a certificate it may direct the parties to file other documents showing that the relevant steps have been taken and may refuse to make the decree absolute until that direction has been complied with: r 2.45B(4) (as so added).

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.45B(1)(e) (as added: see note 4). The declaration may be filed either before or together with an application to make the decree absolute under r 2.49 (see PARA 866) or r 2.50 (see PARAS 867-868): r 2.45B(1)(e) (as so added).

15 Matrimonial Causes Act 1973 s 10A(5) (as added: see note 2).

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875. Intervention by Queen's Proctor.

If the Queen's Proctor¹ wishes to show cause against a decree nisi being made absolute or a conditional order being made final he must give notice to that effect to the court² and to the party in whose favour the decree or order was pronounced or made³. Within 21 days after giving such notice, the Queen's Proctor must file his plea setting out the grounds on which he desires to show cause, together with a copy for service on the party in whose favour the decree or civil partnership order was pronounced or made and every other party affected by the decree or order⁴. If no answer to the plea is filed within the time limited or if an answer is filed and struck out or not proceeded with, the Queen's Proctor may apply forthwith by motion for an order rescinding the decree nisi or civil partnership order and dismissing the petition⁵. The normal rules relating to directions⁶ apply to proceedings in respect of a plea by the Queen's Proctor as they apply to the trial of a cause; but, if all his allegations are denied in the answer, the application for directions must be made by the Queen's Proctor and, in any other case, it must be made by the party in whose favour the decree nisi or the conditional order has been pronounced or made⁷.

Where a decree nisi has been obtained on the ground of the respondent's wilful refusal to consummate a marriage, and the Queen's Proctor intervenes alleging that the marriage has been consummated, the whole matter is re-opened and the petitioner must prove his case⁸.

Evidence is usually given orally, and not by affidavit⁹. If the petitioner does not attend at the trial¹⁰, a decree or order may be rescinded without evidence being adduced by the Queen's Proctor¹¹; and, if there is no opposition, this may be done on motion¹², as where, after decree nisi or conditional order, a reconciliation¹³ has been effected and cohabitation resumed.

1 As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

2 As to the meaning of 'court' see PARA 737 note 3.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.46(1) (r 2.46(1) substituted, r 2.46(2), (5), (6) amended, by SI 2005/2922). Contested applications by the Queen's Proctor under the Family Proceedings Rules 1991, SI 1991/1247, r 2.46 should be heard in open court and not in chambers: *Biggs v Biggs and Wheatley* [1977] Fam 1, [1977] 1 All ER 20.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.46(2) (as amended: see note 3). The proper officer must serve a copy of the plea on each of the persons mentioned in r 2.46(2): r 2.46(3). The Family Proceedings Rules 1991, SI 1991/1247, apply, subject to r 2.46(5) (see the text and note 5) and r 2.46(6) (see the text and note 7) to all subsequent pleadings and proceedings in respect of the plea as if it were a petition by which a cause is begun: r 2.46(4). As to the meaning of 'proper officer' see PARA 461 note 5. The Queen's Proctor is not exempt from giving particulars (*Barnes v Barnes and Grimwade* (1867) LR 1 P & D 505; *Hulse v Hulse and Tavernor* (1871) LR 2 P & D 259; *Gladstone v Gladstone* (1875) LR 3 P & D 260; *Crawford v Crawford and Dilke* (1886) 11 PD 150, CA; *Pierce v Pierce* (1892) 66 LT 861 (where the particulars contained charges against a man, who was not a co-respondent, and were struck out)), and, if he is allowed to amend erroneous allegations of dates, it may be at his own expense (*Tomkins v Tomkins* (1872) 20 WR 497).

After the Queen's Proctor has filed a plea showing cause against a decree, the petitioner is not entitled to prevent the case from being heard (*Gray v Gray* (1861) 2 Sw & Tr 263; on appeal 2 Sw & Tr 266); and, should he consent to its being dismissed, the Queen's Proctor is still entitled to prove his case (*Clapham v Clapham and Guest* (1868) 17 LT 584 (before decree nisi)).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.46(5) (as amended: see note 3).

- 6 le the Family Proceedings Rules 1991, SI 1991/1247, r 2.24: see PARA 814.
- 7 Family Proceedings Rules 1991, SI 1991/1247, r 2.46(6) (amended by SI 1992/456; SI 2005/2922).
- 8 *Bluff v Bluff (otherwise Kelly)* [1946] 2 All ER 63. The standard of proof is the same as on an original petition: *Rudman v Rudman and Lee (Queen's Proctor showing cause)* [1964] 2 All ER 102, [1964] 1 WLR 598. As to wilful refusal to consummate a marriage see PARAS 335, 342.
- 9 *Studholme v Studholme and Cullum* (1876) 25 WR 165. See, however, *Forster v Forster and Nanni* (1912) 29 TLR 22 (affidavit evidence might be allowed, by consent).
- 10 *Pollack v Pollack, Deane and M'Namara* (1863) 34 LJPM & A 49.
- 11 *Sheldon v Sheldon* (1865) 4 Sw & Tr 75; *Crowden v Crowden* (1906) 23 TLR 143; *Forster v Forster and Nanni* (1912) 29 TLR 22.
- 12 See the text and notes 5-7.
- 13 *Flower v Flower* [1893] P 290. See also *Hope v Hope and Johnson* (1924) 40 TLR 282.

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876. Intervention by third party.

Where a decree nisi of divorce or nullity has been granted but not made absolute, or a conditional order of dissolution or nullity has been made but has not been made final¹, any person², excluding a party to the proceedings other than the Queen's Proctor³, may show cause⁴ why the decree should not be made absolute or the conditional order made final, by reason of material facts⁵ not having been brought⁶ before the court⁷, and in such a case the court may:

- 1134 (1) make the decree absolute or the order final⁸;
- 1135 (2) rescind the decree nisi or the conditional order⁹;
- 1136 (3) require further inquiry¹⁰; or
- 1137 (4) otherwise deal with the case as it thinks fit¹¹.

A party who has obtained a decree nisi or a conditional order can also in a proper case apply for its rescission¹², for example in the event of a reconciliation¹³ or where a decree nisi has been granted or a conditional order made on the basis of two years' separation with consent and the court is satisfied that the petitioner misled the respondent, whether intentionally or unintentionally, about any matter which the respondent took into account in deciding to give his consent¹⁴.

1 The intervention must be before decree absolute or final order: see *Marsh v Marsh* [1945] AC 271, PC; *Crosland v Crosland* [1947] P 12, [1946] 2 All ER 91; and see *T v T (otherwise T)* (1908) 24 TLR 580 (decree in undefended nullity suit rescinded on proof of consummation); and *Bluff v Bluff (otherwise Kelly)* [1946] 2 All ER 63.

2 *Harries v Harries and Gregory* (1901) 18 TLR 219 (co-respondent did not defend; not permitted to show cause); and see *Latham v Latham and Gethin* (1861) 2 Sw & Tr 299; *Stoate v Stoate* (1861) 2 Sw & Tr 384 (a respondent who has failed cannot show cause; the proper course is to appeal); but a woman named may show cause provided that she has not applied for leave to intervene and so was not a party to the suit: *W- (MJ) v W- (HRW)* [1936] P 187, [1936] 2 All ER 1112. See also *Stanga v Stanga* [1954] P 10 at 14, [1954] 2 All ER 16 at 18, DC (decree nisi against minor wife set aside when attention of court directed to non-compliance with the appropriate rules); *Jones v Jones* (1958) Times, 4 November, DC (undefended; court not aware of respondent's pending application for legal aid certificate; decree nisi rescinded); and see *Y- v Y-* (1860) 1 Sw & Tr 598 (where a private person attempted unsuccessfully to allege adultery by the petitioner).

Woodhead v Woodhead and Jones (Broadbent showing cause) (1907) 23 TLR 334; *Stuart v Stuart and Holden (Moon showing cause)* [1930] P 77; *W- (MJ) v W- (HRW)* are instances of successful interventions by members of the public, but the court does not lean towards this process; see *Stoate v Stoate*; *Forster v Forster and Berridge (Graham intervening)* (1863) 3 Sw & Tr 151; *Lautour v Queen's Proctor* (1864) 10 HL Cas 685; *Clements v Clements and Thomas (Eames and Burroughes intervening)* (1864) 3 Sw & Tr 394; *Hulse v Hulse and Tavernor* (1871) LR 2 P & D 259; subsequent proceedings LR 2 P & D 357. Under the former practice it was held that terms could be imposed on such an intervener (see *Howarth v Howarth* (1884) 9 PD 218, CA); but neither statute nor current rules refer to jurisdiction to impose terms.

3 *Bowen v Bowen and Evans (Queen's Proctor intervening)* (1864) 3 Sw & Tr 530; *Masters v Masters (Queen's Proctor intervening)* (1864) 34 LJPM & A 7; *Gladstone v Gladstone* (1875) LR 3 P & D 260. As to intervention by the Queen's Proctor see PARA 875; and as to the Queen's Proctor generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

4 A person other than the Queen's Proctor who wishes to show cause under these provisions against a decree nisi being made absolute or a conditional order being made final must file an affidavit stating the facts

on which he relies, a copy of which must be served on the party in whose favour the decree or conditional order, as the case may be, was pronounced: Family Proceedings Rules 1991, SI 1991/1247, r 2.47(1) (r 2.47(1) substituted, r 2.47(6), (7) amended, by SI 2005/2922). A party on whom a copy of the affidavit has been so served may, within 14 days after service, file an affidavit in answer and, if he does so, a copy thereof must be served on the person showing cause (Family Proceedings Rules 1991, SI 1991/1247, r 2.47(2)); the person showing cause may also file an affidavit in reply within 14 days after service of the affidavit in answer and, if he does so, a copy must be served on each party who was served with a copy of his original affidavit (r 2.47(3)). No affidavit after an affidavit in reply may be served without leave (r 2.47(4)), and any person who files an affidavit under r 2.47(1)-(3) must at the same time file a copy for service on each person required to be served therewith and the proper officer must thereupon serve the copy on that person (r 2.47(5)). A person showing cause must apply to the judge (or, where a district judge has pronounced the decree nisi or the conditional order, a district judge) for directions with 14 days after expiry of the time allowed for filing an affidavit in reply or, where an affidavit in answer has been filed, within 14 days after the expiry of the time allowed for filing such an affidavit: r 2.47(6) (as so amended). If the person showing cause does not so apply within the time allowed, the person in whose favour the decree or order was pronounced may do so: r 2.47(7) (as so amended). As to the procedure on intervention by the Queen's Proctor see r 2.46; and PARA 875. As to the meaning of 'proper officer' see PARA 461 note 5. As to the meanings of 'judge' and 'district judge' see PARA 737 note 3. Contested applications under r 2.47 should be heard in open court and not in chambers: *Biggs v Biggs and Wheatley* [1977] Fam 1, [1977] 1 All ER 20.

5 *Dering v Dering and Blakeley* (1868) LR 1 P & D 531; *Wechsler v Wechsler* (1954) Times, 18 June.

6 See the observations of Lord Reading CJ in *Kynaston v Hickman and Brown* (1919) Times, 6 November, on the criminal nature of suppression and non-disclosure; and *Abraham v Abraham and Harding* (1919) 120 LT 672 (duty of solicitor and counsel). A finding of adultery as a fact on which a decree nisi has proceeded is not *res judicata*, and such a decree proceeds merely on the materials before the court at the time when it is pronounced and cause can be shown against its being made absolute: *Chalmers v Chalmers (Threlfall intervening) (King's Proctor showing cause)* [1930] P 154.

7 Matrimonial Causes Act 1973 ss 9(1), 15; Civil Partnership Act 2004 s 40(1).

8 Matrimonial Causes Act 1973 ss 9(1)(a); Civil Partnership Act 2004 s 40(3)(a). This applies notwithstanding anything in the Matrimonial Causes Act 1973 s 1(5) and the Civil Partnership Act 2004 s 37(2) (see PARA 863), but subject to the Matrimonial Causes Act 1973 ss 10(2)-(4), 41 and the Civil Partnership Act 2004 ss 48(4), 63 (see PARAS 873, 884).

9 Matrimonial Causes Act 1973 s 9(1)(b); Civil Partnership Act 2004 s 40(3)(b). Where the court has been deceived, the inevitable result is that the decree nisi will be rescinded: *Bradley v Bradley (Queen's Proctor intervening)* [1986] 1 FLR 128, [1986] Fam Law 25 (although petitioner disclosed name and address of co-respondent to his solicitor, petition and affidavit alleged identity of man unknown). See also *Smillie v Smillie* (1981) 11 Fam Law 147, CA (decree nisi irregularly obtained).

10 Matrimonial Causes Act 1973 s 9(1)(c); Civil Partnership Act 2004 s 40(3)(c). See *W v W (decree absolute)* [1998] 2 FCR 304, sub nom *Wickler v Wickler* [1998] 2 FLR 326 (leave to apply for decree absolute refused where decree would have prejudiced wife's position).

11 Matrimonial Causes Act 1973 s 9(1)(d); Civil Partnership Act 2004 s 40(3)(d).

12 *Griffiths v Griffiths* (1912) 28 TLR 281; *Rutter v Rutter (No 2)* [1921] P 421 (wife's wish to return to husband respondent). This power was formerly doubted (*Lewis v Lewis* (1861) 2 Sw & Tr 394); but see *Ousey v Ousey and Atkinson* (1875) 1 PD 56. A decree granted or order made after the death of the other party cannot be rescinded as the decree or order itself is a nullity: see *Nelson v Nelson* (1964) 108 Sol Jo 381.

13 See PARA 869. See also *Quartermaine v Quartermaine and Glenister* [1911] P 180; *Wood v Wood and Brereton* (1919) Times, 16 December; *Walker v Walker and Walker* [1937] P 206, [1937] 3 All ER 523.

14 See PARA 409.

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877. Material facts not before the court.

It is sufficient to plead that a decree nisi of divorce or nullity or a conditional order of dissolution or nullity was obtained contrary to justice, owing to material facts not being before the court¹. If a fact which has been withheld turns out on investigation not to be material, a decree absolute or final order will be pronounced²; if it is material, although not withheld intentionally, the decree or order may be rescinded³. Where there has been a decree nisi or conditional order of presumption of death and dissolution of the marriage or civil partnership⁴, the court will rescind the decree or order on proof that the respondent is alive⁵.

A solicitor, whose character is assailed, whether by his client or the Queen's Proctor⁶, in connection with such a charge, is not prevented by any question of privilege from clearing himself; nor can a petitioner in such circumstances rely on privilege so as to have material facts kept from the court⁷.

1 See *Crawford v Crawford and Dilke (Queen's Proctor intervening)* (1886) 55 LT 305, CA; *Chalmers v Chalmers (Threlfall intervening) (King's Proctor showing cause)* [1930] P 154 (cause shown after decree nisi by reason of intervener's virginity, fresh evidence to disprove adultery notwithstanding previous finding in the affirmative); *Wechsler v Wechsler* (1954) Times, 18 June; *Rantanen v Rantanen (Queen's Proctor showing cause)* (1963) 107 Sol Jo 873; *Rudman v Rudman and Lee (Queen's Proctor showing cause)* [1964] 2 All ER 102, [1964] 1 WLR 598; *Goldsmith v Goldsmith* [1965] P 188n, [1964] 3 All ER 321, CA; *Bull v Bull (Queen's Proctor showing cause)* [1968] P 618, [1965] 1 All ER 1057; *Williams v Williams and Harris* [1966] P 97, [1966] 2 All ER 614, CA; *Joyce v Joyce* [1966] P 84, [1966] 1 All ER 905, CA; *Newman v Newman, McLean v McLean, Jones v Jones (Queen's Proctor intervening)* [1984] FLR 835, [1985] Fam Law 52.

2 *Alexandre v Alexandre (Queen's Proctor intervening)* (1870) LR 2 P & D 164; *Hunter v Hunter (King's Proctor showing cause)* [1905] P 217; *Barrett v Barrett and Vaughan* (1913) 30 TLR 63; *Hook v Hook and Brown* [1917] P 56; but see *Roche v Roche* [1905] P 142.

3 *Howarth v Howarth* (1884) 9 PD 218, CA; cf *Philipps v Philipps* (1878) 4 QBD 127 at 133, CA per Brett LJ; *Davy v Garrett* (1878) 7 ChD 473 at 488, CA per Thesiger LJ.

4 See PARA 415.

5 *Manser v Manser* [1940] P 224, [1940] 4 All ER 238. The court will not rescind a decree or order made against a dead person, since the decree or order itself is a nullity: see *Nelson v Nelson* (1964) 108 Sol Jo 381.

6 See *Heaven v Heaven (King's Proctor showing cause) (Parr intervening)* (1933) Times, 24 March (where a solicitor's clerk and solicitor who had acted for the petitioner and the respondent respectively gave details of their dealings with their lay clients and as between themselves). As to intervention by the Queen's Proctor see PARA 875; and as to the Queen's Proctor generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

7 *Lambart v Lambart* (1907) 51 Sol Jo 345; and see *Rogers v Rogers (Queen's Proctor showing cause)* [1894] P 161; *Pretty v Pretty* [1911] P 83 (suppression and denial of adultery, on counsel's advice).

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878. Indorsement and certificate of decree absolute and final order.

Where a decree nisi is made absolute or a conditional order is made final, the proper officer¹ must make an indorsement to that effect on the decree or order, stating the precise time at which it was made absolute or final² and must send to the petitioner and the respondent a certificate or a copy of the order in the prescribed form³, authenticated by the seal of the divorce or civil partnership proceedings county court⁴ or registry from which it is issued⁵.

A central index of decrees absolute and final orders must be kept under the control of the Principal Registry⁶ and any person is entitled to require a search to be made in the index, and to be furnished with a certificate of the result of the search, on payment of the prescribed fee⁷.

A certificate that a decree nisi has been made absolute or that a conditional order has been made final must be issued to any person requiring it on payment of the prescribed fee⁸.

1 As to the meaning of 'proper officer' see PARA 461 note 5.

2 Family Proceedings Rules 1991, SI 1991/1247, rr 2.51(1), 2.51A(1) (r 2.51A, Forms M9A, M10A added by SI 2005/2922); and see *Dennis v Dennis* [2000] Fam 163, [2000] 3 WLR 1443.

3 For the prescribed form of certificate see the Family Proceedings Rules 1991, SI 1991/1247, rr 2.51(2), 2.51A(2), Appendix 1, Forms M9, M9A, M10, M10A (r 2.51A, Forms M9A, M10A as added (see note 2); Forms M9, M10 amended by SI 1996/816), whichever is appropriate.

4 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

5 Family Proceedings Rules 1991, SI 1991/1247, rr 2.51(2), 2.51A(2) (as added: see note 2).

6 As to the meaning of 'Principal Registry' see PARA 737 note 3.

7 Family Proceedings Rules 1991, SI 1991/1247, rr 2.51(3), 2.51A(3) (as added: see note 2). As to the central index, see the *President's Direction; Central Index of Decrees Absolute and of Final Orders for the Dissolution or Annulment of Civil Partnerships* [2008] 2 FLR 930. As to the procedure on making a search see [1996] Fam Law 337. The fee payable on making a search in the central index of decrees absolute and final orders kept at the Principal Registry for any specified period of ten calendar years or, if no such period is specified, for the ten most recent years, and, if appropriate, providing a certificate of decree absolute or of final order, as the case may be, is £40 (Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 6.1); and the fee payable on making a search in the index of decrees absolute and final orders kept at any designated county court or district registry for any specified period of ten calendar years or, if no period is specified, for the ten most recent years, and, if appropriate, providing a certificate of decree absolute or of final order, as the case may be is £40 (Sch 1, Fee 6.3). As to the meaning of 'designated county court' see PARA 737 note 3.

8 Family Proceedings Rules 1991, SI 1991/1247, rr 2.51(4), 2.51A(4) (as added: see note 2). As to the prescribed fee see note 7.

UPDATE

878 Indorsement and certificate of decree absolute and final order

NOTE 7--Fee for a search at the Principal Registry is now £60: SI 2008/1054 Sch 1, Fee 6.1 (amended by SI 2009/1499).

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879. Final effect of decree absolute and final order.

The decree absolute is the final decree in a matrimonial suit and the final dissolution order concludes a civil partnership proceeding¹, for until that decree or order the marriage or civil partnership still subsists². A decree of divorce or a final order for dissolution, granted or made after trial by a competent court, puts an end to the status of marriage or civil partnership between the parties. If the decree or order gives the wrong date or place of marriage or civil partnership, the decree is not thereby rendered void³.

The effect of irregularity in the proceedings leading up to the decree absolute or final order may be to render the decree or order void and a nullity⁴, or merely voidable at the instance of the person affected⁵, according to the nature of the irregularity in question⁶. It has been said that, where there is an irregularity, the court should strive to hold that a decree absolute (or, presumably, final order) is voidable rather than void, for this enables justice to be done to all parties⁷. If the court makes absolute a decree nisi of divorce or of nullity of marriage, makes final an order for dissolution or nullity of civil partnership, or makes a decree of judicial separation or a separation order, without having made by order a declaration with regard to children of the family, the decree or order is void⁸. Except where the decree or order is void, the effect of the decree or order is to dissolve the marriage or civil partnership from the moment the decree or order is made; it is a judgment in rem, and, unless and until a court of appeal⁹ reverses it, the marriage or civil partnership is for all purposes at an end¹⁰. A decree absolute or final order which is void may be set aside by the court on motion¹¹ or summons¹². The court has power in an appropriate case to correct an error in the decree absolute or final order resulting from an accidental slip or omission¹³, and is entitled to allow amendment of the petition and decree nisi or conditional order, if application is made before the decree is made absolute or the order is made final¹⁴. Even if the decree has been made absolute or the order made final, the court has power, under its inherent jurisdiction, to do what is necessary and proper to correct the decree or order so that the position under it is free from ambiguity; but the power does not extend so far as to allow an amendment of the effective part of the order, for example it does not enable the court to amend the decree or order in relation to a question of status or proof of the fact alleged¹⁵.

Where two ceremonies are stated in the petition, the court decides which was the valid ceremony and recites it in the decree or order¹⁶.

The Queen's Proctor or a member of the public is not entitled to intervene to show cause against a decree or order after it has been made absolute or final¹⁷.

Where there is a suit for the administration of the trusts of a marriage or civil partnership settlement in the Chancery Division, a spouse or civil partner against whom a decree nisi or conditional order has been made will not necessarily be made a party to it¹⁸.

1 *Hyman v Hyman and Goldman* [1904] P 403 at 406; this dictum is cited (though without approval) in *Brydges v Brydges and Wood* [1909] P 187 at 193, CA per Farwell LJ.

Although the provisions described in this paragraph derive from common law decisions pre-dating the concept of civil partnerships and concerned with proceedings for divorce and nullity of marriage only, it is submitted that they must now apply equally to proceedings for the dissolution of civil partnerships.

2 *Fender v St John-Mildmay* [1938] AC 1, [1937] 3 All ER 402, HL; and see *Noble v Noble and Godman* (1869) LR 1 P & D 691; *Stanhope v Stanhope* (1886) 11 PD 103 at 109, CA per Bowen LJ; commenting on *Laxton v Laxton* (1861) 30 LJPM & A 208; *Hulse v Hulse and Tavernor* (1871) LR 2 P & D 259; *Ellis v Ellis* (1883) 8 PD 188, CA. Cf *Prole v Soady* (1868) 3 Ch App 220; and see *Norman v Villars* (1877) 2 Ex D 359, CA; *Sinclair v Fell* [1913] 1 Ch 155 (wife becoming entitled to property, subject to settlement, between decree nisi and decree absolute); *Wiggins v Wiggins (otherwise Brooks) and Ingram* [1958] 2 All ER 555, [1958] 1 WLR 1013 (remarriage by wife, after decree nisi of nullity of marriage on ground of incapacity but before decree made absolute, held to be bigamous notwithstanding form of nullity decree, as it then was, and the fact that such a decree was retrospective for some purposes). As to remarriage and the formation of a new civil partnership after decree absolute or final order see PARA 34.

3 *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 at 285, [1955] 3 All ER 129, CA.

4 *Woolfenden v Woolfenden* [1948] P 27, [1947] 2 All ER 653. See also *Craig v Kanssen* [1943] KB 256, [1943] 1 All ER 108, CA; *Heanan v Heanan* (1963) 107 Sol Jo 702; *Nelson v Nelson* (1964) 108 Sol Jo 381.

5 See eg *McPherson v McPherson* [1936] AC 177, PC.

6 See *Marsh v Marsh* [1945] AC 271 at 284, PC; *Wiseman v Wiseman* [1953] P 79 at 91, 92, [1953] 1 All ER 601 at 607, 608, CA per Denning LJ; *Balloqui v Balloqui* [1963] 3 All ER 989, [1964] 1 WLR 82, CA; *Bates v Bates* (1964) Times, 8 December, CA; *Stevens v Stevens* [1965] P 147, [1965] 1 All ER 1003, CA; *Newton v Newton* (1966) 110 Sol Jo 72, CA; *Strefford v Strefford* (1966) 110 Sol Jo 568, CA; *Schneider v Schneider* (1968) 112 Sol Jo 600, CA.

7 *Dryden v Dryden* [1973] Fam 217 at 236, [1973] 3 All ER 526 at 540.

8 See the Matrimonial Causes Act 1973 s 41; the Civil Partnership Act 2004 s 63; and PARA 884.

9 As to the restrictions on appeals from decrees absolute and final orders see PARA 737.

10 *Marsh v Marsh* [1945] AC 271, PC (death of petitioner, while appeal pending on ground of irregularity which, at most, was sufficient to render decree voidable; respondent not 'widow of petitioner'). As to the effect of death of the parties see PARA 538; and as to the restrictions on remarriage and the formation of a new civil partnership see PARA 34.

11 *Woolfenden v Woolfenden* [1948] P 27, [1947] 2 All ER 653; *Everitt v Everitt* [1948] 2 All ER 545 at 549, CA per Lord Merriman P; *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 at 281, [1955] 2 All ER 377 at 383; on appeal [1955] P 272 at 285, [1955] 3 All ER 129, CA. In the case of such a decree absolute or final order, a party may also, if he has not had time or opportunity of appealing against the decree nisi or conditional order, appeal to the Court of Appeal to set aside the decree absolute or the final order (*Everitt v Everitt*); and see PARA 879. As to the power to apply to a Divisional Court for a rehearing where the decree absolute or final order is void see PARA 739. Although it is in practice expedient to have such a decree or order set aside, it is void even without any order setting it aside: see the cases cited in note 6.

12 See as in *Dryden v Dryden* [1973] Fam 217, [1973] 3 All ER 526.

13 *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 at 281, [1955] 2 All ER 377 at 383; on appeal [1955] P 272 at 285, [1955] 3 All ER 129, CA.

14 See *Marshall v Marshall* (1909) 25 TLR 716 (Scottish marriage by declaration, followed by formal ceremony; petition by wife, and decree thereon, for restitution of conjugal rights (a remedy then available) followed by petition for divorce and decree nisi; only second ceremony mentioned in proceedings owing to mistaken belief that marriage by declaration was invalid; petitions and decrees amended); and see text and note 3; *Hewett v Hewett and Dupin* (1929) 73 Sol Jo 402; *Baker v Pritchett (formerly Baker) and Pritchett* (1963) 108 Sol Jo 37 (misrecital of date of marriage in petition and decree nisi; leave to amend petition and decree granted).

15 *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 at 285, [1955] 3 All ER 129, CA; and see, in particular, at 301 and at 138 per Singleton LJ, approving *Hampson v Hampson* [1908] P 355. As to the 'facts' constituting irretrievable breakdown of marriage or civil partnership see PARA 347.

16 *Reder v Reder* [1948] WN 238, CA; *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 at 285, [1955] 3 All ER 129, CA; *Ohochuku v Ohochuku* [1960] 1 All ER 253, [1960] 1 WLR 183.

17 See PARA 876 note 1. As to intervention by the Queen's Proctor see PARA 875; and as to the Queen's Proctor generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545.

18 *Stephenson v Strutt* (1872) 26 LT 690.

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880. No impeachment of decree absolute or final order.

A decree absolute of dissolution of marriage, or a final order for dissolution of a civil partnership, granted by a court of competent jurisdiction, cannot be impeached, in the absence of want of jurisdiction on the part of the court which granted the decree or made the order or any procedural irregularity¹ (although if the decree or order was obtained by fraud, it will be set aside²). It has been held, however, in relation to divorce proceedings (and presumably also applying to proceedings for the dissolution of civil partnerships) that it is especially important to serve the respondent effectively, that is to say to bring the matter to the respondent's knowledge, and that in the absence of such service the court will set aside a decree absolute (or final order) even where the time for appeal has passed and the petitioner has remarried³ (or formed a new civil partnership) and has issue by that second 'marriage'⁴.

1 *Callaghan v Hanson-Fox* [1992] Fam 1, sub nom *Callaghan v Andrew-Hanson* [1992] 1 All ER 56 (where the authorities, including *Bater v Bater* [1906] P 209 at 228, CA, are reviewed).

2 *Moynihan v Moynihan (Nos 1 and 2)* [1997] 2 FCR 105, [1997] 1 FLR 59 (application by the Queen's Proctor to set aside decree obtained by deliberate and sustained deception); cf *Kemp-Welch v Kemp-Welch and Crymes* [1912] P 82 (where it was held that the court had jurisdiction, on motion by co-respondent, to rescind decree absolute on the ground that it was obtained by fraud).

3 The right of remarriage was specifically stated in previous statutes concerned with matrimonial proceedings: see eg the Matrimonial Causes Act 1965 s 8(1) (repealed but not replaced by the Matrimonial Causes Act 1973).

4 *Wiseman v Wiseman* [1953] P 79, [1953] 1 All ER 601, CA; distinguishing *McPherson v McPherson* [1936] AC 177, PC. As to the power to dispense with personal service see PARA 777.

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881. Death of party after decree absolute or dissolution order.

Where a death occurs after a decree absolute or final order in circumstances in which, apart from the death, the court in exercise of its discretion would have set aside the decree or order because it was voidable, the court retains jurisdiction in the suit, notwithstanding the death, because the decree absolute or final order is to be regarded as a thing which is under the court's control and the court has an inherent jurisdiction to set it aside or, alternatively, because the surviving spouse or civil partner has a statutory right of appeal or, alternatively, because the surviving spouse or civil partner may be regarded as having an enforceable claim or right to have the decree or order set aside which has accrued before the death of the other spouse or civil partner¹.

¹ See *Purse v Purse* [1981] Fam 143, [1981] 2 All ER 465, CA (petition never came to the attention of the wife by reason of service being dispensed with, inadequate inquiry both by the husband and the district judge). As to the death of a party see PARA 538.

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882. Restriction on applications for financial relief from estate of deceased former spouse or civil partner.

On the grant of a decree of divorce, nullity of marriage or judicial separation, or on the making of a dissolution order, a nullity order, a separation order or a presumption of death order in relation to a civil partnership, or at any time thereafter, the court¹, if it considers it just to do so, may, on the application of either spouse or civil partner, order that the other spouse or civil partner is not on the death of the applicant to be entitled to apply for an order² for reasonable financial provision out of the estate of the deceased³. An order may be so made before or after the decree is made absolute or the dissolution order is made final; but, if it is made before that time it does not take effect unless the decree is made absolute or the dissolution order is made final⁴.

Where an order so made on the grant of a decree of divorce or nullity of marriage or on the making of a dissolution order, a nullity order, or a presumption of death order relating to a civil partnership has come into force with respect to a spouse or civil partner, then, on the death of the other spouse or civil partner, the court may not entertain any application for an order for reasonable financial provision out of the estate of the deceased made by the surviving spouse or civil partner⁵. Where an order so made on the grant of a decree of judicial separation or the making of a separation order has come into force with respect to any spouse or civil partner, then, if the other spouse or civil partner dies while the decree or separation order is in force and the separation is continuing, the court may not entertain any application for an order for reasonable financial provision out of the estate of the deceased made by the first-mentioned spouse or civil partner⁶.

1 For these purposes 'court' means the High Court or, where a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-42) (see PARA 732 et seq), a county court: Inheritance (Provision for Family and Dependents) Act 1975 ss 15(1), 15ZA(2) (s 15(1) substituted by the Matrimonial and Family Proceedings) Act 1984 s 8; Inheritance (Provision for Family and Dependents) Act 1975 s 15ZA added by the Civil Partnership Act 2004 Sch 4 para 21).

2 I.e. an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691, 692.

3 Inheritance (Provision for Family and Dependents) Act 1975 ss 15(1), 15ZA(1) (as substituted and added: see note 1). Before an order can be so made, the court must have evidence before it of what the estate of the applicant is likely to consist and details of the persons whom the applicant considers to have a prior claim on his estate on his death: *Whiting v Whiting* [1988] 2 All ER 275, [1988] 1 WLR 565, CA.

4 Inheritance (Provision for Family and Dependents) Act 1975 ss 15(2), 15ZA(3) (as added: see note 1).

5 Inheritance (Provision for Family and Dependents) Act 1975 ss 15(3), 15ZA(4) (as added: see note 1).

6 Inheritance (Provision for Family and Dependents) Act 1975 ss 15(4), 15ZA(5) (as added: see note 1).

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883. Appeals.

Where an appeal is pending against a decree nisi or a conditional order, a judge has no discretion or right to grant an application to make the decree absolute or the final order, even if in his opinion the appeal is frivolous, vexatious or otherwise without merit¹.

An appeal against a decree nisi of divorce or nullity of marriage or a conditional order of dissolution or nullity of civil partnership made by a district judge under the special procedure² lies to a judge on notice³ and thereafter with permission to the Court of Appeal⁴; and an appeal against a decree nisi of divorce or nullity of marriage or a conditional order of dissolution or nullity of civil partnership made by a judge following a contested hearing lies with permission to the Court of Appeal⁵.

A decree nisi must not be made absolute, or a conditional order made final, while an appeal is pending⁶, unless the appeal is on the question of costs only⁷.

No appeal lies to the Court of Appeal from a decree absolute of divorce or nullity of marriage or a final order of dissolution or nullity of civil partnership by a party who, having had time and opportunity⁸ to appeal from the decree nisi or conditional order on which the decree absolute or final order was founded, has not appealed from the decree nisi⁹. The fact that the decree nisi has been made absolute or the conditional order made final does not bar an appeal as to costs only¹⁰.

If the decree nisi is made absolute or the conditional order made final per incuriam without compliance with the statutory provisions, it may be rescinded on the ground that it is a nullity¹¹.

1 *Lloyd-Davies v Lloyd-Davies* [1947] P 53, [1947] 1 All ER 161, CA; and see *Dryden v Dryden* [1973] Fam 217 at 232, [1973] 3 All ER 526 at 536. As to the jurisdiction to hear appeals see PARA 737.

2 As to the special procedure see PARAS 814-815.

3 See *Marya v Marya* [1996] 1 FCR 153, [1995] 2 FLR 911, CA; and PARA 737.

4 See **CIVIL PROCEDURE** vol 12 (2009) PARA 1682.

5 See **CIVIL PROCEDURE** vol 12 (2009) PARA 1701 et seq.

6 *Lloyd-Davies v Lloyd-Davies* [1947] P 53, [1947] 1 All ER 161, CA.

7 *W v W and D* [1948] P 157.

8 See *Everitt v Everitt* [1948] 2 All ER 545, CA (husband not served; leave to appeal out of time granted on hearing; decrees nisi and absolute set aside; new trial ordered); *Edwards v Edwards* [1951] P 228, [1951] 1 All ER 63, DC (rehearing refused by Divisional Court; wife's application for poor person's certificate overlooked by committee); *Wiseman v Wiseman* [1953] P 79, [1953] 1 All ER 601, CA (substituted service ordered on insufficient evidence; petitioner remarried, had child; leave to appeal out of time granted; decrees set aside despite remarriage and birth of child; new trial ordered); *McPherson v McPherson* [1936] AC 177, PC, distinguished); *Hurlstone v Hurlstone* [1956] 1 All ER 804, [1956] 1 WLR 286, CA (wife knew of the decree nisi, but husband misled her into believing that it was merely a temporary court order and that the proceedings for the divorce itself had been dropped; application for leave to appeal out of time against the decree nisi and absolute dismissed, as what is now the Supreme Court Act 1981 s 18(1)(d) could not apply); *Farrow v Farrow* (1955) Times, 14 December, CA (although the wife had signed acknowledgment of service of the petition, the husband had deliberately concealed from her the true nature of the proceedings; leave to appeal out of time

granted and decree nisi set aside); *Rogers v Rogers* (1960) Times, 22 November, CA; subsequent proceedings (1961) Times, 23 February, CA (husband obtained decree absolute whilst living with his wife who was ignorant of the divorce proceedings; thereafter husband went through ceremony of marriage with another woman; on learning of true facts and on husband's promise to give up other woman, took him back; husband later convicted of perjury and forgery in connection with the divorce proceedings; Court of Appeal held that this was proper case to give wife leave to appeal out of time against divorce decree; the other woman should not be given leave to intervene); *Balloqui v Balloqui* [1963] 3 All ER 989, [1964] 1 WLR 82, CA; *Bates v Bates* (1964) Times, 8 December, CA (husband deprived of opportunity of defending or putting his case through no fault of his own; decrees absolute and nisi rescinded and new trial ordered); *Stevens v Stevens* [1965] P 147, [1965] 1 All ER 1003, CA (husband told court he did not wish to defend; no evidence decree obtained contrary to justice of case; he had had the time and opportunity); *C v C* (1965) 109 Sol Jo 473 (a single judge has no power to set aside a decree absolute which is not void in law); *Newton v Newton* (1966) 110 Sol Jo 72, CA (through default of her solicitors, wife divorced without knowing it; decrees nisi and absolute rescinded); *Strefford v Strefford* (1966) 110 Sol Jo 568, CA; *Schneider v Schneider* (1968) 112 Sol Jo 600, CA (husband told wife he was not proceeding with divorce; decree absolute set aside on the ground that subversion of the course of justice had occurred).

Where a party wishes to appeal against a decree absolute of divorce or nullity of marriage or a final order of dissolution or nullity of civil partnership, the question whether he has had the time and opportunity to appeal from the decree nisi or conditional order on which the decree absolute or final order was founded is to be determined on an application for a rehearing: see the Family Proceedings Rules 1991, SI 1991/1247, r 2.42(8); *Clark v Clark* [1995] 2 FLR 487n, [1996] Fam Law 17, CA; and PARA 739.

9 Supreme Court Act 1981 s 18(1)(d), (fa) (s 18(1)(fa) added by the Civil Partnership Act 2004 Sch 27 para 68); and see *Cleaver v Cleaver* (1884) 9 App Cas 631 at 634, HL per Lord Selborne LC; *Meier v Meier* [1948] P 89, [1948] 1 All ER 161, CA; *Hatwell v Hatwell* (1963) 107 Sol Jo 394, CA; *Whitehead v Whitehead* (otherwise *Vasbor*) [1963] P 117, [1962] 3 All ER 800, CA.

10 *Kingston v Kingston* (*Gilder cited*) [1958] P 122, [1958] 1 All ER 397, CA.

11 *Manchanda v Manchanda* [1996] 1 FCR 733, [1995] 2 FLR 590, CA, approving and following *Woolfenden* (otherwise *Clegg*) v *Woolfenden* [1948] P 27, [1947] 2 All ER 653 (in both cases the party against whom the decree nisi was made applied for that decree to be made absolute before the expiration of the period fixed by statute and without notice to the other party). See also *Craig v Kanssen* [1943] KB 256, [1943] 1 All ER 108, CA; *Heanan v Heanan* (1963) 107 Sol Jo 702; *Nelson v Nelson* (1964) 108 Sol Jo 381; *Ebrahim v Ali* (otherwise *Ebrahim*) (*Queen's Proctor intervening*) [1983] 3 All ER 615, sub nom *Ali Ebrahim v Ali Ebrahim* (*Queen's Proctor intervening*) [1983] 1 WLR 1336, CA (cited in PARA 853 note 1).

UPDATE

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NOTES 8, 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981:
Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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B. ORDERS RELATING TO CHILDREN

884. Restrictions on decrees and orders affecting children.

Provision is made for the protection, in proceedings for divorce or nullity of marriage, judicial separation, and dissolution, nullity or separation relating to a civil partnership, of the interests of:

- 1138 (1) any child of the family¹ who has not reached the age of 16 at the date when the court considers the case in accordance with these requirements²; and
- 1139 (2) any child of the family who has reached that age at that date and in relation to whom the court directs that these provisions are to apply³.

Accordingly, in any such proceedings the court must consider:

- 1140 (a) whether there are any children of the family to whom these provisions apply⁴; and
- 1141 (b) where there are any such children, whether, in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare, it should exercise any of its statutory child welfare powers⁵ with respect to any of them⁶.

Where, in any case to which these provisions apply, it appears to the court that:

- 1142 (i) the circumstances of the case require it, or are likely to require it, to exercise any of its statutory child welfare powers⁷ with respect to any such child⁸;
- 1143 (ii) it is not in a position to exercise that power or, as the case may be, those powers without giving further consideration to the case⁹; and
- 1144 (iii) there are exceptional circumstances which make it desirable in the interests of the child that the court should give a direction under these provisions¹⁰,

it may direct that the decree of divorce or nullity of marriage is not to be made absolute, the order for dissolution or nullity of civil partnership is not to be made final, or that the decree of judicial separation or separation order is not to be granted or made, until the court orders otherwise¹¹.

Where no application relating to children of the family¹² is pending, the district judge¹³ must, after making his certificate certifying that he is satisfied that the contents of the petition have been sufficiently proved¹⁴ or after the provision of evidence pursuant to a direction given by him¹⁵, as the case may be, proceed to consider the matters specified in heads (a) and (b) above in accordance with the following provisions¹⁶.

Where, on consideration of the relevant evidence, including any further evidence or report provided pursuant to these provisions and any statement filed by the respondent¹⁷, the district judge is satisfied either that there are no children of the family to whom these provisions¹⁸

apply, or that there are such children but the court need not exercise its statutory child welfare powers¹⁹ with respect to any of them or give a relevant direction²⁰, the district judge must certify accordingly; and, in the latter case, the petitioner and the respondent must each be sent a copy of the certificate by the proper officer²¹. Where the district judge is not so satisfied, he may²² give one or more of the following directions:

- 1145 (A) that the parties²³, or any of them, must file further evidence relating to the arrangements for the children (and the direction must specify the matters to be dealt with in the further evidence)²⁴;
- 1146 (B) that a welfare report on the children, or any of them, be prepared²⁵; and
- 1147 (C) that the parties, or any of them, must attend before him at the date, time and place specified in the direction²⁶,

and the parties must be notified accordingly²⁷.

As to the meaning of 'child of the family' see PARA 477 note 3; and the text and note 10. A child may be a 'child of the family' in a suit to which only one of the parents is a party, and this is so whether or not there is in existence a custody or access order made in an earlier suit to which both parents were parties: *Newman v Newman* [1971] P 43 at 48, [1970] 3 All ER 529 at 533.

2 Matrimonial Causes Act 1973 s 41(3)(a) (s 41 substituted by the Children Act 1989 Sch 12 para 31); Civil Partnership Act 2004 s 63(3)(a).

3 Matrimonial Causes Act 1973 s 41(3)(b) (as substituted: see note 2); Civil Partnership Act 2004 s 63(3)(b).

4 Matrimonial Causes Act 1973 s 41(1)(a) (as substituted: see note 2); Civil Partnership Act 2004 s 63(1)(a).

5 I.e. the court's powers under the Children Act 1989; as to which see PARA 885.

6 Matrimonial Causes Act 1973 s 41(1)(b) (as substituted: see note 2); Civil Partnership Act 2004 s 63(1)(b).

7 See note 5.

8 Matrimonial Causes Act 1973 s 41(2)(a) (as substituted: see note 2); Civil Partnership Act 2004 s 63(2)(a).

9 Matrimonial Causes Act 1973 s 41(2)(b) (as substituted: see note 2); Civil Partnership Act 2004 s 63(2)(b).

10 Matrimonial Causes Act 1973 s 41(2)(c) (as substituted: see note 2); Civil Partnership Act 2004 s 63(2)(c).

11 Matrimonial Causes Act 1973 s 41(2) (as substituted: see note 2); Civil Partnership Act 2004 s 63(2). Where the court gives such a direction, notice of its direction must be given to the parties: Family Proceedings Rules 1991, SI 1991/1247, r 2.39(4), (5)(b) (r 2.39(1)-(4) amended, r 2.39(5) substituted, by SI 2005/2922).

12 I.e. no application such as is referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 2.40: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 224.

13 As to the meaning of 'district judge' see PARA 737 note 3.

14 I.e. under the Family Proceedings Rules 1991, SI 1991/1247, r 2.36(1)(a): see PARA 815.

15 I.e. under the Family Proceedings Rules 1991, SI 1991/1247, r 2.24(4): see PARA 814.

16 Family Proceedings Rules 1991, SI 1991/1247, r 2.39(1) (as amended: see note 11).

17 I.e. under the Family Proceedings Rules 1991, SI 1991/1247, r 2.38: see PARA 767 note 4.

18 I.e. the Matrimonial Causes Act 1973 s 41 or the Civil Partnership Act 2004 s 63: see the text and notes 1-11.

19 See note 5.

20 I.e. a direction under the Matrimonial Causes Act 1973 s 41(2) or the Civil Partnership Act 2004 s 63(2): see the text and notes 7-11.

21 Family Proceedings Rules 1991, SI 1991/1247, r 2.39(2) (as amended: see note 11). As to the meaning of 'proper officer' see PARA 461 note 5.

22 le without prejudice to his powers under the Children Act 1989 or his power to give a relevant direction.

23 For these purposes 'parties' means the petitioner, the respondent and any person who appears to the court to have the care of the child: Family Proceedings Rules 1991, SI 1991/1247, r 2.39(5)(a) (as substituted: see note 11).

24 Family Proceedings Rules 1991, SI 1991/1247, r 2.39(3)(a) (as amended: see note 11).

25 Family Proceedings Rules 1991, SI 1991/1247, r 2.39(3)(b) (as amended: see note 11).

26 Family Proceedings Rules 1991, SI 1991/1247, r 2.39(3)(c) (as amended: see note 11).

27 Family Proceedings Rules 1991, SI 1991/1247, r 2.39(3) (as amended: see note 11).

UPDATE

884 Restrictions on decrees and orders affecting children

TEXT AND NOTES 12, 13--Words 'Where ... is pending' omitted: SI 1991/1247 r 2.39(1) (amended by SI 2008/2836).

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885. Orders that may be made.

All matrimonial and civil partnership proceedings¹ are family proceedings². Accordingly, the court has jurisdiction in any such proceedings to make contact orders³, prohibited steps orders⁴, residence orders⁵ or specific issue orders⁶ in exactly the same way as in any other family proceedings⁷. In particular, if the court considers that it might be appropriate for a care or supervision order to be made with respect to a child, the court has power to direct the appropriate authority to undertake an investigation of a child's circumstances⁸. There is power to make orders if the court considers that the order should be made, even though no application has been made for such an order⁹; and the court may make an order at any time during the proceedings, even though it is not in a position to dispose finally of those proceedings¹⁰.

1 In all proceedings under the Matrimonial Causes Act 1973, the Domestic Proceedings and Magistrates' Courts Act 1978, the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) and the Civil Partnership Act 2004 Schs 5, 6.

2 Children Act 1989 s 8(4)(b), (ba), (e), (ea), (g) (s 8(4)(ba), (ea) added by the Civil Partnership Act 2004 Sch 27 para 129(1)-(3)).

3 As to contact orders see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 251.

4 As to prohibited steps orders see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 261.

5 As to residence orders see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 262.

6 As to specific issue orders see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 263.

7 See the Children Act 1989 s 10; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 247-249.

8 See the Children Act 1989 s 37(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 272.

9 See the Children Act 1989 s 10(1)(b); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 247.

10 See the Children Act 1989 s 11(3); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 266.

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(3) PROCEDURE IN APPLICATIONS FOR FINANCIAL RELIEF

(i) Financial Provision during Subsistence of Marriage or Civil Partnership

A. APPLICATIONS TO THE HIGH COURT AND COUNTY COURTS

886. Originating application.

An application by a spouse or civil partner who alleges that his spouse or civil partner has failed to provide reasonable maintenance for the applicant, or any children of the family for whom such application may be made¹, must be made by originating application in the prescribed form². The application may be made to any divorce or civil partnership proceedings county court³.

¹ See an application under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 paras 39-45 (see PARA 542 et seq).

² Family Proceedings Rules 1991, SI 1991/1247, r 3.1(1) (amended by SI 2005/2922). For the prescribed form of originating application see Appendix 1, Form M19 (substituted by SI 1993/295; and amended by SI 2003/184; SI 2005/2922). See also *Lindwall v Lindwall* [1967] 1 All ER 470, [1967] 1 WLR 143, CA (not appropriate procedure for submission of no case to answer). The Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 5-9 (see PARA 535 et seq) and r 10.10 (see PARA 747) apply, with such modifications as may be appropriate, to an application for an order under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 paras 39-45 as if the application were an application for financial relief: Family Proceedings Rules 1991, SI 1991/1247, r 3.1(10) (substituted by SI 2005/2922).

³ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(2) (substituted by SI 2005/2922). As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732. As to the affidavit to accompany the originating application see PARA 887.

Where an application is made for a consent order under these provisions there must be lodged with every application two copies of a draft of the order in the terms sought, one of which must be indorsed with a statement signed by the respondent to the application signifying his agreement, and a statement of information (which may be made in more than one document) which must include:

- 207 (1) the duration of the marriage or civil partnership, as the case may be, the age of each party and of any minor or dependent child of the family (Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 5(1)(a), (2)(a) (Appendix 4 added by SI 2005/2922));
- 208 (2) an estimate in summary form of the approximate amount or value of the capital resources and net income of each party and of any minor child of the family (Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 5(2)(b) (as so added));
- 209 (3) what arrangements are intended for the accommodation of each of the parties and any minor child of the family (Appendix 4 para 5(2)(c) (as so added));
- 210 (4) whether either party has subsequently married or formed a civil partnership or has any present intention to do so or to cohabit with another person (Appendix 4 para 5(2)(d) (as so added));

- 211 (5) where the order includes provision to be made under the Matrimonial and Family Proceedings Act 1984 s 17(1)(a) of a kind which could be made by an order under the Matrimonial Causes Act 1973 s 25B or s 25C, under the Matrimonial and Family Proceedings Act 1984 s 17(1)(b), or under the Civil Partnership Act 2004 Sch 7 para 9(2) of a kind which could be made by an order under Sch 5 paras 15, 25 or 26 (orders relating to pension sharing: see PARAS 485-486, 523-524), a statement confirming that the person responsible for the pension arrangement in question has been served with the documents required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(11) (see PARA 927) and that no objection to such an order has been made by that person within 21 days from such service (Appendix 4 para 5(2)(e) (as so added));
- 212 (6) where the terms of the order provide for a transfer of property, a statement confirming that any mortgagee of that property has been served with notice of the application and that no objection to such a transfer has been made by the mortgagee within 14 days from such service (Appendix 4 para 5(2)(f) (as so added)); and
- 213 (7) any other especially significant matters (Appendix 4 para 5(2)(g) (as so added)).

Where an application is made for a consent order for interim periodical payments pending the determination of the application or for an order varying an order for periodical payments, the statement of information required by these provisions need include only the information in respect of net income mentioned in head (2) above: Appendix 4 para 5(3) (as so added). Where all or any of the parties attend the hearing of an application for financial relief the court may dispense with the lodging of a statement of information in accordance with heads (1)-(7) above and give directions for the information which would otherwise be required to be given in such a statement to be given in such a manner as it sees fit: Appendix 4 para 5(4) (as so added).

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887. Affidavit to accompany originating application.

Where an application is made by a spouse or civil partner who alleges that his spouse or civil partner has failed to provide reasonable maintenance for the applicant, or any children of the family for whom such application may be made¹, there must be filed with the originating application² an affidavit by the applicant and also a copy of the application and of the affidavit for service on the respondent³.

The affidavit must state:

- 1148 (1) the same particulars regarding the marriage or the civil partnership, the court's jurisdiction, the children and the previous proceedings as are required⁴ in the case of a petition⁵;
- 1149 (2) particulars of the respondent's failure to provide reasonable maintenance for the applicant, or, as the case may be, of the respondent's failure to provide, or to make a proper contribution towards, reasonable maintenance for the children of the family⁶; and
- 1150 (3) full particulars of the applicant's property and income and of the respondent's property and income, so far as may be known to the applicant⁷.

¹ ie an application under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 paras 39-45 (see PARA 542 et seq).

² As to the originating application see PARA 886.

³ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(2) (substituted by SI 2005/2922).

⁴ ie the same particulars as are required in the case of a petition by the Family Proceedings Rules 1991, SI 1991/1247, r 2.3, Appendix 2 para 1(a), (c), (d), (f) and (i): see PARA 756.

⁵ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(3)(a) (amended by SI 2005/2922).

⁶ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(3)(b). As to the meaning of 'child of the family' see PARA 553 note 4.

⁷ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(3)(c).

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888. Mode of service.

A copy of the originating application and affidavit alleging that a spouse or civil partner has failed to provide sufficient maintenance¹ must be served on the respondent, together with a notice of application in the prescribed form² with an acknowledgment of service in the prescribed form³.

¹ See under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 paras 39-45 (see PARA 542 et seq). As to the originating application see PARA 886; and as to the affidavit see PARA 887.

² For the prescribed form of notice of application see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Forms M20 (substituted by SI 2005/559; amended by SI 2005/2922).

³ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(4) (amended by SI 2005/559). For the prescribed form of acknowledgment of service see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M23A (substituted by SI 2005/559; amended by SI 2005/2922).

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889. Fixing the inspection appointment.

On or after the filing of a notice of an application for maintenance¹ appointment must be fixed for the hearing of the application by the district judge². Notice of the appointment must be given³ by the proper officer⁴ to every party to the application⁵. Any party may apply to the court for an order that any person must attend an appointment (an 'inspection appointment') before the court and produce any documents to be specified or described in the order, the inspection of which appears to the court to be necessary for disposing fairly of the application to which it relates or for saving costs⁶.

1 See PARA 886.

2 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 6(1) (Appendix 4 added by SI 2005/2922). As to the meaning of 'district judge' see PARA 737 note 3. An application for an avoidance of disposition order must, if practicable, be heard at the same time as any related application: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 6(2) (as so added).

3 See in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M20 (substituted by SI 2005/559; amended by SI 2005/2922).

4 As to the meaning of 'proper officer' see PARA 461 note 5.

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 6(3) (as added: see note 2).

6 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 6(4) (as added: see note 2). No person will be required by such an order to produce any document at an inspection appointment which he could not be required to produce at the final hearing of the application: Appendix 4 para 6(5) (as so added). The court must permit any person attending an inspection appointment pursuant to an order under these provisions to be represented at the appointment: Appendix 4 para 6(6) (as so added).

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890. Respondent's affidavit in answer and applicant's reply.

Where an application is made¹ alleging that a spouse or civil partner has failed to provide sufficient maintenance the respondent must, within 14 days after the time allowed for sending the acknowledgment of service, file an affidavit stating:

- 1151 (1) whether the alleged failure to provide, or to make proper contribution towards, reasonable maintenance is admitted or denied, and, if denied, the grounds on which he relies²;
- 1152 (2) any allegation which he wishes to make against the applicant³; and
- 1153 (3) full particulars of his property and income, unless otherwise directed⁴.

Where, however, the respondent challenges the jurisdiction of the court to hear the application, he must, within 14 days after the time allowed for sending the acknowledgment of service, file an affidavit setting out the grounds of the challenge; and the obligation to file an affidavit⁵ does not arise until 14 days after the question of jurisdiction has been determined and the court has decided that the necessary jurisdiction exists⁶.

Where the respondent's affidavit contains an allegation of adultery or of an improper association with a person named, the provisions dealing with service on, and filing of a statement in answer by, a named person⁷ apply⁸.

If the respondent does not so file an affidavit⁹, the court may order him to file an affidavit containing full particulars of his property and income, and in that case the respondent must serve a copy of any such affidavit on the applicant¹⁰.

Within 14 days after being served with a copy of any affidavit filed by the respondent, the applicant may file a further affidavit as to means and as to any fact in the respondent's affidavit which is disputed, and in that case the applicant must serve a copy on the respondent¹¹. No further affidavit may be filed without leave¹².

¹ ie under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 paras 39-45 (see PARA 542 et seq). As to the originating application see PARA 886; and as to the affidavit see PARA 887.

² Family Proceedings Rules 1991, SI 1991/1247, r 3.1(5)(a)

³ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(5)(b).

⁴ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(5)(c).

⁵ ie under the Family Proceedings Rules 1991, SI 1991/1247, r 3.1(5): see the text and notes 1-4.

⁶ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(6).

⁷ ie the provisions of the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 4(4)-(7): see PARA 890.

⁸ Family Proceedings Rules 1991, SI 1991/1247, r 3.1(7) (amended by SI 1999/3491; SI 2005/2922). Where an affidavit contains an allegation of adultery or of an improper association with a named person the court may

direct that the party who filed the affidavit serve a copy of all or part of it on the named person together with Form F (the references to ancillary relief in that form being substituted by references to the provision under which the application is made): Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 4(2), (4) (Appendix 4 added by SI 2005/2922). Where the court makes such a direction the named person may file an affidavit in answer to the allegations: Appendix 4 para 4(5) (as so added). The named person may intervene in the proceedings by applying for directions under Appendix 4 para 7(4) (see PARAS 708-709) within seven days of service of the affidavit on him: Appendix 4 para 4(6) (as so added). Rule 2.37(3) (see PARA 1038) applies to a person served with an affidavit under Appendix 4 para 7(4) as it applies to a co-respondent: Appendix 4 para 4(7) (as so added).

9 le in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 3.1(5): see the text and notes 1-4.

10 Family Proceedings Rules 1991, SI 1991/1247, r 3.1(8).

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.1(9).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.1(9).

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891. Hearing the application and making the order.

At the hearing of an application for financial provision¹ the district judge² must³ investigate the allegations made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined and order the disclosure and inspection of any document or require further affidavits⁴. The district judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings⁵.

Subject to any directions given by the court⁶, any party to an application for financial provision may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to provide a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the district judge for directions⁷.

Pending the final determination of the application, the district judge may make an interim order upon such terms as he thinks just⁸, and after completing his investigation under these provisions he must⁹ make such order as he thinks just¹⁰.

1 Ie an application under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 paras 39-45 (see PARA 542 et seq).

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 8, 9(5) (see the text and notes 8-9; and PARA 892) and r 10.10 (see PARA 747).

4 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(1)(a), (3) (Appendix 4 added by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(4) (as added: see note 4).

6 Where any party to such an application intends on the day appointed for the hearing to apply for directions, he must file and serve on every other party a notice to that effect: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(5) (as added: see note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(6) (as added: see note 4).

8 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(1)(a), (3) (as added: see note 4).

9 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(5) (see PARA 892).

10 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(2) (as added: see note 4). RSC Order 31 r 1 (power to order sale of land) applies to applications to which these provisions apply as though that application were a cause or matter in the Chancery Division: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(4) (as so added). As to the continuing application of specific provisions of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

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892. Reference to judge.

The district judge¹ may at any time refer an application for financial provision², or any question arising thereon, to a judge³ for his decision, and where such an application is so referred or adjourned to a judge the proper officer⁴ must fix a date, time and place for the hearing of the application or the consideration of the question and give notice of that date to all parties⁵. The hearing or consideration must, unless the court otherwise directs, take place in chambers⁶. Where the application is proceeding in a divorce or civil partnership proceedings county court⁷ which is not a court of trial or is pending in the High Court and proceeding in a district registry⁸ which is not in a divorce town or a dissolution town⁹, the hearing or consideration must take place at such court of trial or divorce or dissolution town as in the opinion of the district judge is the nearest or most convenient¹⁰. The judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings¹¹.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 I.e. an application under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 paras 39-45 (see PARA 542 et seq).

3 As to the meaning of 'judge' see PARA 737 note 3.

4 As to the meaning of 'proper officer' see PARA 461 note 5.

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(1)(a), (5), (6) (Appendix 4 added by SI 2005/2922).

6 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(7) (as added: see note 5).

7 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

8 As to the meaning of 'district registry' see PARA 737 note 3.

9 As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2. For these purposes the Royal Courts of Justice are treated as a divorce town or a dissolution town, as the case may be: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(10) (as added: see note 5).

10 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(8), (9) (as added: see note 5).

11 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 7(4), 9(11) (as added: see note 5).

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893. Application to vary, discharge or suspend order.

An application to vary, discharge or suspend an order made on an application in a case of failure to provide reasonable maintenance may be made in the same manner as an application for the variation, discharge or suspension of an order for financial relief¹.

¹ See the Matrimonial Causes Act 1973 s 31; the Civil Partnership Act 2004 Sch 5 Pt 11 (paras 50-62); and PARAS 567-568.

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B. APPLICATIONS TO MAGISTRATES' COURTS

894. Application for order for financial provision.

An applicant in the magistrates' courts for an order for financial provision during the subsistence of a marriage or civil partnership¹ must:

- 1154 (1) file² the application in the prescribed form³ or, where there is no such form, in writing, together with sufficient copies for one to be served on the respondent⁴; and
- 1155 (2) serve a copy of the application, indorsed in accordance with head (b) below, on the respondent at least 21 days prior to the date fixed under head (a) below⁵.

On receipt by the designated officer for a magistrates' court of the documents filed under head (1) above:

- 1156 (a) the justices' clerk must fix the date, time and place for a hearing or a directions appointment⁶, allowing sufficient time for the applicant to comply with head (2) above⁷; and
- 1157 (b) the justices' chief executive must indorse the date, time and place so fixed on the copies of the application filed by the applicant; and return the copies to the applicant forthwith⁸.

A court⁹ may proceed on an application made orally where it is an application¹⁰ for an order for periodical payments agreed between the parties and the applicant has already applied for an order for financial provision¹¹.

Within 14 days of service of such an application¹², the respondent must file and serve on the parties an answer to the application in the prescribed form¹³.

1 file an application under the Domestic Proceedings and Magistrates' Courts Act 1978 or the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq) made pursuant to the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Pt II (rr 2-25) (see PARA 895 et seq).

2 For these purposes, unless a contrary intention appears, 'file' means deposit with the designated officer for a magistrates' court: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 2(1) (amended by SI 2005/617).

3 For the prescribed forms in these proceedings see:

- 214 (1) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 1 (amended by SI 2005/2930) (application for order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8));
- 215 (2) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 2 (amended by SI 1992/2068; SI 1993/267; SI 1994/809; SI 2005/2930) (application

for order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14));

- 216 (3) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 3 (amended by SI 1992/2068; SI 1993/267; SI 2005/2930) (application for order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 7 or the Civil Partnership Act 2004 Sch 6 Pt 3 (paras 15-19));
- 217 (4) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 4 (amended by SI 1992/2068; SI 1993/267; SI 2005/2930) (application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 paras 30-34);
- 218 (5) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 5 (amended by SI 2005/2930) (written statement to evidence the consent and financial resources of the respondent to the making of an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2);
- 219 (6) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 6 (amended by SI 2005/2930) (written statement to evidence the financial resources of a child (Domestic Proceedings and Magistrates' Courts Act 1978 s 6(9)(c) or the Civil Partnership Act 2004 Sch 6 para 11(2)(c));
- 220 (7) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 7 (amended by SI 2005/617; SI 2005/2930) (notice of decision to treat an application for an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 (s 7(4)) or to treat an application under the Civil Partnership Act 2004 Sch 6 Pt 3 as an application for an order under Sch 6 Pt 1 (Sch 6 para 18));
- 221 (8) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 9 (orders under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2, s 6 or s 7); and
- 222 (9) the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form 9A (added by SI 2005/2930) (orders under the Civil Partnership Act 2004 Sch 6 Pt 1, Pt 2 or Pt 3).

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3(1)(a) (amended by SI 1997/1894). For these purposes, unless a contrary intention appears, 'respondent' includes, as the case may be, more than one respondent: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 2(1).

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3(1)(b) (amended by SI 1997/1894; SI 2005/2930).

6 For these purposes, unless a contrary intention appears, 'directions appointment' means a hearing for directions under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(1) (see PARA 895): r 2(1).

7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3(2)(a) (substituted by SI 2001/615; and amended by SI 2005/617). As to delegation of his functions by a justices' clerk see PARA 1035.

8 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3(2)(b) (substituted by SI 2001/615).

9 For these purposes, unless a contrary intention appears, 'court' means a family proceedings court constituted in accordance with the Magistrates' Courts Act 1980 ss 66, 67 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 603) or, in respect of those proceedings prescribed in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 25 (see PARA 735), a single justice who is a member of a family panel: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 2(1) (amended by SI 1997/1894).

10 In an application made by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 s 6(4) or the Civil Partnership Act 2004 Sch 6 para 14 (see PARA 554).

11 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3(3) (amended by SI 2005/2930). Where an application is so made the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3(1) (see PARA 894) does not apply: r 3(3) (as so amended).

12 le under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 (see PARA 553), s 6 (see PARA 554 et seq), s 7 (see PARA 556 et seq) or s 20 (see PARA 576 et seq).

13 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 5 (amended by SI 2005/2930). For the prescribed forms see note 3.

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895. Directions for the conduct of proceedings.

In any proceedings for financial provision¹ the justices' clerk or the court² may give, vary or revoke directions for the conduct of the proceedings, including:

- 1158 (1) the timetable for the proceedings³;
- 1159 (2) varying the time within which or by which an act is required⁴ to be done⁵;
- 1160 (3) the service of documents⁶; and
- 1161 (4) the submission of evidence⁷,

and the justices' clerk must, on receipt of an application by the designated officer for the court, consider whether such directions need to be given⁸.

Where the justices' clerk or a single justice who is holding a directions appointment⁹ considers, for whatever reason, that it is inappropriate to give a direction on a particular matter, he must refer the matter to the court which may give any appropriate direction¹⁰.

Such directions may be given, varied or revoked either:

- 1162 (a) of the justices' clerk's or the court's own motion, the designated officer of the court having given the parties notice of the intention to do so and an opportunity to attend and be heard or to make written representations¹¹;
- 1163 (b) on the written request of a party specifying the direction which is sought, which request has been filed¹² and served on the other parties¹³; or
- 1164 (c) on the written request of a party specifying the direction which is sought, to which the other parties consent and which they or their representatives have signed¹⁴.

The justices' clerk or the court must take a note¹⁵ of the giving, variation or revocation of a direction under these provisions and the designated officer for the court must serve, as soon as practicable, a copy of the note on any party who was not present at the giving, variation or revocation¹⁶.

At or before the first directions appointment in, or hearing of, the proceedings, whichever occurs first, the applicant must file a statement that service of a copy of the application has been effected on the respondent¹⁷; and the statement must indicate the manner, date, time and place of service or, where service was effected by post, the date, time and place of posting¹⁸. In any proceedings for financial provision the justices' clerk or the court may direct that a procedural requirement to serve a document¹⁹ is not to apply or is to be effected in such manner as the justices' clerk or the court directs²⁰.

¹ ie under the Domestic Proceedings and Magistrates' Courts Act 1978 or the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

² As to the meaning of 'court' see PARA 894 note 9.

³ Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(1)(a).

- 4 le by the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991.
- 5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(1)(b).
- 6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(1)(c).
- 7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(1)(d).
- 8 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(1) (amended by SI 2001/615; SI 2005/617). As to delegation of his functions by a justices' clerk see PARA 1035.
- 9 As to the meaning of 'directions appointment' see PARA 894 note 6.
- 10 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(2).
- 11 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(3)(a) (amended by SI 2001/615; SI 2005/617).
- 12 As to the meaning of 'file' see PARA 894 note 2.
- 13 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(3)(b). In an urgent case the request may, with the leave of the justices' clerk or the court, be made orally, without notice to the other parties or both orally and without notice to the other parties: r 6(4). On the receipt of such a request by the designated officer for the court, the justices' clerk must fix a date for the hearing of the request and the designated officer for the court must give not less than two days' notice to the parties of the date so fixed: r 6(5) (amended by SI 2001/615; SI 2005/615).
- 14 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(3)(c). On considering such a request the justices' clerk or the court must either:
 - 223 (1) grant the request, whereupon the designated officer for the court must inform the parties of the decision (r 6(6)(a) (amended by SI 2001/615; SI 2005/617)); or
 - 224 (2) direct that a date be fixed for the hearing of the request, whereupon the designated officer for the court must fix such a date and the designated officer for the court must give not less than two days' notice to the parties of the date so fixed (Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(6)(b) (amended by SI 2001/615; SI 2005/617)).
- 15 For these purposes, unless a contrary intention appears, 'note' includes a record made by mechanical means: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 2(1).
- 16 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(7) (amended by SI 2001/615; SI 2005/617).
- 17 As to the meaning of 'respondent' see PARA 894 note 4.
- 18 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(4) (amended by SI 1997/1894).
- 19 le a requirement in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Pt II (rr 2-25).
- 20 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(5). As to delegation of his functions by a justices' clerk see PARA 1035.

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896. Procedure at directions appointments and hearings.

A party to proceedings for financial provision¹ must attend a directions appointment² of which he has been given due notice³, unless the justices' clerk or the court⁴ otherwise directs⁵.

Before the hearing, the justice or justices who will be dealing with the case must read any documents which have been filed⁶ in respect of the hearing⁷. The court must not, however, begin⁸ to hear an application in the absence of the respondent⁹ unless it is proved to the satisfaction of the court that he received reasonable notice of the date of the hearing or the court is satisfied that the circumstances of the case justify proceeding with the hearing¹⁰.

The justices' clerk at a directions appointment or the court at a hearing or directions appointment may give directions as to the order of speeches and evidence¹¹ and, subject to such directions, at a hearing of, or directions appointment in, proceedings the parties must adduce their evidence in the following order:

- 1165 (1) the applicant¹²;
- 1166 (2) the respondent other than the child¹³; and
- 1167 (3) the child if he is a respondent¹⁴.

On hearing a complaint in a matrimonial or civil partnership case the court has no power to give the respondent the option of making an unsworn statement; the court is concerned only with testimony given on oath¹⁵.

Where, at the time and place appointed for a hearing, the respondent appears but the applicant does not, the court may refuse the application or, if sufficient evidence has previously been received, proceed in the absence of the applicant¹⁶. Where, at the time and place appointed for a hearing, neither the applicant nor the respondent appears, the court may refuse the application¹⁷.

1 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 or the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

2 As to the meaning of 'directions appointment' see PARA 894 note 6.

3 Ie in accordance with the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(3) (see PARA 895).

4 As to the meaning of 'court' see PARA 894 note 9.

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 8(1). As to delegation of his functions by a justices' clerk see PARA 1035.

6 Ie under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 9 (see PARA 1028). As to the meaning of 'file' see PARA 894 note 2.

7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(1).

8 Ie subject to the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 18(2) (see PARA 556) and r 22(2) (see PARA 581).

- 9 As to the meaning of 'respondent' see PARA 894 note 4.
- 10 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 8(2) (amended by SI 1997/1894). As to the principles to be followed by the court see PARA 897.
- 11 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(2) (amended by SI 1997/1894).
- 12 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(3)(a) (r 12(3) amended by SI 1997/1894).
- 13 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(3)(b).
- 14 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(3)(c).
- 15 *Aggas v Aggas* [1971] 2 All ER 1497, [1971] 1 WLR 1409, DC.
- 16 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 8(3).
- 17 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 8(4).

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897. Principles to be followed by the court.

Opportunity should be given to a party to be present when he indicates that he has a case to put forward¹; and it is the duty of the court to see that the parties understand the proceedings². While the court is entitled to say, after the complainant has presented his or her case, that there is no substance in it, and to dismiss the application, it is generally better to wait and hear both sides³. A submission that the complainant has no case in law should never be allowed before the conclusion of the complainant's case⁴. Where proceedings for divorce or dissolution are pending between the parties, the justices have a discretion whether to hear the application or adjourn⁵.

A witness in matrimonial or civil partnership proceedings in a magistrates' court is under no obligation to leave the court unless the magistrates make an order excluding him, although where the magistrates receive an application for such an order they should, unless they are satisfied that it would not be an appropriate step to take in the circumstances, order the witness to withdraw⁶. If a party is not represented and the justices think that the case is one in which a witness should be excluded, they should suggest to the party who is not represented that he should make an application to that effect (although such an order can never apply to one of the parties themselves or their solicitors or to expert witnesses)⁷. If, however, a witness remains in court after an order excluding him has been made, and his evidence is then offered to the court, the magistrates have a discretion to admit that evidence notwithstanding that the witness has remained in court in apparent defiance of the justices' ruling⁸.

The magistrates should not act on their supposed personal knowledge of a party without giving that party an opportunity of dealing with the facts which they suppose that they know⁹, nor should the court allow a letter improperly written to it by one party to be put to him in evidence where the existence and contents of the letter have not previously been made known to the other party¹⁰. Where the letter is read out, the court should consider an application for an adjournment on the grounds of surprise¹¹.

The decision should be that of the justices themselves and not that of the justices and their clerk, and nothing should be done to give the parties or the public the impression that the clerk is influencing the decision¹². It should not be regarded as a matter of course that, if justices retire to consider their decision, the clerk should retire with them, and if he does retire with them or is sent for in the course of the deliberations, he should return to his place in court as soon as the justices release him, leaving them to complete their deliberations alone¹³.

1 *Scutt v Scutt* (1950) 94 Sol Jo 422, DC; *Smith v Smith* [1957] 2 All ER 397, [1957] 1 WLR 802, DC; and see *Wilson v Wilson* [1986] 2 FLR 104, [1986] Fam Law 212, CA (refusal of adjournment to enable mother to put case with professional advice held to be a denial of justice). A probation officer may apply for an adjournment on behalf of an absent party: *Smith v Smith*. If the party against whom the order for financial provisions is sought through inadvertence fails to appear but later wishes to be heard on quantum alone, he should apply for a variation rather than appeal (*Kaye v Kaye* [1965] P 100, [1964] 1 All ER 620, DC); and the same consideration should apply if he does not appear 'through some good reason' (*Neal v Neal* (1971) 115 Sol Jo 772, DC; *Walker v Walker* [1967] 1 All ER 412, [1967] 1 WLR 327, DC (refusal of adjournment resulted in serious injustice to husband), applying *Maxwell v Keun* [1928] 1 KB 645, CA). Where the party against whom the order for financial provisions is sought does not appear but sends written details of his finances, to which the other party cannot agree, the court should adjourn so that the first party can be given the opportunity of attending the court in order to deal with those matters: *Whittingstall v Whittingstall* [1989] FCR 759, [1989] 2 FLR 368.

2 *Kashick v Kashick* (1951) 116 JP 6, DC (party did not understand English). See also *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034, CA; *Hobby v Hobby* [1954] 2 All ER 395, [1954] 1 WLR 1020, DC.

3 *Ramsden v Ramsden* [1954] 2 All ER 623, [1954] 1 WLR 1105, DC; *Marjoram v Marjoram* [1955] 2 All ER 1 at 6, [1955] 1 WLR 520 at 523, DC; *Waters v Waters* [1956] P 344, [1956] 1 All ER 432, DC; *Storey v Storey* [1961] P 63, [1960] 3 All ER 279, CA; *Disher v Disher* [1965] P 31, [1963] 3 All ER 933, DC.

4 *Vye v Vye* [1969] 2 All ER 29, [1969] 1 WLR 588, DC. Where the justices wish to dismiss the complaint at the end of the complainant's case, they must first invite him or his representative to address the court: *Mayes v Mayes* [1971] 2 All ER 397, [1971] 1 WLR 679, DC.

5 *Kaye v Kaye* [1965] P 100, [1964] 1 All ER 620, DC; and see *Lanitis v Lanitis* [1970] 1 All ER 466, [1970] 1 WLR 503, DC (although divorce proceedings were pending in the High Court, the justices were right to take the exceptional decision to proceed with the urgent matters of maintenance and custody with all the speed inherent in their jurisdiction when the interests of justice to the wife so demanded and when this could be done without prejudice to the merits or to the husband in his subsequent proceedings).

6 *Tomlinson v Tomlinson* [1980] 1 All ER 593, [1980] 1 WLR 322, DC.

7 *Tomlinson v Tomlinson* [1980] 1 All ER 593, [1980] 1 WLR 322, DC.

8 *Tomlinson v Tomlinson* [1980] 1 All ER 593, [1980] 1 WLR 322, DC.

9 *Church v Church* (1933) 148 LT 432, DC; *Thomas v Thomas* [1961] 1 All ER 19, [1961] 1 WLR 1, DC; *Brinkley v Brinkley* [1965] P 75, [1963] 1 All ER 493, DC.

10 *Jones v Jones* (1941) 165 LT 398, DC; *Marjoram v Marjoram* [1955] 2 All ER 1, [1955] 1 WLR 520, DC.

11 *Marjoram v Marjoram* [1955] 2 All ER 1 at 5, [1955] 1 WLR 520 at 523, DC (letter by husband to court; letter put to him at end of his evidence; wife's application for adjournment refused; refusal by court to hear legal submission on behalf of wife as to effect of husband's allegations; existence of letter should have been made known and contents read out when court assembled and any application for adjournment considered).

12 *Practice Direction* [1954] 1 All ER 230; and see *Hudson v Hudson* [1965] 2 All ER 82, [1965] 1 WLR 567, DC; *Williams v Williams* (1962) 106 Sol Jo 858, DC; *Hobby v Hobby* [1954] 2 All ER 395, [1954] 1 WLR 1020, DC (justice not seen to be done; clerk obstructed presentation of case; rehearing ordered); cf *Simms v Moore* [1970] 2 QB 327, [1970] 3 All ER 1, DC. As to the general duty of the magistrates' clerk see *Claxton v Claxton* [1959] P 33, [1959] 1 All ER 386, DC. See also *Jolliffe v Jolliffe* [1965] P 6, [1963] 3 All ER 295, DC (clerk called as witness should not act as clerk).

13 See note 12.

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898. Constitution of court after adjournment.

Where the hearing of an application for financial provision¹ is adjourned after the court has decided that it is satisfied of any ground of application², the court which resumes the hearing of that application may include justices who were not sitting when the hearing began if:

- 1168 (1) the parties to the proceedings agree³; and
- 1169 (2) at least one of the justices composing the court which resumes the hearing was sitting when the hearing of the application began⁴.

Where⁵ among the justices composing the court which resumes the hearing of such an application⁶ there are any justices who were not sitting when the hearing of the application began, the court which resumes the hearing must, before making any order on the application, make such inquiry into the facts and circumstances of the case as will enable the justices who were not sitting when the hearing began to be fully acquainted with those facts and circumstances⁷.

¹ I.e. an application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 or the Civil Partnership Act 2004 Sch 6: see PARA 553 et seq.

² I.e. any ground mentioned in the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 or the Civil Partnership Act 2004 Sch 6 para 1: see PARA 553.

³ Domestic Proceedings and Magistrates' Courts Act 1978 s 31(1)(a); Civil Partnership Act 2004 Sch 6 para 46(c). When the hearing of an application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8) (see PARA 553 et seq) is adjourned after the court has decided that it is satisfied of any ground mentioned in the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 or the Civil Partnership Act 2004 Sch 6 para 1 (see PARA 553), and the parties to the proceedings agree to the resumption of the hearing in accordance with the Domestic Proceedings and Magistrates' Courts Act 1978 s 31 by a court which includes justices who were not sitting when the hearing began, particulars of the agreement must be entered in the court's register: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 23(2) (substituted by SI 2005/2930).

⁴ Domestic Proceedings and Magistrates' Courts Act 1978 s 31(1)(b). See note 3.

⁵ I.e. by virtue of the Domestic Proceedings and Magistrates' Courts Act 1978 s 31(1) (see the text and notes 1-4).

⁶ See note 1.

⁷ Domestic Proceedings and Magistrates' Courts Act 1978 s 31(2).

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899. Court's decision.

After the final hearing of proceedings on an application for financial provision¹ the court² must make its decision as soon as is practicable³. Before the court makes an order or refuses an application, the justices' clerk must record in writing:

- 1170 (1) the name of the justice or justices constituting the court by which the decision is made⁴; and
- 1171 (2) in consultation with the justice or justices, the reasons for the court's decision and any findings of fact⁵.

When making an order or when refusing an application, the court, or one of the justices constituting the court by which the decision is made, must state any findings of fact and the reasons for the court's decision⁶. After the court announces its decision, the justices' clerk must as soon as practicable make a record of any order made in the prescribed form⁷ in writing; and the designated officer for the court must serve⁸ a copy of the order made on the parties to the proceedings⁹.

¹ ie an application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 or the Civil Partnership Act 2004 Sch 6: see PARA 553 et seq.

² As to the meaning of 'court' see PARA 894 note 9.

³ Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(4) (amended by SI 1997/1894).

⁴ Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(5)(a). As to delegation of his functions by a justices' clerk see PARA 1035.

⁵ Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(5)(b). The designated officer for the court must supply a copy of the record of the reasons to a party in proceedings under the Family Law Act 1996 Pt IV ss 30-63 (see PARA 285 et seq) and to any other person, if satisfied that it is required in connection with an appeal or possible appeal, if so requested by such person: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(8) (substituted by SI 2007/1628).

⁶ Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(6).

⁷ As to the prescribed forms for these purposes see PARA 894 note 3.

⁸ ie in accordance with the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991.

⁹ Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(7) (substituted by SI 2001/615; amended by SI 2005/617).

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900. Appeals against orders.

Where a magistrates' court makes or refuses to make, varies or refuses to vary, revokes or refuses to revoke an order for financial provision¹, other than an interim maintenance order², an appeal lies³ to the High Court⁴. Every such appeal must be heard by a Divisional Court of the Family Division and must be entered by lodging three copies of the notice of motion in the Principal Registry⁵. The notice must be served⁶, and the appeal entered, within six weeks after the date of the order appealed against⁷. On entering the appeal, or as soon as practicable thereafter, the appellant must, unless otherwise directed, lodge in the Principal Registry:

- 1172 (1) three certified copies of the summons and of the order appealed against, and of any order staying its execution⁸;
- 1173 (2) three copies of the clerk's notes of the evidence⁹;
- 1174 (3) three copies of the justices' reasons for their decision¹⁰;
- 1175 (4) a certificate that notice of the motion has been duly served on the clerk and on every party affected by the appeal¹¹; and
- 1176 (5) where the notice of the motion includes an application to extend the time for bringing the appeal, a certificate (and a copy thereof by the appellant's solicitor, or the appellant if he is acting in person), setting out the reasons for the delay and the relevant dates¹².

If the clerk's notes of the evidence are not produced, the court may hear and determine the appeal on any other evidence or statement of what occurred in the proceedings before the magistrates' court as appears to the court to be sufficient¹³.

The court is not bound to allow the appeal on the ground merely of misdirection or improper reception or rejection of evidence unless, in the opinion of the court, substantial wrong or miscarriage of justice has been thereby occasioned¹⁴.

A district judge¹⁵ may dismiss an appeal to which these provisions apply for want of prosecution or, with the consent of the parties, may dismiss the appeal or give leave for it to be withdrawn, and may deal with any question of costs arising out of the dismissal or withdrawal¹⁶.

Any interlocutory application in connection with or for the purpose of any appeal to which these provisions apply may be heard and disposed of before a single judge¹⁷.

Where an appeal to which these provisions apply relates only to the amount of any periodical or lump sum payment ordered to be made, it must be heard and determined, unless the President of the Family Division otherwise directs, by a single judge¹⁸.

1 Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) or the Civil Partnership Act 2004 Sch 6 (see PARA 553 et seq).

2 As to the meaning of 'interim maintenance order' see PARA 563.

3 Ie subject to the Domestic Proceedings and Magistrates' Courts Act 1978 s 27: see PARA 565.

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 29(1); Civil Partnership Act 2004 Sch 6 para 46(b). As to the orders that may be made on appeal see PARA 901.

5 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(1). As to the meaning of 'Principal Registry' see PARA 737 note 3. Only one copy of the notice of motion is required in an appeal relating only to the amount of any periodical or lump sum payment ordered to be made which is to be heard and determined by a single judge (as to which see the text and note 18): r 8.2(9)(a).

6 le in accordance with RSC Ord 65 r 5. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

7 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(2), (3).

8 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(4)(a). Only one copy of the summons is required in an appeal relating only to the amount of any periodical or lump sum payment ordered to be made which is to be heard and determined by a single judge (as to which see the text and note 18): r 8.2(9)(a).

9 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(4)(b). Only one copy of the clerk's notes is required in an appeal relating only to the amount of any periodical or lump sum payment ordered to be made which is to be heard and determined by a single judge (as to which see the text and note 18): r 8.2(9)(a).

10 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(4)(c). Only one copy of the justices' reasons is required in an appeal relating only to the amount of any periodical or lump sum payment ordered to be made which is to be heard and determined by a single judge (as to which see the text and note 18): r 8.2(9)(a).

11 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(4)(d).

12 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(4)(e).

13 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(5).

14 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(6).

15 As to the meaning of 'district judge' see PARA 737 note 3.

16 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(7).

17 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(8). As to the meaning of 'judge' see PARA 737 note 3.

18 Family Proceedings Rules 1991, SI 1991/1247, r 8.2(9). In that case, only one copy of the various documents required to be lodged is required (see the text and notes 5, 8-10), and the parties may agree in writing, or the President may direct, that the appeal be heard and determined at a divorce or dissolution town: r 8.2(9) (amended by SI 2005/2922). As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2; and as to the President of the Family Division see **COURTS** vol 10 (Reissue) PARA 515; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 303.

UPDATE

900 Appeals against orders

TEXT AND NOTES 1-4--References to the High Court are now to a county court: Domestic Proceedings and Magistrates' Courts Act 1978 s 29 (amended by SI 2009/871).

TEXT AND NOTES 5-18--SI 1991/1247 r 8.2 substituted; r 8.A1 (substituted by SI 2009/2027), SI 1991/1247 rr 8.2A-8.2H added: SI 2009/636. The provisions so added apply where (1) there is an appeal under (a) Maintenance Orders Act 1958 s 4(7); (b) Domestic Proceedings and Magistrates' Courts Act 1978 s 29; (c) Family Law Act 1986 s 60(5); (d) Children Act 1989 s 94(1)-(9); (e) Family Law Act 1996 s 61; (f) any other enactment giving a person a right of appeal against a decision of a magistrates' court; or (g) the Child Support (Collection and Enforcement) Regulations 1992, SI 1992/1989, reg 25AB(1)(a)-(d); or (2) an appeal lies from any decision of a district judge to the judge of the court in which the decision was made in proceedings (a) listed in SI 1991/1247 r 4.1(2); or (b) to which Family Law Act 1996 Pts 4, 4A apply; or (c) relating to a deduction order appeal: SI 1991/1247 r 8.2(1) (amended by SI 2009/2027). In

proceedings referred to in head (2) above, any party may appeal from an order or decision made or given by the district judge in a county court to a judge on notice and CPR Sch 2 CCR Ord 13 r 1(10) and CCR Ord 37 r 6 do not apply: SI 1991/1247 r 8.2(2) (amended by SI 2009/2027). Appeals under head (2) must be heard in chambers unless the judge directs otherwise: SI 1991/1247 r 8.2(3). The provisions added are subject to any enactment: r 8.2(4).

The appellant must file and serve the following documents on the parties to the proceedings in the court below and in the case of a deduction order appeal, the Commission and any other respondent, any children's guardian and, where applicable, the local authority that prepared a report under the Children Act 1989 s 14A(8) or (9): (i) notice in writing of the appeal, setting out the grounds of the appeal; (ii) a certified copy of the summons or application and of the order appealed against, and of any order staying its execution; (iii) a copy of any notes of the evidence; and (iv) a copy of any reasons given for the decision: SI 1991/1247 r 8.2A(1) (amended by SI 2009/2027), SI 1991/1247 r 8.2A(2). 'The court below' means the court from which, or the person from whom, the appeal lies: r 8.A1(a). The appellant must file and serve the notice of appeal (A) within 14 days after the determination against which the appeal is brought; (B) in the case of an appeal against an order under the 1989 Act s 38(1), within seven days after the making of the order; (C) in the case of an appeal against an order under the 1978 Act s 29, within 21 days after the making of the order; or (D) in the case of a deduction order appeal, within 21 days of where the appellant is a deposit-taker, service of the order, where the appellant is a liable person, receipt of the order, or where the appellant is either a deposit-taker or a liable person, the date of receipt of notification of the decision; or (E) with the leave of the court to which, or judge to whom, the appeal is brought, within such other time as that court or judge may direct: SI 1991/1247 r 8.2A(3) (amended by SI 2009/2027). Subject to any direction of the court to which, or judge to whom, the appeal is brought, the appellant must file and serve the documents mentioned in heads (ii)-(iv) above as soon as practicable after filing and service of the notice of appeal: SI 1991/1247 r 8.2A(4) (amended by SI 2009/2027). Where the magistrates' court is the court below, the appellant must serve the documents mentioned in heads (i) and (ii) on the designated officer for that court: SI 1991/1247 r 8.2A(5). In the case of a deduction order appeal, the Commission must provide to the court and serve on all other parties to the appeal any information and evidence relevant to the making of the decision or order being appealed, within 14 days of receipt of the notice of appeal: r 8.2A(6) (r 8.2A(6), (7) added by SI 2009/2027). For the purposes of head (D) references to 'liable person' and 'deposit-taker' are to be interpreted in accordance with the Child Support Act 1991 s 32E, SI 1992/1989 reg 25A(2), 1991 Act s 54 and the liable person is to be treated as having received the order or notification of the decision two days after it was posted by the Commission: SI 1991/1247 r 8.2A(7). 'Commission' means the Child Maintenance and Enforcement Commission; 'deduction order appeal' means an appeal under SI 1992/1989 reg 25AB(1)(a)-(d); for the purposes of a deduction order appeal 'the appellant' means the person who brings or seeks to bring an appeal and 'the respondent' means the Commission and any person other than the appellant who was served with an order under the 1991 Act ss 32A(1), 32E(1) or 32F(1) and a person who is permitted by the appeal court to be a party to the appeal: SI 1991/1247 r 8.A1 (as substituted).

A respondent who wishes to contend (1) on the appeal that the decision of the court below or, in a deduction order appeal, the order or decision of the Commission, should be varied, either in any event or in the event of the appeal being allowed in whole or in part; (2) that the decision of the court below or, in a deduction order appeal, the order or decision of the Commission, should be affirmed on grounds other than those relied on by that court; or (3) by way of cross-appeal that the decision of the court below or, in a deduction order appeal, the order or decision of the Commission, was wrong in

whole or in part, must, within 14 days of receipt of notice of the appeal, file and serve on all other parties to the appeal a notice in writing, setting out the grounds upon which the respondent relies: r 8.2B(1) (amended by SI 2009/2027) . However, no notice may be filed or served in an appeal against an order under the Children Act 1989 s 38: SI 1991/1247 r 8.2B(2). Where the Commission as a respondent, wishes to contend that its order or decision should be varied, either in any event or in the event of the appeal being allowed in whole or in part or affirmed on different grounds from those on which it relied when making the order or decision, it must, within 14 days of receipt of notice of the appeal, file and serve on all other parties to the appeal a notice in writing, setting out the grounds on which it relies: r 8.2B(3) (added by SI 2009/2027). Unless the court orders otherwise, an appeal under SI 1991/1247 r 8.2(1) does not operate as a stay of proceedings on the order or decision appealed against: r 8.2C(1) (r 8.2C substituted, rr 8.2E, 8.2F, 8.2G amended, r 8.2FF added, by SI 2009/2027). SI 1991/1247 r 8.2C(1) does not apply to an appeal made against an order under the 1991 Act s 32F(1): SI 1991/1247 r 8.2C(2).

Provision is also made for the amendment of the appeal notice (r 8.2D), the powers of a district judge on appeal (r 8.2E, as amended), the powers of the appeal court (rr 8.A1(b) (as substituted), 8.2F (as amended)), the powers of the appeal court in relation to deduction order appeals (r 8.2FF, as added) and the hearing of appeals (rr 8.A1(b), 8.2G (as amended)). Where an appeal is brought against the making of a hospital order or a guardianship order under the Mental Health Act 1983, a copy of any written evidence considered by the magistrates' court under s 37(1) must be sent by the designated officer to the county court in which the documents relating to the appeal are filed: SI 1991/1247 r 8.2H.

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901. Orders that may be made on appeal.

On an appeal against the making or refusal to make, the variation or refusal to vary, or the revocation or refusal to revoke, an order for financial provision¹, the High Court has power to make such orders as may be necessary to give effect to its determination of the appeal, including such incidental or consequential orders as appear to the court to be just, and, in the case of an appeal from a decision of a magistrates' court made on an application for or in respect of an order for the making of periodical payments, the High Court has power to order that its determination of the appeal is to have effect from such date as the court thinks fit, not being earlier than the date of the making of the application to the magistrates' court or, in a case where there was made to the magistrates' court an application for an order for financial provision² and an application for an order for periodical payments which have been agreed³ and the term of the periodical payments was or might have been ordered to begin on the date of the making of the application for an order for financial provision⁴, the date of the making of that application⁵.

Where, on such an appeal in respect of an order of a magistrates' court requiring any person to make periodical payments, the High Court reduces the amount of those payments or discharges the order, the High Court has power⁶ to order the person entitled to payments under the order of the magistrates' court to pay to the person liable to make payments under that order such sum in respect of payments already made in compliance with the order as the court thinks fit and, if any arrears are due under the order of the magistrates' court, the High Court has power to remit the payment of those arrears or any part thereof⁷.

Any order of the High Court made on an appeal under these provisions, other than an order directing that an application be reheard by a magistrates' court, is to be treated, for the purposes of the enforcement of the order and for the purposes of the variation, revival and revocation of the order⁸, as if it were an order of the magistrates' court from which the appeal was brought and not of the High Court⁹.

1 Ie an appeal under the Domestic Proceedings and Magistrates' Courts Act 1978 s 29(1), as extended to civil partnership proceedings by the Civil Partnership Act 2004 Sch 6 para 46(b): see PARAS 900-901.

2 Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or the Civil Partnership Act 2004 Sch 6 Pt 1 (paras 1-8): see PARA 553.

3 Ie an application under the Domestic Proceedings and Magistrates' Courts Act 1978 s 6 or the Civil Partnership Act 2004 Sch 6 Pt 2 (paras 9-14): see PARA 554.

4 See note 2.

5 Domestic Proceedings and Magistrates' Courts Act 1978 s 29(2) (amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 26); Civil Partnership Act 2004 Sch 6 para 46(b).

6 Ie without prejudice to the generality of the Domestic Proceedings and Magistrates' Courts Act 1978 s 29(2): see the text and notes 1-5.

7 Domestic Proceedings and Magistrates' Courts Act 1978 s 29(3).

8 le for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978 s 20 or the Civil Partnership Act 2004 Sch 6 paras 30-34: see PARA 576 et seq.

9 Domestic Proceedings and Magistrates' Courts Act 1978 s 29(5) (amended by the Children Act 1989 Sch 13 para 42).

UPDATE

901 Orders that may be made on appeal

TEXT AND NOTES--References to the High Court are now to a county court: Domestic Proceedings and Magistrates' Court Act 1978 s 29 (amended by SI 2009/871).

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(ii) Financial Relief on Divorce, Dissolution, Nullity, Separation and Presumption of Death

A. THE PROCEDURAL CODE

902. Proceedings for relief.

Where a petition or application for divorce, dissolution, nullity, judicial separation or a separation order has been presented or made, proceedings for maintenance pending suit or the outcome of proceedings¹, for a financial provision order² or for a property adjustment order³ may be begun, subject to and in accordance with rules of court, at any time after the presentation of the petition⁴.

For the purposes of rules of court⁵ 'ancillary relief' means:

- 1177 (1) an avoidance of disposition order⁶;
- 1178 (2) a financial provision order⁷;
- 1179 (3) an order for maintenance pending suit or the outcome of proceedings⁸;
- 1180 (4) a property adjustment order⁹;
- 1181 (5) a variation order¹⁰; or
- 1182 (6) a pension sharing order¹¹.

The procedures for applying for financial relief¹² apply to any financial relief application and to any application¹³ for special protection in separation cases¹⁴.

1 Ie proceedings under the Matrimonial Causes Act 1973 s 22 or the Civil Partnership Act 2004 Sch 5 para 38 (see PARA 456).

2 Ie proceedings under the Matrimonial Causes Act 1973 s 23 or the Civil Partnership Act 2004 Sch 5 Pt 1 (paras 1-5) (see PARA 450 et seq).

3 Ie proceedings under the Matrimonial Causes Act 1973 s 24 or the Civil Partnership Act 2004 Sch 5 Pt 2 (paras 6-9) (see PARA 499 et seq).

4 Matrimonial Causes Act 1973 s 26(1); Civil Partnership Act 2004 Sch 5 para 46(1), (2). An application may also be made for a pension sharing order: see PARA 916. As to the making of applications see PARA 916.

5 Ie for the purposes of the Family Proceedings Rules 1991, SI 1991/1247.

6 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1). An 'avoidance of disposition order' is an order under the Matrimonial Causes Act 1973 s 37(2)(b) or (c) or the Civil Partnership Act 2004 Sch 5 para 74(3) or (4) (see PARA 587); Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

7 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1). A 'financial provision order' is an order mentioned in the Matrimonial Causes Act 1973 s 21(1), except an order under s 27(6), or an order mentioned in the Civil Partnership Act 2004 Sch 5 para 2(1) made under Sch 5 Pt 1 (paras 1-5) (see PARA 450); Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

8 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922). For these purposes, unless the context otherwise requires, 'order for maintenance pending suit' means an order under the

Matrimonial Causes Act 1973 s 22 and 'order for maintenance pending outcome of proceedings' means an order under the Civil Partnership Act 2004 Sch 5 para 38 (see PARA 456): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

9 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1). For these purposes, unless the context otherwise requires, 'property adjustment order' means any of the orders mentioned in the Matrimonial Causes Act 1973 s 21(2) and the Civil Partnership Act 2004 Sch 5 para 7(1) (see PARA 498): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

10 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1). For these purposes, unless the context otherwise requires, 'variation order' mean an order under the Matrimonial Causes Act 1973 s 31 or the Civil Partnership Act 2004 Sch 5 Pt 11 (paras 50-61) (see PARA 567): Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2005/2922).

11 Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 2000/2267). As to the meaning of 'pension sharing order' see PARA 523.

12 Ie the Family Proceedings Rules 1991, SI 1991/1247, rr 2.51D-2.71 (see PARA 867 et seq).

13 Ie under the Matrimonial Causes Act 1973 s 10(2) or the Civil Partnership Act 2004 s 48(2): see PARA 873.

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.51B(1) (r 2.51B added by SI 1999/3491; renumbered and amended by SI 2005/2922).

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903. The overriding objective.

The ancillary relief rules¹ are a procedural code with the overriding objective of enabling the court² to deal with cases justly³.

Dealing with a case justly includes, so far as is practicable:

- 1183 (1) ensuring that the parties are on an equal footing⁴;
- 1184 (2) saving expense⁵;
- 1185 (3) dealing with the case in ways which are proportionate:
- .10
- 13. (a) to the amount of money involved⁶;
- 14. (b) to the importance of the case⁷;
- 15. (c) to the complexity of the issues⁸; and
- 16. (d) to the financial position of each party⁹;
- .11
- 1186 (4) ensuring that it is dealt with expeditiously and fairly¹⁰; and
- 1187 (5) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases¹¹.

The court must seek to give effect to the overriding objective when it exercises any power given to it by the ancillary relief rules or interprets any rule¹²; and the parties are required to help the court to further the overriding objective¹³.

The court must further the overriding objective by actively managing cases¹⁴. 'Active case management' includes:

- 1188 (i) encouraging the parties to co-operate with each other in the conduct of the proceedings¹⁵;
- 1189 (ii) encouraging the parties to settle their disputes through mediation, where appropriate¹⁶;
- 1190 (iii) identifying the issues at an early date¹⁷;
- 1191 (iv) regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question¹⁸;
- 1192 (v) helping the parties to settle the whole or part of the case¹⁹;
- 1193 (vi) fixing timetables or otherwise controlling the progress of the case²⁰;
- 1194 (vii) making use of technology²¹; and
- 1195 (viii) giving directions to ensure that the trial of a case proceeds quickly and efficiently²².

1 As to the meaning of 'ancillary relief rules' see PARA 902.

2 As to the meaning of 'court' see PARA 824 note 4.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(1) (r 2.251D added by SI 1999/3491; renumbered by SI 2005/2922). The new procedure for ancillary relief is intended to reduce delay, facilitate settlements, limit costs incurred by parties and provide the court with greater and more effective control over the conduct of the

proceedings: *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 1.1.

- 4 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(a) (as added and renumbered: see note 3).
- 5 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(b) (as added and renumbered: see note 3).
- 6 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(c)(i) (as added and renumbered: see note 3).
- 7 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(c)(ii) (as added and renumbered: see note 3).
- 8 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(c)(iii) (as added and renumbered: see note 3).
- 9 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(c)(iv) (as added and renumbered: see note 3).
- 10 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(d) (as added and renumbered: see note 3).
- 11 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(2)(e) (as added and renumbered: see note 3).
- 12 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(3) (as added and renumbered: see note 3).
- 13 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(4) (as added and renumbered: see note 3).
- 14 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(5) (as added and renumbered: see note 3).
- 15 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(a) (as added and renumbered: see note 3).
- 16 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(b) (as added and renumbered: see note 3).
- 17 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(c) (as added and renumbered: see note 3).
- 18 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(d) (as added and renumbered: see note 3).
- 19 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(e) (as added and renumbered: see note 3).
- 20 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(f) (as added and renumbered: see note 3).
- 21 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(g) (as added and renumbered: see note 3).
- 22 Family Proceedings Rules 1991, SI 1991/1247, r 2.51D(6)(h) (as added and renumbered: see note 3).

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904. Desirability of substantive and financial matters to be considered together.

The courts' powers in relation to substantive and financial matters are not isolated from one another and, if convenient, should be considered together at the same hearing¹, as the exercise of the wide jurisdiction given to the court in respect of financial provision and property adjustment may make it unnecessary to decide the exact property rights of the parties² or to make specific orders as to the occupation of the family home³.

¹ See *Practice Direction* [1971] 1 All ER 895, [1971] 1 WLR 260.

² See *Kowalczyk v Kowalczyk* [1973] 2 All ER 1042, [1973] 1 WLR 930, CA; *Griffiths v Griffiths* [1974] 1 All ER 932, [1974] 1 WLR 1350, CA; *Gee v Gee* (1972) 116 Sol Jo 219, CA; *Williams v Williams* [1976] Ch 278 at 286, [1977] 1 All ER 28 at 31, CA per Lord Denning MR.

³ See *Baynham v Baynham* [1969] 1 All ER 305 at 307, [1968] 1 WLR 1890 at 1894, CA per Lord Denning MR.

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B. THE PRE-APPLICATION PROTOCOL

905. Purpose of the pre-application protocol.

The pre-application protocol¹ outlines the steps parties should take to seek and provide information from and to each other prior to the commencement of any application for ancillary relief². The aim of the pre-application protocol is to ensure that:

- 1196 (1) pre-application disclosure and negotiation take place in appropriate cases³;
- 1197 (2) where there is pre-application disclosure and negotiation, it is dealt with cost effectively and in line with the overriding objective⁴; and
- 1198 (3) the parties are in a position to settle the case fairly and early without litigation⁵.

The court will be able to treat the standard set in the pre-application protocol as the normal, reasonable approach to pre-application conduct⁶. If proceedings are subsequently issued, the court will be entitled to decide whether there has been non-compliance with the protocol and, if so, whether non-compliance merits consequences⁷.

1 See PARA 906 et seq.

2 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 2.1.

3 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 1.2(a).

4 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 1.2(b). The 'overriding objective' is set out in the Family Proceedings Rules 1991, SI 1991/1247, r 2.51D (see PARA 903).

5 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 1.2(c).

6 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 1.3.

7 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 1.3.

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906. Scope of the pre-application protocol.

The pre-application protocol¹ is intended to apply to all claims for financial relief²; and it is designed to cover all classes of case, ranging from a simple application for periodical payments to an application for a substantial lump sum and property adjustment order³.

In considering the option of pre-application disclosure and negotiation, solicitors should bear in mind the advantage of having a court timetable and court managed process⁴. There is sometimes an advantage in preparing disclosure before proceedings are commenced⁵. However, solicitors should bear in mind the objective of controlling costs and, in particular, the costs of discovery and that the option of pre-application disclosure and negotiation has risks of excessive and uncontrolled expenditure and delay⁶. This option should only be encouraged where both parties agree to follow this route and disclosure is not likely to be an issue or has been adequately dealt with in mediation or otherwise⁷.

Solicitors ought to consider at an early stage and keep under review whether it would be appropriate to suggest mediation to the clients as an alternative to solicitor negotiation or court-based litigation⁸.

Making an application to the court ought not to be regarded as a hostile step or a last resort, rather as a way of starting the court timetable, controlling disclosure and endeavouring to avoid the costly final hearing and the preparation for it⁹.

¹ As to the purpose of the pre-application protocol see PARA 905.

² ie as defined by the Family Proceedings Rules 1991, SI 1991/1247, r 1.2 (see PARA 902).

³ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.1.

⁴ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.2.

⁵ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.2.

⁶ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.2.

⁷ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.2.

⁸ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.3.

⁹ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.4.

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907. General principles.

All parties must always bear in mind the overriding objective¹ and try to ensure that all claims should be resolved and a just outcome achieved as speedily as possible without costs being unreasonably incurred². The needs of any children should be addressed and safeguarded³. The procedures which it is appropriate to follow should be conducted with minimum distress to the parties and in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances⁴.

The principle of proportionality must be borne in mind at all times⁵. It is unacceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute⁶.

Parties should be informed that, where a court exercises a discretion as to whether costs are payable by one party to another, this discretion extends to pre-application offers to settle and conduct of disclosure⁷.

¹ ie the overriding objective in the Family Proceedings Rules 1991, SI 1991/1247, r 2.51D (see PARA 903).

² *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.1.

³ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.1.

⁴ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.1.

⁵ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.2.

⁶ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.2.

⁷ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.4.

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908. First letter.

The circumstances of parties to an application for financial relief are so various that it would be difficult to prepare a specimen first letter¹. The request for information will be different in every case². However, the tone of the initial letter is important³. It should be approved in advance by the client⁴. Solicitors writing to an unrepresented party should always recommend that he seeks independent legal advice and enclose a second copy of the letter to be passed to any solicitor instructed⁵. A reasonable time limit for a response may be 14 days⁶.

1 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.5.

2 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.5.

3 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.5. The guidelines in *Practice Direction* Annex para 3.7 (see PARA 913) should be followed: *Practice Direction* Annex para 2.5.

4 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.5.

5 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.5.

6 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.5.

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909. Negotiation and settlement.

In the event of pre-application disclosure and negotiation¹, an application should not be issued when a settlement is a reasonable prospect².

¹ le as envisaged in *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.2: see PARA 906.

² *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.6.

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910. Disclosure.

The pre-application protocol¹ underlines the obligation of parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues². Solicitors owe their clients a duty to tell them in clear terms of this duty and of the possible consequences of breach of the duty³. This duty of disclosure is an ongoing obligation and includes the duty to disclose any material changes after initial disclosure has been given⁴.

1 As to the purpose of the pre-application protocol see PARA 905.

2 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.7.

3 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.7.

4 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 2.7.

UPDATE

910 Disclosure

NOTES--As to a husband's restraint of the use in ancillary relief proceedings of confidential information obtained without authorisation see *Imerman v Tchenguiz* [2009] EWHC 2024 (QB), [2010] 1 FCR 14.

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911. Identifying the issues.

Parties must seek to clarify their claims and identify the issues between them as soon as possible¹. So that this can be achieved, they must provide full, frank and clear disclosure of facts, information and documents which are material and sufficiently accurate to enable proper negotiations to take place to settle their differences². Openness in all dealings is essential³.

¹ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.4.

² *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.4.

³ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.4.

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912. Disclosure.

If parties carry out voluntary disclosure before the issue of proceedings, they should exchange schedules of assets, income, liabilities and other material facts, using the relevant prescribed form as a guide to the format of the disclosure¹. Documents should only be disclosed to the extent that they are required by that prescribed form². Excessive or disproportionate costs should not be incurred³.

¹ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.5.

² *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.5.

³ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.5.

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913. Correspondence.

Any first letter and subsequent correspondence must focus on the clarification of claims and identification of issues and their resolution¹. Protracted and unnecessary correspondence and 'trial by correspondence' must be avoided².

The impact of any correspondence on the reader and, in particular, the parties must always be considered³. Any correspondence which raises irrelevant issues or which might cause the other party to adopt an entrenched, polarised or hostile position is to be discouraged⁴.

1 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.6.

2 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.6.

3 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.7.

4 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.7.

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914. Experts.

Expert valuation evidence is only necessary where the parties cannot agree or do not know the value of some significant asset¹. The cost of a valuation should be proportionate to the sums in dispute². Wherever possible, valuations of properties, shares etc should be obtained from a single valuer instructed by both parties³. To that end, a party wishing to instruct an expert (the 'first party') should first give the other party a list of the names of one or more experts in the relevant speciality whom he considers are suitable to instruct⁴. Within 14 days the other party may indicate an objection to one or more of the named experts and, if so, should supply the names of one or more experts whom that party considers suitable⁵.

Where the identity of the expert is agreed, the parties should agree the terms of a joint letter of instructions⁶. Where no agreement is reached as to the identity of the expert, each party ought to think carefully before instructing their own expert because of the costs implications⁷. Disagreements about disclosure such as the use and identity of an expert may be better managed by the court within the context of an application for ancillary relief⁸. Whether a joint report is commissioned or the parties have chosen to instruct separate experts, it is important that the expert is prepared to answer reasonable questions raised by either party⁹.

Where experts' reports are commissioned pre-application, it ought to be made clear to the expert that they may in due course be reporting to the court and that they should, therefore, consider themselves bound by the guidance¹⁰ as to expert witnesses¹¹. Where the parties propose to instruct a joint expert, there is a duty on both parties to disclose whether they have already consulted that expert about the assets in issue¹². If the parties agree to instruct separate experts, the parties should be encouraged to agree in advance that the reports will be disclosed¹³.

1 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.8.

2 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.8.

3 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.8.

4 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.8.

5 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.8.

6 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.9.

7 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.10.

8 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.10.

9 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.11.

10 le the guidance in CPR Pt 35: see **CIVIL PROCEDURE** vol 11 (2009) PARA 835 et seq.

11 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.12.

12 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.13.

13 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.14.

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915. Aim of pre-application proceedings.

The aim of all steps in pre-application proceedings must be to assist the parties to resolve their differences speedily and fairly or at least narrow the issues and, if that is not possible, to assist the court to do so¹.

¹ *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 Annex para 3.15.

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C. APPLICATIONS FOR RELIEF

916. Application by petitioner or respondent.

Any application by a petitioner, or by a respondent¹ who files an answer claiming relief, for:

- 1199 (1) an order for maintenance pending suit or the outcome of proceedings²;
- 1200 (2) a financial provision order³;
- 1201 (3) a property adjustment order⁴;
- 1202 (4) a pension sharing order⁵,

must be made in the petition or answer, as the case may be⁶.

An application for financial relief which should have been made in the petition or answer may⁷ be made subsequently:

- 1203 (a) by leave of the court, either by notice in the prescribed form⁸ or at the trial⁹; or
- 1204 (b) where the parties are agreed on the terms of the proposed order, without leave by notice in the prescribed form¹⁰.

An application by a petitioner or respondent for financial relief, not being an application which is required to be made in the petition or answer, must be made by notice in the prescribed form¹¹.

1 As to the meaning of 'respondent' see PARA 714 note 4.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(1)(a), (aa) (r 2.53(1)(aa) added by SI 2005/2922). As to the meanings of 'order for maintenance pending suit' and 'order for maintenance pending the outcome of proceedings' see PARA 902 note 8.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(1)(b). As to the meaning of 'financial provision order' see PARA 902 note 7.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(1)(c). As to the meaning of 'property adjustment order' see PARA 902 note 9.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(1)(d) (added by SI 2000/2267). As to the meaning of 'pension sharing order' see PARA 523.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(1) (amended by SI 2000/2267; SI 2005/2922). The Family Proceedings Rules 1991, SI 1991/1247, r 2.53, is made pursuant to the Matrimonial Causes Act 1973 s 26(2) and the Civil Partnership Act 2004 Sch 5 para 46(3), under which rules of court may provide, in such cases as may be prescribed by the rules:

- 225 (1) that applications for any such relief as is mentioned in the Matrimonial Causes Act 1973 s 26(1) or the Civil Partnership Act 2004 Sch 5 para 46(2) are to be made in the petition or answer, or the application or response (Matrimonial Causes Act 1973 s 26(2)(a); Civil Partnership Act 2004 Sch 5 para 46(3)(a)); and

226 (2) that applications for any such relief which are not so made, or are not made until after the expiration of such period following the presentation of the petition or filing of the answer, or presentation of the application or filing of the response as may be so prescribed, are to be made only with the leave of the court (Matrimonial Causes Act 1973 s 26(2)(b); Civil Partnership Act 2004 Sch 5 para 46(3)(b)).

7 le notwithstanding anything in the Family Proceedings Rules 1991, SI 1991/1247, r 2.53(1) (see the text and notes 1-6).

8 For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form A (added by SI 1999/3491; substituted by SI 2000/2267; and amended by SI 2005/2922).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(2)(a) (amended by SI 1999/3491).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(2)(b) (amended by SI 1999/3491). The fee payable on an application on notice, or on filing a notice of intention to proceed with an application for ancillary relief other than an application for an order by consent is £210: Family Proceedings Fees Order 2008, SI 2008/1054 Sch 1, Fee 4.4.

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.53(3) (amended by SI 1999/3491).

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917. Leave to apply and delay.

On an application for leave to apply to make a claim for financial relief the court should consider whether the applicant has or appears to have reasonable prospects of obtaining the relief claimed¹. In a straightforward case the application for leave may often be listed with the substantive application for financial relief². In deciding whether to grant leave, the court will consider the way in which the parties have conducted themselves and their affairs up to the time of the application³.

There is no statutory period of limitation that applies to proceedings for financial relief⁴. Delay may, however, be one of the factors to which the court will have regard when considering all the circumstances of the case⁵.

1 *Chaterjee v Chaterjee* [1976] Fam 199, [1976] 1 All ER 719, CA.

2 *Chaterjee v Chaterjee* [1976] Fam 199, [1976] 1 All ER 719, CA.

3 *Chaterjee v Chaterjee* [1976] Fam 199, [1976] 1 All ER 719, CA.

4 *Twiname v Twiname* [1992] 1 FCR 185, [1992] 1 FLR 29, CA.

5 See under the Matrimonial Causes Act 1973 s 25(1) or the Civil Partnership Act 2004 Sch 5 para 20 (see PARA 589 et seq); and see *Chaterjee v Chaterjee* [1976] Fam 199, [1976] 1 All ER 719, CA; *D v W (application for financial provision: effect of delay)* [1984] Fam Law 152.

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918. Evidence on application for property adjustment or avoidance of disposition order.

Where an application for a property adjustment order¹ or an avoidance of disposition order² relates to land, the notice in the prescribed form³ must identify the land and:

- 1205 (1) state whether the title to the land is registered or unregistered and, if registered, the Land Registry title number⁴; and
- 1206 (2) give particulars, so far as known to the applicant⁵, of any mortgage of the land or any interest therein⁶.

Copies of the notice in the prescribed form and of the prescribed form of financial statement⁷ completed by the applicant must be served on the following persons as well as on the respondent⁸ to the application:

- 1207 (a) in the case of an application for an order for a variation of settlement, the trustees of the settlement and the settlor, if living⁹;
- 1208 (b) in the case of an application for an avoidance of disposition order, the person in whose favour the disposition is alleged to have been made¹⁰,

and such other persons, if any, as the district judge¹¹ may direct¹².

In the case of an application for a property adjustment order or an avoidance of disposition order¹³, a copy of the notice in the prescribed form¹⁴ must be served on any mortgagee of whom particulars are given¹⁵; and any person so served may apply to the court¹⁶ in writing, within 14 days after service, for a copy of the applicant's financial statement in the prescribed form¹⁷. Any person who is so served with copies of the notice and financial statement¹⁸ or receives a copy of the financial statement following an application so made¹⁹ may, within 14 days after service or receipt, as the case may be, file a statement in answer²⁰; and a statement so filed must be sworn to be true²¹.

1 As to the meaning of 'property adjustment order' see PARA 902 note 9.

2 As to the meaning of 'avoidance of disposition order' see PARA 902 note 6.

3 For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form A (added by SI 1999/3491; substituted by SI 2000/2267; and amended by SI 2005/2922).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(2)(a) (amended by SI 1999/3491).

5 For these purposes, 'applicant' means the party applying for ancillary relief: Family Proceedings Rules 1991, SI 1991/1247, r 2.51B(2) (added by SI 1999/3491).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(2)(b) (amended by SI 1999/3491).

7 For the prescribed form of financial statement see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form E (added by SI 1999/3491; substituted by SI 2005/2922).

- 8 As to the meaning of 'respondent' see PARA 714 note 4.
- 9 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(3)(a) (amended by SI 1992/456; SI 1999/3491).
- 10 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(3)(b).
- 11 As to the meaning of 'district judge' see PARA 737 note 3.
- 12 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(3) (amended by SI 1992/456; SI 1999/3491).
- 13 Ie an application to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.59(2) (see the text and notes 1-6) refers.
- 14 See note 3.
- 15 Ie pursuant to the Family Proceedings Rules 1991, SI 1991/1247, r 2.59(2) (see notes 1-6).
- 16 As to the meaning of 'court' see PARA 747 note 7.
- 17 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(4) (amended by SI 1992/456; SI 1999/3491). See note 7.
- 18 Ie pursuant to the Family Proceedings Rules 1991, SI 1991/1247, r 2.59(3) (see the text and notes 7-12).
- 19 Ie in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.59(4) (see the text and notes 13-17).
- 20 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(5) (amended by SI 1999/3491).
- 21 Family Proceedings Rules 1991, SI 1991/1247, r 2.59(6) (added by SI 1999/3491).

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919. Service of statement in answer.

Where a form or other document filed with the court¹ contains an allegation of adultery or of an improper association with a named person (the 'named person'), the court may direct that the party who filed the relevant form or document serve a copy of all or part of that form or document on the named person, together with a notice of allegation in the prescribed form².

If the court makes such a direction, the named person may file a statement in answer to the allegations³; and such a statement must be sworn to be true⁴.

1 As to the meaning of 'court' see PARA 747 note 7.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.60(1) (r 2.60 substituted by SI 1999/3491). For the prescribed form of notice of allegation see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form F (added by SI 1999/349; amended by SI 2005/2922). The Family Proceedings Rules 1991, SI 1991/1247, r 2.37(3) (see PARA 1038) applies to a person served under r 2.60(1) as it applies to a co-respondent: r 2.60(4) (substituted by SI 1999/3491).

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.60(2) (as substituted: see note 2).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.60(3) (as substituted: see note 2).

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920. Right to be heard on ancillary questions.

A respondent¹ may be heard on any question of financial relief² without filing an answer and whether or not he has returned to the court office an acknowledgment of service stating his wish to be heard on that question³.

1 As to the meaning of 'respondent' see PARA 714 note 4.

2 As to financial relief see PARA 902.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.52. Notwithstanding these provisions, if either party wishes an order to be made in his or her favour, that party must make an application of his or her own and cannot simply rely on the other party's application: *Robin v Robin* (1983) 4 FLR 632, 13 Fam Law 147, CA. Thus, it is essential that, if either party seeks an order, all effective applications must be made prior to remarriage or the formation of a subsequent civil partnership because of the bar in the Matrimonial Causes Act 1973 s 28(3) and the Civil Partnership Act 2004 Sch 5 para 48 (see PARA 452).

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921. Open proposals.

Not less than 14 days before the date fixed for the final hearing of an application for financial relief¹, the applicant² must, unless the court³ directs otherwise, file with the court and serve on the respondent⁴ an open statement which sets out concise details, including the amounts involved, of the orders which he proposes to ask the court to make⁵. Not more than seven days after service of such a statement, the respondent must file with the court and serve on the applicant an open statement which sets out concise details, including the amounts involved, of the orders which he proposes to ask the court to make⁶.

1 As to financial relief see PARA 902.

2 As to the meaning of 'applicant' see PARA 918 note 5.

3 As to the meaning of 'court' see PARA 747 note 7.

4 As to the meaning of 'respondent' see PARA 714 note 4.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.69E(1) (r 2.69E added by SI 1999/3491).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.69E(2) (as added: see note 5).

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922. Effect of failure to pursue mitigating issues during divorce or dissolution proceedings.

A spouse or civil partner does not prejudice his or her chances in future maintenance proceedings by not pursuing a prayer at the hearing of the divorce or dissolution case, or by refraining from an attempt to set up matters which might theoretically have constituted a bar to the decree or order¹. The fact that one party has obtained a decree or order does not necessarily give a true picture of the conduct of the parties, and when it comes to ancillary matters consequent on the divorce or dissolution, the truth should be seen²; at that stage public policy requires that all the facts relevant to the conduct of the parties should be presented to the court³.

1 *Porter v Porter* [1969] 3 All ER 640, [1969] 1 WLR 1155, CA; *Tumath v Tumath* [1970] P 78 at 80, [1970] 1 All ER 111 at 115, CA; *Porter v Porter* [1971] P 282 at 284, [1971] 2 All ER 1037 at 1040; *Rose v Rose* (1970) 115 Sol Jo 12, CA.

2 *Trestain v Trestain* [1950] P 198 at 202, [1950] 1 All ER 618n, CA.

3 *Tumath v Tumath* [1970] P 78 at 89, [1970] 1 All ER 111 at 117 per Edmund Davies LJ. As to conduct see PARA 621.

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923. Application for interim orders.

A party may apply at any stage of the proceedings for an order for maintenance pending suit or outcome of proceedings, as the case may be¹, interim periodical payments or an interim variation order². An application for such an order must be made by notice of application and the date fixed for the hearing of the application must be not less than 14 days after the date the notice of application is issued³: the applicant⁴ must forthwith serve the respondent⁵ with a copy of the notice of application⁶.

Where an application is made before a party has filed the prescribed form of financial statement⁷, that party must file with the application and serve on the other party a draft of the order requested and a short sworn statement explaining why the order is necessary and giving the necessary information about his means⁸. Not less than seven days before the date fixed for the hearing, the respondent must file with the court and serve on the other party a short sworn statement about his means, unless he has already filed the prescribed form of financial statement⁹.

A party may apply for any other form of interim order at any stage of the proceedings with or without notice¹⁰.

1 As to the meanings of 'order for maintenance pending suit' and 'order for maintenance pending the outcome of proceedings' see PARA 902 note 7.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(1) (r 2.69F added by SI 1999/3491; Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(1) amended by SI 2005/2922).

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(2) (as added: see note 2).

4 As to the meaning of 'applicant' see PARA 918 note 5.

5 As to the meaning of 'respondent' see para 714 note 4.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(3) (as added: see note 2).

7 For the prescribed form of financial statement see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form E (added by SI 1999/3491; amended by SI 2000/2267).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(4) (as added: see note 2).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(5) (as added: see note 2).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(6) (as added: see note 2). Where an application referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F(6) is made with notice, the provisions of r 2.69F(1)-(5) (see the notes 1-9) apply to it: r 2.69F(7) (as so added). Where an application referred to in r 2.69F(6) is made without notice, the provisions of r 2.69F(1) (see the text and notes 1-2) apply to it: r 2.69F(8) (as so added).

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D. INTERLOCUTORY PROCEDURE

924. Intention to proceed with application by petitioner or respondent.

A notice of intention to proceed with an application for financial relief¹ made in the petition or answer or an application for financial relief must be made by notice in the prescribed form². The notice must be filed:

- 1209 (1) if the case is pending in a designated county court³, in that court⁴; or
- 1210 (2) if the case is pending in the High Court, in the registry in which it is proceeding⁵.

Where the applicant⁶ requests an order for financial relief that includes provision to be made in respect of pension arrangements⁷, the terms of the order requested must be specified in the notice in the prescribed form⁸.

On the filing of the notice of intention to proceed in the prescribed form⁹, the court must:

- 1211 (a) fix a first appointment not less than 12 weeks and not more than 16 weeks after the date of the filing of the notice and give notice of that date¹⁰;
- 1212 (b) serve a copy on the respondent¹¹ within four days of the date of the filing of the notice¹²,

and the date so fixed for the first appointment, or for any subsequent appointment, must not be cancelled except with the court's permission and, if cancelled, the court must immediately fix a new date¹³.

1 As to financial relief see PARA 902.

2 Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(1) (r 2.61A added by SI 1999/3491). For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form A (added by SI 1999/3491; substituted by SI 2000/2267; and amended by SI 2005/2922). The fee payable on filing a notice of intention to proceed with an application for ancillary relief, other than an application for an order by consent, is £210: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 4.4. As to the effect of remarriage and the formation of a subsequent civil partnership see PARA 34.

3 As to the meaning of 'designated county court' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(2)(a) (as added (see note 2); amended by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(2)(b) (as added: see note 2).

6 As to the meaning of 'applicant' see PARA 918 note 4.

7 Ie by virtue of the Matrimonial Causes Act 1973 s 24B, s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 15, 25 or 26 (see PARAS 485-486, 524).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(3) (as added (see note 2); amended by SI 2000/2267; SI 2005/2922). As to the prescribed form see note 2.

9 See note 2.

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(4)(a) (as added: see note 2).

11 As to the meaning of 'respondent' see PARA 714 note 4.

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(4)(b) (as added: see note 2).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(5) (as added: see note 2).

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925. Procedure before the first appointment.

Both parties must, at the same time, exchange with each other, and each file with the court¹, a financial statement in the prescribed form², which:

- 1213 (1) is signed by the party who made the statement³;
- 1214 (2) is sworn to be true⁴; and
- 1215 (3) contains the information and has attached to it the documents required by that statement⁵.

The financial statements in the prescribed form must be exchanged and filed not less than 35 days before the date of the first appointment⁶ and they must have attached to them:

- 1216 (a) any documents required by the financial statement⁷;
- 1217 (b) any other documents necessary to explain or clarify any of the information contained in the financial statement⁸;
- 1218 (c) any documents furnished to the party producing the form by a person responsible for a pension arrangement, either following a request⁹ or as part of a relevant valuation¹⁰; and
- 1219 (d) any notification or other document¹¹ which has been received by the party producing the form¹²,

but the financial statement must have no documents attached to it other than the documents referred to in heads (a) to (c) above¹³.

Where a party was unavoidably prevented from sending any document required by the financial statement, that party must at the earliest opportunity serve copies of that document on the other party and file a copy of that document with the court, together with a statement explaining the failure to send it with the financial statement¹⁴.

No disclosure or inspection of documents may be requested or given between the filing of the application for ancillary relief¹⁵ and the first appointment, except copies sent with the financial statement, or in accordance with the above provisions¹⁶ or in accordance with the following provisions¹⁷.

At least 14 days before the hearing of the first appointment, each party must file with the court and serve on the other party:

- 1220 (i) a concise statement of the issues between the parties¹⁸;
- 1221 (ii) a chronology¹⁹;
- 1222 (iii) a questionnaire setting out by reference to the concise statement of issues any further information and documents requested from the other party or a statement that no information and documents are required²⁰; and
- 1223 (iv) a notice of response in the prescribed form²¹ stating whether that party will be in a position at the first appointment to proceed on that occasion to a FDR appointment²².

At least 14 days before the hearing of the first appointment, the applicant must file with the court and serve on the respondent confirmation of the names of all persons duly served²³, and that there are no other persons who must be so served²⁴.

1 As to the meaning of 'court' see PARA 747 note 7.

2 For the prescribed form of financial statement see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form E (added by SI 1999/3491; substituted by SI 2005/2922). Where the ancillary relief material before the court indicates illegal or unlawful conduct, including the evasion or non-payment of tax, the court should generally order further disclosure, or use, of that material to the appropriate prosecuting or public authorities where the court is satisfied that it is in the overall public interest to do so: *A v A, B v B* [2000] 1 FCR 577, [2000] 1 FLR 701.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(1)(a) (s 2.61B added by SI 1999/3491).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(1)(b) (as added: see note 3).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(1)(c) (as added: see note 3).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(2) (as added: see note 3).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(3)(a) (as added (see note 3); amended by SI 2000/2267).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(3)(b) (as added (see note 3); amended by SI 2006/2080).

9 Ie a request under the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(2) (see PARA 926).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(3)(c) (as added (see note 3); amended by SI 2000/2267). For these purposes 'relevant valuation' has the meaning given by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(4) (see PARA 926 note 12): r 2.61B(3)(c) (as so added and amended).

11 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(2), (4) or (5) (see PARA 926).

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(3)(d) (added by SI 2006/2080).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(4) (as added: see note 3).

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(5) (as added: see note 3).

15 As to the meaning of 'ancillary relief' see PARA 902.

16 Ie in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(5) (as added: see note 3).

17 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(6) (as added: see note 3).

18 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(7)(a) (as added: see note 3).

19 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(7)(b) (as added: see note 3).

20 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(7)(c) (as added: see note 3).

21 For the prescribed form of notice of response see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form G (added by SI 1999/3491; amended by SI 2005/2922).

22 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(7)(d) (as added: see note 3). For these purposes, 'FDR appointment' means a financial dispute resolution appointment in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.61E (see PARAS 929-930): r 2.51A(2) (added by SI 1999/3491).

23 Ie served in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.59(3), (4): see PARA 918.

24 Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(9) (as added: see note 3).

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926. Special provision concerning pension sharing.

Where an application for financial relief¹ has been made, or notice of intention to proceed with the application has been given in the prescribed form², or an application for the court to consider the financial position of the respondent after a divorce or dissolution has been made in the prescribed form³, and the applicant⁴ or respondent⁵ has or is likely to have any benefits under a pension arrangement⁶, the following provisions apply.

When the court fixes a first appointment⁷ the party with pension rights⁸ must, within seven days after receiving notification of the date of that appointment, request the person responsible for each pension arrangement⁹ under which he has or is likely to have benefits to furnish the prescribed information¹⁰ (although such a request need not be made where the party with pension rights is in possession of, or has requested, a relevant valuation¹¹ of the pension rights or benefits accrued under the pension arrangement in question¹²). Within seven days of receiving such information, the party with pension rights must send a copy of it to the other party, together with the name and address of the person responsible for each pension arrangement¹³.

On making or giving notice of intention to proceed with an application for ancillary relief which includes a request for a pension sharing order, or on adding a request for such an order to an existing application for ancillary relief, the applicant must send to the person responsible for the pension arrangement concerned a copy of the notice of intention to proceed in the prescribed form¹⁴.

1 As to financial relief see PARA 902.

2 For the prescribed form of notice of intention to proceed see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form A (added by SI 1999/3491; substituted by SI 2000/2267; and amended by SI 2005/2922).

3 For the prescribed form of application see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form B (added by SI 1999/3491; amended by SI 2005/2922).

4 As to the meaning of 'applicant' see PARA 918 note 4.

5 As to the meaning of 'respondent' see PARA 714 note 4.

6 As to the meaning of references to benefits under a pension arrangement and 'pension arrangement' see PARA 485 note 1.

7 As required by the Family Proceedings Rules 1991, SI 1991/1247, r 2.61A(4)(a) (see PARA 924).

8 As to the meaning of 'party with pension rights' see PARA 485 note 7 (definition applied by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(a), (ab) (r 2.70 added by SI 1996/1674 and substituted by SI 2000/2267; Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(a) amended, r 2.70(18)(ab), (c) added, by SI 2005/2922).

9 As to the meaning of 'pension arrangement', and as to references to the person responsible for a pension arrangement, see PARA 485 notes 1, 6 (definitions applied by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(a), (ab) (as added, substituted and amended: see note 8).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(1), (2) (as added and substituted (see note 8); r 2.70(2) further substituted by SI 2005/2922). The prescribed information is the information contained in the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048, reg 2(2) (see **SOCIAL SECURITY AND PENSIONS**): Family Proceedings Rules 1991, SI 1991/1247, r 2.70(2) (as so added and substituted).

11 For these purposes, a 'relevant valuation' means a valuation of pension rights or benefits as at a date not more than 12 months earlier than the date fixed for the first appointment which has been furnished or requested for the purposes of any of:

- 227 (1) the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048 (see **SOCIAL SECURITY AND PENSIONS**) (Family Proceedings Rules 1991, SI 1991/1247, r 2.70(5)(a) (as added and substituted (see note 8); amended by SI 2001/821));
- 228 (2) the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 5, Sch 2 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 800) and the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 11, Sch 1 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARAS 960, 963) (Family Proceedings Rules 1991, SI 1991/1247, r 2.70(5)(b) (as so added, substituted and amended));
- 229 (3) the Pension Schemes Act 1993 s 93A or s 94(1)(a) or (aa) (see **SOCIAL SECURITY AND PENSIONS**) (Family Proceedings Rules 1991, SI 1991/1247, r 2.70(5)(c) (as so added, substituted and amended)); and
- 230 (4) the Pension Schemes Act 1993 s 94(1)(b) (see **SOCIAL SECURITY AND PENSIONS**) or the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 5, Sch 2 para 2(a) or, where applicable, Sch 2 para 2(b) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 735) (Family Proceedings Rules 1991, SI 1991/1247, r 2.70(5)(d) (as so added, substituted and amended)).

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(4) (as added and substituted (see note 8); amended by SI 2005/2922).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(3) (as added and substituted (see note 8); amended by SI 2005/2922).

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(6) (as added and substituted (see note 8); amended by SI 2005/2922). A 'pension sharing order' is an order making provision under the Matrimonial Causes Act 1973 s 24B or the Civil Partnership Act 2004 Sch 5 para 15 (see PARA 524): Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(c) (as so added and substituted).

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927. Pension attachments.

On making or giving notice of intention to proceed with an application for financial relief¹ which includes an application for a pension attachment order², or upon adding a request for such an order to an existing application for ancillary relief, the applicant³ must send to the person responsible for the pension arrangement⁴ concerned:

- 1224 (1) a copy of the notice of intention to proceed in the prescribed form⁵;
- 1225 (2) an address to which any notice which the person responsible is required to serve on the applicant⁶ is to be sent⁷;
- 1226 (3) an address to which any payment which the person responsible is required to make to the applicant is to be sent⁸; and
- 1227 (4) where the address in head (3) above is that of a bank, a building society or the Department of National Savings, sufficient details to enable payment to be made into the account of the applicant⁹.

A person responsible for a pension arrangement on whom a copy of a notice is so served may, within 21 days after service, require the party with the pension rights¹⁰ to provide him with a copy of the relevant part of the financial statement¹¹ supporting his application; and that party must then provide that person with the copy of that part of the statement within the time limited¹² for filing it or 21 days after being required to do so, whichever is the later¹³.

A person responsible for a pension arrangement who so receives a copy of the relevant part of the financial statement may within 21 days after receipt send to the court, the applicant and the respondent¹⁴ a statement in answer¹⁵. A person responsible for a pension arrangement who files such a statement in answer is entitled to be represented at the first appointment; and the court must, within four days of the date of filing of the statement in answer, give the person notice of the date of the first appointment¹⁶.

Where the parties have agreed on the terms of an order and the agreement includes a pension attachment order then, unless service has already been effected¹⁷, they must serve on the person responsible for the pension arrangement concerned:

- 1228 (a) the notice of application¹⁸ for a consent order¹⁹;
- 1229 (b) a draft of the proposed order²⁰, complying with the relevant provisions²¹;
and
- 1230 (c) the particulars set out in heads (2), (3) and (4) above²².

No consent order is to be so made unless either the person responsible has not made any objection within 21 days after the service on him of such notice or the court has considered any such objection; and, for the purpose of considering any objection, the court may make such direction as it sees fit for the person responsible to attend before it or to furnish written details of his objection²³.

1 As to financial relief see PARA 902.

2 le an order making provision under the Matrimonial Causes Act 1973 s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 paras 24, 26 (see PARAS 485-486): Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(d) (r 2.70 added by SI 1996/1674 and substituted by SI 2000/2267; Family Proceedings Rules 1991, SI 1991/1247, r 2.70(7)-(9), (11), (18)(a) amended, r 2.20(18)(ab), (d) added, by SI 2005/2922).

3 As to the meaning of 'applicant' see PARA 918 note 4.

4 As to the meaning of 'pension arrangement', and as to references to the person responsible for a pension arrangement, see PARA 485 notes 1, 6 (definitions applied by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(a), (ab) (as added, substituted and amended: see note 2)).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(7)(a) (as added, substituted and amended: see note 2). As to the prescribed form of notice of intention to proceed see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form A (added by SI 1999/3491; substituted by SI 2000/2267; amended by SI 2005/2922).

6 le under the Divorce etc (Pensions) Regulations 2000, SI 2000/1123, or the Dissolution etc (Pensions) Regulations 2005, SI 2005/2920: see PARA 487.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(7)(b) (as added, substituted and amended: see note 2).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(7)(c) (as added, substituted and amended: see note 2).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(7)(d) (as added, substituted and amended: see note 2).

10 As to the meaning of 'party with pension rights' see PARA 485 note 7 (definition applied by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(a), (ab) (as added, substituted and amended: see note 2)).

11 le the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form E section 2.13 (Form E added by SI 1999/3491; substituted by SI 2005/2922).

12 le by the Family Proceedings Rules 1991, SI 1991/1247, r 2.61B(2) (see PARA 925).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(8) (as added, substituted and amended: see note 2).

14 As to the meaning of 'respondent' see PARA 714 note 4.

15 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(9) (as added, substituted and amended: see note 2).

16 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(10) (as added and substituted: see note 2).

17 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(7) (see the text and notes 1-9).

18 le under the Family Proceedings Rules 1991, SI 1991/1247, r 2.61(1) (see PARA 714).

19 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(11)(a) (as added, substituted and amended: see note 2).

20 See note 18.

21 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(11)(b) (as added, substituted and amended: see note 2). For the 'relevant provisions' see r 2.70(13); and PARA 934.

22 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(11)(c) (as added, substituted and amended: see note 2).

23 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(12) (as added and substituted: see note 2).

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928. The first appointment.

The first appointment must be conducted with the objective of defining the issues and saving costs¹.

At the first appointment the district judge²:

1231 (1) must determine the extent to which any questions seeking information³ must be answered⁴ and what documents requested⁵ must be produced⁶, and give directions for the production of such further documents as may be necessary⁷;

1232 (2) must give directions about:

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17. (a) the valuation of assets, including, where appropriate, the joint instruction of joint experts⁸;

18. (b) obtaining and exchanging expert evidence, if required⁹; and

19. (c) evidence to be adduced by each party and, where appropriate, about further chronologies or schedules to be filed by each party¹⁰;

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1233 (3) must, unless he decides that a referral is not appropriate in the circumstances, direct that the case be referred to a FDR appointment¹¹;

1234 (4) must, where he decides that a referral to a FDR appointment is not appropriate, direct one or more of the following:

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20. (a) that a further directions appointment be fixed¹²;

21. (b) that an appointment be fixed for the making of an interim order¹³;

22. (c) that the case be fixed for final hearing and, where that direction is given, the district judge must determine the judicial level at which the case should be heard¹⁴; or

23. (d) that the case be adjourned for out-of-court mediation or private negotiation or, in exceptional circumstances, generally¹⁵;

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1235 (5) in considering whether to make a costs order¹⁶ must have particular regard to the extent to which each party has complied with the requirement to send documents with the prescribed form of financial statement¹⁷;

1236 (6) may:

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24. (a) make an interim order where an application for it has been duly made¹⁸ returnable at the first appointment¹⁹;

25. (b) having regard to the contents of the prescribed form of notice of response²⁰ filed by the parties, treat the appointment, or part of it, as a FDR appointment²¹;

26. (c) where an order for financial relief²² is requested that includes provision to be made in respect of pension arrangements²³, direct any party with pension rights²⁴ to file and serve a pension inquiry form²⁵, completed in full or in part as the court may direct²⁶.

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After the first appointment a party is not entitled to production of any further documents except in accordance with directions given under head (1) above or with the permission of the court²⁷. At any stage a party may apply for further directions or a FDR appointment and the court may give further directions or direct that the parties attend a FDR appointment²⁸. Both parties must personally attend the first appointment unless the court orders otherwise²⁹.

In order to make the most effective use of the first appointment, the legal representatives attending those appointments will be expected to have full knowledge of the case³⁰.

- 1 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(1) (r 2.61D added by SI 1999/3491).
- 2 As to the meaning of 'district judge' see PARA 737 note 3.
- 3 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.61B (see PARA 925).
- 4 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(a)(i) (as added: see note 1).
- 5 See note 3.
- 6 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(a)(ii) (as added: see note 1).
- 7 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(a) (as added: see note 1).
- 8 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(b)(i) (as added: see note 1).
- 9 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(b)(ii) (as added: see note 1).
- 10 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(b)(iii) (as added: see note 1).
- 11 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(c) (as added: see note 1). As to the meaning of 'FDR appointment' see PARA 925 note 22.
- 12 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(d)(i) (as added (see note 1); r 2.61D(2)(d) amended by SI 2003/184).
- 13 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(d)(ii) (as added and amended: see notes 1, 12).
- 14 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(d)(iii) (as added and amended: see notes 1, 12).
- 15 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(d)(iv) (as added and amended: see notes 1, 12).
- 16 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.71(4) (see PARA 1037).
- 17 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(e) (as added (see note 1); substituted by SI 2006/352). For the prescribed form of financial statement see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form E (added by SI 1999/3491; substituted by SI 2005/2922).
- 18 Ie in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F (see PARA 923).
- 19 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(f)(i) (as added: see note 1).
- 20 For the prescribed form of notice of response see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form G (added by SI 1999/3491; substituted by SI 1999/3491; amended by SI 2005/2922).
- 21 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(f)(ii) (as added: see note 1). The appointment is to be treated as a FDR appointment to which r 2.61E (see PARAS 929-930) applies.
- 22 As to financial relief see PARA 902.
- 23 Ie under the Matrimonial Causes Act 1973 s 24B, s 25B or s 25C or the Civil Partnership Act 2004 Sch 5 para 15, 25 or 26 (see PARAS 485-486, 524).
- 24 As to the meaning of 'party with pension rights' cf PARA 485 note 7.

25 le under the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form P (added by SI 2005/2922).

26 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(2)(f)(iii), (iv) (as added (see note 1); substituted by SI 2005/2922).

27 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(3) (as added: see note 1).

28 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(4) (as added: see note 1).

29 Family Proceedings Rules 1991, SI 1991/1247, r 2.61D(5) (as added: see note 1).

30 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.4.

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929. Purpose of the FDR appointment.

The financial dispute resolution appointment (the 'FDR appointment') is to be treated as a meeting held for the purposes of discussion and negotiation¹.

The FDR appointment is a key element in the procedure on applications for financial relief². Such meetings, which were formerly described as meetings held for the purposes of conciliation, have been developed as a means of reducing the tension which inevitably arises in matrimonial, civil partnership and family disputes and facilitating settlement of those disputes³. In order for the FDR appointment to be effective, parties must approach the occasion openly and without reserve⁴. Non-disclosure of the content of such meetings is accordingly vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties⁵. The FDR appointment is an important part of the settlement process⁶. Evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible⁷ in evidence⁸. Courts will, therefore, expect parties to make offers and proposals, recipients of offers and proposals to give them proper consideration and that parties, whether separately or together, will not seek to exclude from consideration at the appointment any such offer or proposal⁹. In order to make the most effective use of the FDR appointment, the legal representatives attending those appointments will be expected to have full knowledge of the case¹⁰.

1 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(1) (r 2.61E added by SI 1999/3491). As to the procedure at the FDR appointment see PARA 930.

2 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.1.

3 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.1.

4 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.2.

5 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.2.

6 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.2.

7 *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231, [1993] 2 All ER 693, CA, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D (Minors) (Conciliation: Disclosure of Information)*.

8 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.2.

9 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 3.3. A party is not allowed to rescind an agreement which has been recorded by a judge: *Rose v Rose* [2002] EWCA Civ 208, [2002] 1 FCR 639, [2002] 1 FLR 978.

10 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (Ancillary Relief: Procedure)* [2000] 1 WLR 1480 para 3.4.

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930. Procedure at the FDR appointment.

The district judge¹ or judge² hearing the FDR appointment³ must have no further involvement with the application, other than to conduct any further FDR appointment or to make a consent order or a further directions order⁴.

Not later than seven days before the FDR appointment, the applicant⁵ must file with the court details of all offers and proposals, and responses to them, including any offers, proposals or responses made wholly or partly without prejudice, but no material is thereby made admissible as evidence if it would not otherwise be admissible⁶. At the conclusion of the FDR appointment, any documents so filed, and any filed documents referring to them, must, at the request of the party who filed them, be returned to him and not retained on the court file⁷. Parties attending the FDR appointment must use their best endeavours to reach agreement on the matters in issue between them⁸.

The FDR appointment may be adjourned from time to time⁹.

At the conclusion of the FDR appointment, the court may make an appropriate consent order, but otherwise must give directions for the future course of the proceedings, including, where appropriate, the filing of evidence and fixing a final hearing date¹⁰.

Both parties must personally attend the FDR appointment unless the court orders otherwise¹¹.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 As to the meaning of 'judge' see PARA 737 note 3.

3 As to the meaning of 'FDR appointment' see PARA 925 note 22.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(2) (r 2.61E added by SI 1999/3491). As to the proper interpretation of this rule see *Myerson v Myerson* [2008] EWCA Civ 1376, [2008] All ER (D) 121 (Dec). As to the purpose of the FDR appointment see PARA 929.

5 As to the meaning of 'applicant' see PARA 918 note 5.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(3), (4) (as added: see note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(5) (as added: see note 4).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(6) (as added: see note 4).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(7) (as added: see note 4).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(8) (as added: see note 4).

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.61E(9) (as added: see note 4).

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E. HEARING THE APPLICATION AND MAKING THE ORDER

931. Investigation by district judge.

An application for financial relief will generally be heard by a district judge unless he refers the matter, or any question arising thereon, to a judge¹. Before an investigation takes place, it will be necessary to ensure that the case is ready for hearing and that the following particular steps have been taken:

- 1237 (1) open offers have been exchanged prior to any final hearings²;
- 1238 (2) bundles have been prepared³;
- 1239 (3) all appropriate notices have been served⁴;
- 1240 (4) costs forms have been duly filed⁵;
- 1241 (5) expert evidence has been brought up to date, marshalled and subjected to a timetable⁶; and
- 1242 (6) the time estimate has been considered and remains appropriate⁷.

An application for an avoidance of disposition order⁸ must, if practicable, be heard at the same time as any related application for financial relief⁹.

At the hearing of an application for financial relief the district judge¹⁰ must¹¹ investigate the allegations made in support of, and in answer to, the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined and order the disclosure and inspection of any document or require further statements¹². A statement so filed must be sworn to be true¹³.

Any party may apply to the court¹⁴ for an order that any person must attend an appointment (an 'inspection appointment') before the court and produce any documents to be specified or described in the order, the inspection of which appears to the court to be necessary for disposing fairly of the application for ancillary relief or for saving costs¹⁵. No person may be compelled by such an order to produce any document at an inspection appointment which he could not be compelled to produce at the hearing of the application for financial relief¹⁶. The court must permit any person attending an inspection appointment pursuant to such an order to be represented at the appointment¹⁷.

The court does not have power to make generalised orders for third parties to file affidavits in relation to the substantive financial relief hearing, although, presumably, it may give directions for the filing of affidavits within the inspection proceedings¹⁸.

¹ See PARA 936.

² ie in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.69E (see PARA 921).

³ ie in accordance with *Practice Direction (family proceedings: court bundles)* [2000] 2 All ER 287, [2000] 1 WLR 737: see PARA 1016.

4 le, in particular, in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.59 (see PARA 918).

5 le in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 2.61F (as substituted: see PARA 1039).

6 See *Re G, S and H (care proceedings: wasted costs)* [1999] 3 FCR 303, sub nom *Re G, S and M (wasted costs)* [2000] 1 FLR 52; *F v F (ancillary relief: substantial assets)* [1996] 2 FCR 397, [1995] 2 FLR 45.

7 See *Re MD and TD (children's cases: time estimates)* [1994] 2 FCR 94, sub nom *Re MD and TD (minors) (time estimates)* [1994] 2 FLR 336n.

8 As to the meaning of 'avoidance of disposition order' see PARA 902 note 6.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.62(2). As to the meaning of 'ancillary relief' see PARA 902.

10 As to the meaning of 'district judge' see PARA 737 note 3.

11 le subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.64 (see PARA 933), r 2.65 (see PARA 936) and r 10.10 (see PARA 747).

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.62(4) (amended by SI 1999/3491).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.62(4A) (added by SI 1999/3491).

14 As to the meaning of 'court' see PARA 747 note 7.

15 Family Proceedings Rules 1991, SI 1991/1247, r 2.62(7) (amended by SI 1999/3491). There must be good reason before an application for an inspection appointment is made without notice: *B v B (No 2) (production appointment)* [1995] 2 FCR 827, sub nom *B v B (production appointment: procedure)* [1995] 1 FLR 913. The applicant will need to show that it is both necessary and relevant for a third party to attend such an appointment: *D v D (production appointment)* [1995] 3 FCR 183, [1995] 2 FLR 497.

16 Family Proceedings Rules 1991, SI 1991/1247, r 2.62(8) (amended by SI 1999/3491).

17 Family Proceedings Rules 1991, SI 1991/1247, r 2.62(9) (amended by SI 1999/3491).

18 See *Wynne v Wynne and Jeffers* [1980] 3 All ER 659, [1981] 1 WLR 69, CA; *W v W (disclosure by third party)* (1981) 2 FLR 291, 11 Fam Law 247; *H v H (disclosure by third party)* (1981) 2 FLR 303, 11 Fam Law 209; *Morgan v Morgan* [1977] Fam 122, [1977] 2 All ER 515. As to the considerations to be taken into account when requiring of a co-respondent in ancillary relief proceedings to disclose personal financial information see *M v M (financial misconduct; subpoena against third party)* [2006] 2 FCR 555.

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932. Expert evidence.

The normal rules relating to expert evidence in civil proceedings¹, but for two exceptions² apply with appropriate modifications to all proceedings for financial relief³.

The introduction of expert evidence in proceedings for financial relief is likely to increase costs substantially and consequently the court will use its powers to restrict the unnecessary use of experts⁴. Accordingly, where expert evidence is sought to be relied on, parties should, if possible, agree on a single expert whom they can jointly instruct⁵. Where parties are unable to agree on the expert to be instructed, the court will consider using its powers⁶ to direct that evidence be given by one expert only⁷. In such cases parties must be in a position at the first appointment or when the matter comes to be considered by the court to provide the court with a list of suitable experts or to make submissions as to the method by which the expert is to be selected⁸.

1 Ie CPR 35.1-35.14: see **CIVIL PROCEDURE** vol 11 (2009) PARA 835 et seq.

2 Ie CPR 35.5(2), 35.8(4)(b): see **CIVIL PROCEDURE** vol 11 (2009) PARAS 839, 847.

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.61C (added by SI 1999/3491). As to the meaning of 'ancillary relief' see PARA 902.

4 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 4.1. See also PARA 914.

5 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 4.1.

6 Ie under CPR 35: see **CIVIL PROCEDURE** vol 11 (2009) PARA 840.

7 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 4.1.

8 *Practice Direction* [2000] 3 All ER 379, sub nom *Practice Direction (ancillary relief: procedure)* [2000] 1 WLR 1480 para 4.1.

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933. Order on application for financial relief.

The district judge¹ must², after completing his investigation³, make such order as he thinks just⁴. Pending the final determination of the application, the district judge may⁵ make an interim order on such terms as he thinks just⁶.

The order must be drafted with care; and the terms of the order must be within the ambit of the orders available under the statutory scheme⁷. Similarly, the preambles to any order must be carefully drafted and their potential enforcement considered: in many circumstances an appropriately worded undertaking may be enforced as if it were an order⁸; although an undertaking will not be varied by the court. However, in some circumstances the party giving the undertaking may be relieved from it. There is authority for the proposition that agreements contained in the preamble to an order may be enforced as if they were orders of the court⁹.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.65: see PARA 936.

3 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.62: see PARA 931.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.64(1). RSC Ord 31 r 1 (power to order sale of land: see PARA 285 et seq) applies to applications for ancillary relief as it applies to causes and matters in the Chancery Division: Family Proceedings Rules 1991, SI 1991/1247, r 2.64(3). As to the meaning of 'ancillary relief' see PARA 902. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

5 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.69F (see PARA 923).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.64(2) (amended by SI 1999/3491).

7 *Dinch v Dinch* [1987] 1 All ER 818, [1987] 1 WLR 252, HL. Orders cannot be made for payment by one party to a third party: *Priest v Priest* (1978) 1 FLR 189, 9 Fam Law 252, CA.

8 *Buckley v Crawford (Townend, claimant)* [1893] 1 QB 105; *Gandolfo v Gandolfo* [1981] QB 359, sub nom *Gandolfo v Gandolfo (Standard Chartered Bank Ltd, garnishee)* [1980] 1 All ER 833, CA; *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424, [1985] 1 All ER 106, HL; *Symmons v Symmons* [1993] 1 FLR 317, [1993] Fam Law 135.

9 See *Horsman v Horsman* [1993] 2 FCR 357, sub nom *H v H (financial provision: capital allowance)* [1993] 2 FLR 335.

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934. Contents of pension sharing order and pension attachment order.

An order for financial relief¹, whether by consent or not, which includes a pension sharing order² or a pension attachment order³ must in the body of the order state that there is to be provision by way of pension sharing in accordance with the annex or annexes to the order, and be accompanied by an annex containing the prescribed information⁴; and, if provision is made in relation to more than one pension arrangement⁵, there must be one annex for each pension arrangement⁶.

1 As to financial relief see PARA 902.

2 As to the meaning of 'pension sharing order' see PARA 926 note 14.

3 As to the meaning of 'pension attachment order' see PARA 927 note 2.

4 I.e. the information set out in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A Form P1 or Form P2 (added by SI 2005/2922).

5 As to the meaning of 'pension arrangement' see PARA 485 note 1.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(13) (r 2.70 added by SI 1996/1674 and substituted by SI 2000/2267; Family Proceedings Rules 1991, SI 1991/1247, r 2.70(13) amended by SI 2005/2922).

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935. Documents to be supplied to persons responsible for pension arrangement.

A court which makes, varies or discharges a pension sharing order¹ or pension attachment order² must send, or direct one of the parties to send, to the person responsible for the pension arrangement³ concerned:

- 1243 (1) a copy of the decree of divorce, nullity of marriage or judicial separation or the conditional order of dissolution, nullity of civil partnership or order of separation⁴;
- 1244 (2) where applicable, a copy of the certificate⁵ that the decree of divorce or nullity of marriage has been made absolute or a copy of the order⁶ making a conditional order for dissolution or nullity of civil partnership final⁷; and
- 1245 (3) a copy of that order, or as the case may be of the order varying or discharging that order, including any annex to that order relating to that pension arrangement but no other annex to that order⁸,

and those documents must be sent within seven days after the making of the relevant pension sharing or pension attachment order, or the decree absolute of divorce or nullity or decree of judicial separation or the final order of dissolution or nullity or order of separation, whichever is the later⁹.

Provision is also made in connection with pension payments for which responsibility has been assumed by the Board of the Pension Protection Fund¹⁰.

1 As to the meaning of 'pension sharing order' see PARA 926 note 14.

2 As to the meaning of 'pension attachment order' see PARA 927 note 2.

3 As to the meaning of 'pension arrangement', and as to references to the person responsible for a pension arrangement, see PARA 485 notes 1, 6 (definitions applied by the Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(a), (ab) (r 2.70 added by SI 1996/1674 and substituted by SI 2000/2267; Family Proceedings Rules 1991, SI 1991/1247, r 2.70(18)(a) amended, r 2.70(16)(a), (b), (18)(ab) added, r 2/70(17) substituted, by SI 2005/2922)).

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(16)(a) (as added and substituted: see note 3).

5 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.51: see PARA 878.

6 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.51A: see PARA 878.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(16)(b) (as added and substituted: see note 3).

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(16)(c) (as added and substituted: see note 3).

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.70(17) (as added and substituted: see note 3).

10 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.70A (added by SI 2006/2080).

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936. Reference of application to judge.

The district judge¹ may at any time refer an application for financial relief², or any question arising thereon, to a judge³ for his decision⁴.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 As to financial relief see PARA 902.

3 As to the meaning of 'judge' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.65 (amended by SI 1999/3491).

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937. Arrangements for hearing of application.

Where an application for financial relief¹ or any question arising thereon has been referred or adjourned to a judge², the proper officer³ must fix a date, time and place for the hearing of the application or the consideration of the question and give notice thereof to all parties⁴. The hearing or consideration must, unless the court otherwise directs, take place in chambers⁵.

Where the application is proceeding in a divorce county court or a civil partnership proceedings county court⁶ which is not a court of trial or is pending in the High Court and proceeding in a district registry⁷ which is not in a divorce town or a dissolution town⁸, the hearing or consideration must take place at such court of trial or divorce or dissolution town as in the opinion of the district judge is the nearest or most convenient; and, for these purposes, the Royal Courts of Justice are to be treated as a divorce or dissolution town⁹.

In respect of any application referred to him under these provisions, a judge has the same powers to make directions as has¹⁰ a district judge¹¹.

1 As to financial relief see PARA 902.

2 As to the meaning of 'judge' see PARA 737 note 3.

3 As to the meaning of 'proper officer' see PARA 461 note 5.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.66(1).

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.66(2).

6 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

7 As to the meaning of 'district registry' see PARA 737 note 3.

8 As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.66(3). (3A) (r 2.66(3) amended, r 2.66(3A) added, by SI 2005/2922).

10 Ie under the Family Proceedings Rules 1991, SI 1991/1247.

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.66(4) (amended by SI 1999/3491).

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(iii) Financial Relief following Overseas Divorce, Dissolution, Separation or Annulment

938. Leave of the court required.

No application for an order for financial relief in an overseas divorce, dissolution, separation or annulment¹ may be made unless the leave of the court² has been obtained in accordance with rules of court; and the court must not grant leave unless it considers that there is substantial ground for the making of an application for such an order³. An application for such leave must be made without notice by originating summons issued in the prescribed form⁴ out of the Principal Registry⁵ and must be supported by an affidavit by the applicant⁶ which must state the facts relied on in support of the application⁷, must give particulars of the judicial or other proceedings by means of which the marriage or civil partnership to which the application relates was dissolved or annulled or by which the parties to the marriage or civil partnership were legally separated, and must state, so far as is known to the applicant:

- 1246 (1) the names of the parties to the marriage or civil partnership and the date and place of the marriage or the formation of the civil partnership⁸;
- 1247 (2) the occupation and residence of each of the parties to the marriage or civil partnership⁹;
- 1248 (3) whether there are any living children of the family¹⁰ and, if so, the number of such children and the full names, including surname, of each and his date of birth or, if it be the case, that he is over 18¹¹;
- 1249 (4) whether either party to the marriage or civil partnership has subsequently married or formed a civil partnership¹²;
- 1250 (5) an estimate in summary form of the appropriate amount or value of the capital resources and net income of each party and of any minor child of the family¹³; and
- 1251 (6) the grounds on which it is alleged that the court has jurisdiction to entertain an application for an order for financial relief¹⁴.

The proper officer¹⁵ must fix a date, time and place for the hearing of the application by a judge¹⁶ in chambers and give notice thereof to the applicant¹⁷.

The court may grant leave notwithstanding that an order has been made by a court in a country outside England and Wales¹⁸ requiring the other party to the marriage or civil partnership to make any payment or transfer any property to the applicant or a child of the family¹⁹. Leave may be granted subject to such conditions as the court thinks fit²⁰.

1 le an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (orders for financial provision, property adjustment and pension sharing: see PARA 531) or an order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act 2004 Sch 7 para 13 (orders for transfers of tenancies of dwelling houses: see PARA 310): see the Matrimonial and Family Proceedings Act 1984 s 12(4); the Civil Partnership Act 2004 Sch 7 para 2(2); and see further PARA 530 note 4.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Matrimonial and Family Proceedings Act 1984 s 13(1); Civil Partnership Act 2004 Sch 7 para 4(1), (2). In determining for these purposes whether there is substantial ground for the making of an application for financial relief, the provisions of the Matrimonial and Family Proceedings Act 1984 s 16 and the Civil Partnership Act 2004 Sch 7 para 8 (see PARA 940) must be taken into account and accordingly, if on the application for leave to apply it is clear that, if leave is given, the application for relief will fail because it will not be appropriate for an order for such relief to be made by a court in England and Wales, it will be wrong to grant leave: *Holmes v Holmes* [1989] Fam 47, [1989] 3 All ER 786, CA (court in New York properly seised of matter and the natural forum for the resolution of the dispute between the parties; no basis for saying that justice would not be done if the wife were compelled to pursue her remedies for financial provision there); *Z v Z (foreign divorce: financial provision)* [1992] 2 FCR 152, sub nom *Z v Z (financial provision: overseas divorce)* [1992] 2 FLR 291 (wife did not satisfy the court that there was substantial ground for making an application); *M v M (financial provision after foreign divorce)* [1994] 2 FCR 448, [1994] 1 FLR 399 (leave set aside); *Hewitson v Hewitson* [1995] Fam 100, [1995] 1 All ER 472, CA (cited in PARA 530 note 4); *Lamagni v Lamagni* [1996] 1 FCR 408, [1995] 2 FLR 452, CA (wife had throughout sought financial relief in the English courts; she was on income support; wife entitled to make application, the delay in making application not being due to the wife's not seeking financial relief); *N v N (overseas divorce: financial relief)* [1997] 1 FCR 573, sub nom *N v N (foreign divorce: financial relief)* [1997] 1 FLR 900 (husband had not made out a substantial ground).

4 For the prescribed form of originating summons see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M25 (amended by SI 2005/2922).

5 As to the meaning of 'Principal Registry' see PARA 737 note 3.

6 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(1), (2)(g) (r 3.17(1), (2) amended, r 3.17(1A), (2)(ab), (g) added, r 3.17(2)(a), (d) substituted, by SI 2005/2922). If the affidavit omits material facts, the respondent may be successful in an application to set aside the granting of leave: see *W v W (financial provision)* [1989] FCR 721, [1989] 1 FLR 22.

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(1A) (as added: see note 6). The facts relied upon must be stated with particular reference to the matters set out in the Matrimonial and Family Proceedings Act 1984 s 16(2) or, as the case may be, the Civil Partnership Act 2004 Sch 7 para 8 (see PARA 940): Family Proceedings Rules 1991, SI 1991/1247, r 3.17(1A) (as so added).

In the case of an application for a transfer or settlement of property the affidavit in support must contain, so far as known to the applicant, full particulars of the property in respect of which the application is made and of the property to which the party against whom the application is made is entitled either in possession or reversion: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 3(1)(a) (Appendix 4 added by SI 2005/2922). In the case of an application for an order for a variation of settlement the affidavit in support must contain, so far as known to the applicant, full particulars of all relevant settlements made on the spouses or civil partners (ie ante-nuptial or post-nuptial settlements and settlements made during the subsistence of a civil partnership or in anticipation of its formation, on the civil partners including one made by will or codicil, but not including one in the form of a pension arrangement) and of the funds brought into settlement by each spouse or civil partner: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 3(1)(b), (5) (as so added). In the case of an application for an avoidance of transaction order the affidavit in support must contain, so far as known to the applicant, full particulars of the property to which the disposition relates and of the person in whose favour the disposition is alleged to have been made: Appendix 4 para 3(1)(c) (as so added). In the case of a disposition alleged to have been made by way of settlement, the affidavit in support must contain, so far as known to the applicant, full particulars of the trustees and the beneficiaries of the settlement: Appendix 4 para 3(1) (as so added).

Where an application for a property adjustment order or an avoidance of transaction order relates to land, the affidavit in support must identify the land and state whether the title to the land is registered or unregistered and, if registered, the Land Registry title number and give particulars, so far as known to the applicant, of any mortgage of the land or other interest in it: Appendix 4 para 3(2) (as so added).

A copy of Form M26 or M27 as the case may be, together with a copy of the supporting affidavit, must, as well as being served on the respondent, be served:

- 231 (1) in the case of an application for an order for a variation of settlement, on the trustees of the settlement and the settlor if living (Appendix 4 para 3(3)(a) (as so added));
- 232 (2) in the case of an application for an avoidance of transaction order, on the person in whose favour the disposition is alleged to have been made (Appendix 4 para 3(3)(b) (as so added)); and
- 233 (3) in the case of an application for a property adjustment order or an avoidance of transaction order relating to land, on any mortgagee of whom particulars are given pursuant to Appendix 4 para 3(2), and on such other persons, if any, as the district judge may direct (Appendix 4 para 3(3)(c) (as so added)),

And any person who is served with an application pursuant to these provisions may within 14 days after service file an affidavit in answer (Appendix 4 para 3(4) (as so added)).

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(2)(a), (ab) (as substituted and added: see note 6).

9 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(2)(b) (as amended: see note 6).

10 As to the meaning of 'child of the family' see PARA 707 note 9.

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(2)(c).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(2)(d) (as substituted: see note 6).

13 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(2)(e).

14 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(2)(f).

15 As to the meaning of 'proper officer' see PARA 461 note 5.

16 As to the meaning of 'judge' see PARA 737 note 3.

17 Family Proceedings Rules 1991, SI 1991/1247, r 3.17(3).

18 As to the relevance of an order made by a foreign court see PARAS 940, 532.

19 Matrimonial and Family Proceedings Act 1984 s 13(2); Civil Partnership Act 2004 Sch 7 para 4(3); and see *Hewitson v Hewitson* [1995] Fam 100, [1995] 1 All ER 472, CA; *Lamagni v Lamagni* [1996] 1 FCR 408, [1995] 2 FLR 452, CA. As to the meaning of 'child of the family' for these purposes see PARA 477 note 3.

20 Matrimonial and Family Proceedings Act 1984 s 13(3); Civil Partnership Act 2004 Sch 7 para 4(4).

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939. Domicile and residence of parties.

The court¹ has jurisdiction to entertain an application for an order for financial relief in an overseas divorce, dissolution, separation or annulment² if:

- 1252 (1) either of the parties to the marriage or civil partnership was domiciled³ in England and Wales on the date of the application for leave or was so domiciled on the date on which the divorce, dissolution, annulment or separation took effect in the overseas country⁴ in which it was obtained⁵;
- 1253 (2) either of the parties to the marriage or civil partnership was habitually resident⁶ in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date on which the divorce, dissolution, annulment or separation took effect in the country in which it was obtained⁷; or
- 1254 (3) either or both of the parties to the marriage or civil partnership had at the date of the application for leave a beneficial interest in possession⁸ in a dwelling house⁹ situated in England and Wales which was at some time during the marriage or civil partnership a family home of the parties¹⁰.

1 As to the meaning of 'court' see PARA 346 note 2.

2 Ie under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (orders for financial provision, property adjustment and pension sharing: see PARAS 531, 926) or an order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act 2004 Sch 7 para 13 (orders for transfers of tenancies of dwelling houses: see PARA 310): see the Matrimonial and Family Proceedings Act 1984 s 12(4); the Civil Partnership Act 2004 Sch 7 para 2(2); and see further PARA 530 note 4.

Where the jurisdiction of the court to entertain proceedings under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (see PARAS 530, 938, 940 et seq) would fall to be determined by reference to the jurisdictional requirements of the Civil Jurisdiction and Judgments Act 1982 Pt I (ss 1-15) (implementation of certain European Conventions: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65) or by virtue of EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 28) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I' Regulation: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65), then satisfaction of the requirements of the Matrimonial and Family Proceedings Act 1984 s 15(1) (see the text and notes 3-10) does not obviate the need to satisfy the requirements imposed by virtue of EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 28) or the Civil Jurisdiction and Judgments Act 1982 Pt I, and satisfaction of the requirements imposed by virtue of EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 28) or the Civil Jurisdiction and Judgments Act 1982 Pt I obviates the need to satisfy the requirements of the Matrimonial and Family Proceedings Act 1984 s 15(1), and the court must entertain or not entertain the proceedings accordingly: s 15(2) (amended by SI 2001/3929; SI 2007/1655). There is no corresponding civil partnership provision.

3 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59.

4 As to the meaning of 'overseas country' see PARA 530 note 1.

5 Matrimonial and Family Proceedings Act 1984 s 15(1)(a); Civil Partnership Act 2004 Sch 7 paras 6, 7(1), (2).

6 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 705.

7 Matrimonial and Family Proceedings Act 1984 s 15(1)(b); Civil Partnership Act 2004 Sch 7 para 7(3).

8 For these purposes 'possession' includes receipt of, or the right to receive, rents and profits: Matrimonial and Family Proceedings Act 1984 s 27; Civil Partnership Act 2004 Sch 7 para 7(5). 'Rent' does not include mortgage interest: Matrimonial and Family Proceedings Act 1984 s 27; Civil Partnership Act 2004 Sch 7 para 7(5).

9 As to the meaning of 'dwelling house' see PARA 285 note 2.

10 Matrimonial and Family Proceedings Act 1984 s 15(1)(c); Civil Partnership Act 2004 Sch 7 para 7(4); and see *Z v Z (foreign divorce: financial provision)* [1992] 2 FCR 152, sub nom *Z v Z (financial provision: overseas divorce)* [1992] 2 FLR 291 (wife did not satisfy the court that there was substantial ground for making an application). Where jurisdiction to entertain an application for financial relief is based only on the Matrimonial and Family Proceedings Act 1984 s 15(1)(c) or the Civil Partnership Act 2004 Sch 7 para 7(4), the court may not make an interim order for maintenance under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536) and the powers to make orders for financial provision and property adjustment are limited (see PARA 533).

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940. Duty of court to consider whether England and Wales is appropriate venue for application.

Before making an order for financial relief in an overseas divorce, dissolution, separation or annulment¹, the court² must consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales; and, if the court is not so satisfied that it would be appropriate, the court must dismiss the application³.

The court must, in particular, have regard to the following matters:

- 1255 (1) the connection which the parties to the marriage or civil partnership have with England and Wales⁴;
- 1256 (2) the connection which those parties have with the country in which the marriage or civil partnership was dissolved or annulled or in which they were legally separated⁵;
- 1257 (3) the connection which those parties have with any other country outside England and Wales⁶;
- 1258 (4) any financial benefit which the applicant or a child of the family⁷ has received, or is likely to receive, in consequence of the divorce, dissolution, annulment or separation by virtue of any agreement or the operation of the law of a country outside England and Wales⁸;
- 1259 (5) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage or civil partnership to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with⁹;
- 1260 (6) any right which the applicant has, or has had, to apply for financial relief from the other party under the law of any country outside England and Wales and, if the applicant has omitted to exercise that right, the reason for that omission¹⁰;
- 1261 (7) the availability in England and Wales of any property in respect of which an order made by the court¹¹ in favour of the applicant could be made¹²;
- 1262 (8) the extent to which any order made by the court is likely to be enforceable¹³;
- 1263 (9) the length of time which has elapsed since the date of the divorce, dissolution, annulment, or legal separation¹⁴.

1 le an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (orders for financial provision, property adjustment and pension sharing: see PARAS 523, 531) or an order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act 2004 Sch 7 para 13 (orders for transfers of tenancies of dwelling houses: see PARA 310): see the Matrimonial and Family Proceedings Act 1984 s 12(4); the Civil Partnership Act 2004 Sch 7 para 2(2); and see further PARA 530 note 4.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Matrimonial and Family Proceedings Act 1984 s 16(1); Civil Partnership Act 2004 Sch 7 paras 6, 8(1), (2); and see *Holmes v Holmes* [1989] Fam 47, [1989] 3 All ER 786, CA; *W v W (financial provision)* [1989] FCR 721, [1989] 1 FLR 22; *M v M (financial provision after foreign divorce)* [1994] 2 FCR 448, [1994] 1 FLR 399; *Lamagni v Lamagni* [1996] 1 FCR 408, [1995] 2 FLR 452, CA (effect of delay). The burden of showing, pursuant to the

Matrimonial and Family Proceedings Act 1984 s 16 or the Civil Partnership Act 2004 Sch 7 para 8, that it is appropriate to make an order lies on the person seeking the order: *Z v Z (foreign divorce: financial provision)* [1992] 2 FCR 152, sub nom *Z v Z (financial provision: overseas divorce)* [1992] 2 FLR 291.

- 4 Matrimonial and Family Proceedings Act 1984 s 16(2)(a); Civil Partnership Act 2004 Sch 7 para 8(3)(a).
- 5 Matrimonial and Family Proceedings Act 1984 s 16(2)(b); Civil Partnership Act 2004 Sch 7 para 8(3)(b).
- 6 Matrimonial and Family Proceedings Act 1984 s 16(2)(c); Civil Partnership Act 2004 Sch 7 para 8(3)(c).
- 7 As to the meaning of 'child of the family' see PARA 477 note 3.
- 8 Matrimonial and Family Proceedings Act 1984 s 16(2)(d); Civil Partnership Act 2004 Sch 7 para 8(3)(d).
- 9 Matrimonial and Family Proceedings Act 1984 s 16(2)(e); Civil Partnership Act 2004 Sch 7 para 8(3)(e).
- 10 Matrimonial and Family Proceedings Act 1984 s 16(2)(f); Civil Partnership Act 2004 Sch 7 para 8(3)(f).
- 11 le under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) or the Civil Partnership Act 2004 Sch 7: see PARAS 530 et seq, 536 et seq.
- 12 Matrimonial and Family Proceedings Act 1984 s 16(2)(f); Civil Partnership Act 2004 Sch 7 para 8(3)(f).
- 13 Matrimonial and Family Proceedings Act 1984 s 16(2)(g); Civil Partnership Act 2004 Sch 7 para 8(3)(g).
- 14 Matrimonial and Family Proceedings Act 1984 s 16(2)(h); Civil Partnership Act 2004 Sch 7 para 8(3)(h).

UPDATE

940 Duty of court to consider whether England and Wales is appropriate venue for application

NOTE 3--See *Agbaje v Agbaje* [2010] UKSC 13, [2010] 2 WLR 709, [2010] 2 FCR 1 (where there were substantial connections to England or Wales it was appropriate for the court to consider what an award would have been if it had been made in England or Wales).

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941. Mode of application.

An application for an order for financial relief in an overseas divorce, dissolution, separation or annulment¹ must be made by originating summons issued in the prescribed form² out of the Principal Registry³ and at the same time the applicant, unless otherwise directed, must file an affidavit in support of the summons giving full particulars of his property and income⁴. The applicant must serve a sealed copy of the originating summons on the respondent and must annex thereto a copy of the affidavit in support, if one has been filed, and a notice of proceedings and acknowledgment of service in the prescribed form⁵. An application for an interim order for maintenance⁶ or an avoidance of transaction order⁷ may be made, unless the court otherwise directs, in the originating summons⁸ or by summons in the normal way⁹; and an application for an avoidance of transaction order must be supported by an affidavit, which may be the affidavit filed under the above provisions¹⁰, stating the facts relied on¹¹.

If the respondent intends to contest the application, he must, within 28 days after the time limited for giving notice to defend, file an affidavit in answer to the application setting out the grounds on which he relies and must serve a copy on the applicant¹².

Where the originating summons contains an application for an avoidance of transaction order¹³, the applicant must serve a copy on the landlord of the dwelling house¹⁴ and he is entitled to be heard on the application¹⁵.

An application for an order for financial relief¹⁶ or for an avoidance of transaction order must be determined by a judge¹⁷.

1 le an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (orders for financial provision, property adjustment and pension sharing: see PARAS 523 et seq, 531) or an order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act 2004 Sch 7 para 13 (orders for transfers of tenancies of dwelling houses: see PARA 310): see the Matrimonial and Family Proceedings Act 1984 s 12(4); the Civil Partnership Act 2004 Sch 7 para 2(2); and see further PARA 530 note 4.

2 For the prescribed form of originating summons see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M26 (amended by SI 2005/2922).

3 As to the meaning of 'Principal Registry' see PARA 737 note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.18(1) (r 3.18(1), (2), (4), (6)-(8) amended, r 3.18(3) substituted, r 3.18(9) added, by SI 2005/2922). The court may order the attendance of any person for the purpose of being examined or cross-examined and the discovery and production of any document: r 3.18(3) (as so substituted).

As to the meaning of 'ancillary relief' see PARA 902. A production order may not be made on such an application; but a writ of subpoena duces tecum may be issued out of the Principal Registry of the Family Division obliging a party to attend court on a day prior to the substantive hearing: *Roker International Properties Inc v Couvaras* [2001] 1 FCR 320, sub nom *Roker International Properties Inc v Couvaras and Wolf* [2000] 2 FLR 976.

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.18(2) (as amended: see note 4). For the prescribed form of acknowledgment of service see Appendix 1, Form M28. Rule 10.8 (see PARA 779) applies to such an acknowledgment of service as if the references in r 10.8(1) to Form M6 and Form M6A and in r 10.8(2) to seven days were, respectively, references to Form M28 and 31 days: r 3.18(2) (as so amended).

6 'Interim order for maintenance' means an order under the Matrimonial and Family Proceedings Act 1984 s 14 or the Civil Partnership Act 2004 Sch 7 para 5 (see PARA 536): Family Proceedings Rules 1991, SI 1991/1247, r 3.18(9)(b) (as added: see note 4).

7 'Avoidance of transaction order' means an application under the Matrimonial and Family Proceedings Act 1984 s 23 or the Civil Partnership Act 2004 Sch 7 para 15 (see PARA 586 et seq): Family Proceedings Rules 1991, SI 1991/1247, r 3.18(9)(a) (as added: see note 4). In respect of any application for an avoidance of transaction order the court may give such a direction or make such appointment as it is empowered to give or make by r 3.18(3) (see note 4): r 3.18(6) (as so amended).

8 le under the Family Proceedings Rules 1991, SI 1991/1247, r 3.18(1): see the text and notes 1-4.

9 le in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 10.9(1): see PARA 1006.

10 See note 8.

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.18(4) (as amended: see note 4).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.18(5).

13 Family Proceedings Rules 1991, SI 1991/1247, r 3.18(6). Where an application is made for financial relief or an avoidance of transaction order under the Matrimonial Causes Act 1984 or the Civil Partnership Act 2004 Sch 7, the affidavit in support must contain, so far as known to the applicant, full particulars:

- 234 (1) in the case of an application for a transfer or settlement of property, of the property in respect of which the application is made, and of the property to which the party against whom the application is made is entitled either in possession or reversion (Appendix 4 para 3(1)(a) (added by SI 2005/2922));
- 235 (2) in the case of an application for an order for a variation of settlement of all relevant settlements, made on the spouses or civil partners, as the case may be, and of the funds brought into settlement by each spouse or civil partner (Appendix 4 para 3(1)(b) (added by SI 2005/2922));
- 236 (3) in the case of an application for an avoidance of transaction order of the property to which the disposition relates, and of the person in whose favour the disposition is alleged to have been made (Appendix 4 para 3(1)(c) (added by SI 2005/2922));

and in the case of a disposition alleged to have been made by way of settlement, of the trustees and the beneficiaries of the settlement: Appendix 4 para 3(1) (added by SI 2005/2922). Where an application for a property adjustment order or an avoidance of transaction order relates to land, the affidavit in support must identify the land and state whether the title to the land is registered or unregistered and, if registered, the Land Registry title number, and give particulars, so far as known to the applicant, of any mortgage of the land or other interest in it: Appendix 4 para 3(2) (added by SI 2005/2922). A copy of Form M26 or M27 as the case may be, together with a copy of the supporting affidavit, must, as well as being served on the respondent, be served:

- 237 (a) in the case of an application for an order for a variation of settlement, on the trustees of the settlement and the settlor if living (Appendix 4 para 3(3)(a));
- 238 (b) in the case of an application for an avoidance of transaction order, on the person in whose favour the disposition is alleged to have been made (Appendix 4 para 3(3)(b));
- 239 (c) in the case of an application to which sub-paragraph (2) refers, on any mortgagee of whom particulars are given pursuant to that paragraph, and on such other persons, if any, as the district judge may direct (Appendix 4 para 3(3)(c)).

Any person who is served with such an application may within 14 days after service file an affidavit in answer: Appendix 4 para 3(4). 'Relevant settlement' means in relation to a marriage, an ante-nuptial or post-nuptial settlement, and in relation to a civil partnership, a settlement made during its subsistence or in anticipation of its formation, on the civil partners including one made by will or codicil, but not including one in the form of a pension arrangement, within the meaning of the Civil Partnership Act 2004 Sch 5 paras 15-19.

See also note 4.

14 As to the meaning of 'dwelling house' see PARA 285 note 2.

15 Family Proceedings Rules 1991, SI 1991/1247, r 3.18(7).

16 See note 1.

17 Family Proceedings Rules 1991, SI 1991/1247, r 3.18(8). As to the meaning of 'judge' see PARA 737 note 3.

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942. Hearing the application and making the order.

At the hearing of an application for financial relief in an overseas divorce, dissolution, separation or annulment¹ the district judge² may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings³. Subject to any directions given by the court⁴, any party to an application for an occupation order in these circumstances may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to provide a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the district judge for directions⁵.

1 le an order under the Matrimonial and Family Proceedings Act 1984 s 17 or the Civil Partnership Act 2004 Sch 7 para 9 (orders for financial provision, property adjustment and pension sharing: see PARAS 526 et seq, 531) or an order under the Matrimonial and Family Proceedings Act 1984 s 22 or the Civil Partnership Act 2004 Sch 7 para 13 (orders for transfers of tenancies of dwelling houses: see PARA 310): see the Matrimonial and Family Proceedings Act 1984 s 12(4); the Civil Partnership Act 2004 Sch 7 para 2(2); and see further PARA 530 note 4.

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(2), (4) (Appendix 4 added by SI 2005/2922). Where an application under these provisions is referred or adjourned to a judge the proper officer must fix a date, time and place for the hearing of the application or the consideration of the question and give notice of that date to all parties: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(4), (6) (as so added). The hearing or consideration must, unless the court otherwise directs, take place in chambers: Appendix 4 para 9(7) (as so added). As to the meaning of 'judge' see PARA 737 note 3. As to the meaning of 'proper officer' see PARA 461 note 5.

4 Where any party to such an application intends on the day appointed for the hearing to apply for directions, he must file and serve on every other party a notice to that effect: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(5) (as added: see note 3).

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(6) (as added: see note 3).

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(iv) Enforcement of Financial Orders

A. METHODS OF ENFORCEMENT

943. Attachment of earnings orders.

Although the High Court may make an attachment of earnings order to enforce a maintenance order¹, there is no longer any procedure governing applications to the High Court. High Court orders may, however, be, and usually are, enforced in a county court².

An application for an attachment of earnings order to secure payments under a maintenance order made by a county court must be made to that county court³. If the maintenance order to be enforced was not made by a county court, it must be made to the county court for the district in which the debtor resides⁴. If the debtor does not reside within England or Wales, or the creditor does not know where he resides, the application may be made to the court in which, or for the district in which, the maintenance order sought to be enforced was obtained⁵. The request for an attachment of earnings order must be accompanied by an affidavit verifying the amount due under the maintenance order and showing how that amount is arrived at⁶.

On the filing of the application, the proper officer must fix a day for the hearing of the application⁷. Notice of the application, together with a form of reply in the appropriate form, must be served on the debtor in the specified manner⁸. The debtor must, within eight days after service, file a reply in the form provided⁹. The court has extensive powers to compel the debtor's attendance at the hearing¹⁰.

The attachment of earnings order is directed to the person appearing to be the judgment debtor's employer and requires him to make periodical deductions from the judgment debtor's pay and send the amounts deducted to the collecting officer of the court¹¹.

The court may make a suspended attachment of earnings order¹² or an interim order.

¹ See PARA 628.

² I.e. pursuant to the power conferred by the Attachment of Earnings Act 1971 s 1(2)(a): see PARA 628. A High Court order may also be enforced by attachment of earnings in a magistrates' court following registration there: see PARA 665.

³ See CPR Sch 2 CCR Ord 27 r 17(2). Procedure in a county court is governed by CPR Sch 2 CCR Ord 27: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1431 et seq. The fee payable on an application in a county court for an attachment of earnings order to secure money due under an order in family proceedings is £65, the fee being payable for each defendant against whom an order is sought but not being payable where the attachment of earnings order is made on the hearing of a judgment summons: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 11.7.

⁴ CPR Sch 2 CCR Ord 27 r 3(1).

⁵ CPR Sch 2 CCR Ord 27 r 3(2). The Attachment of Earnings Act 1971 and CCR Ord 27 apply to the enforcement of an order made in family proceedings in the Principal Registry which are treated as pending in a designated county court as if the order were an order made by such a court: Family Proceedings Rules 1991, SI 1991/1247, r 7.1(4) (amended by SI 2005/2922). As to the meaning of 'Principal Registry' see PARA 737 note 3; and as to the meaning of 'designated county court' see PARA 737 note 3.

- 6 See the Family Proceedings Rules 1991, SI 1991/1247, r 7.1(1); and PARA 623.
- 7 See CPR Sch 2 CCR Ord 27 r 4(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1435.
- 8 See CPR Sch 2 CCR Ord 27 r 5(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1436. For the form of service see CPR 6.20; and **CIVIL PROCEDURE** vol 11 (2009) PARA 139.
- 9 See CPR Sch 2 CCR Ord 27 r 5(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1436.
- 10 See CPR Sch 2 CCR Ord 27 rr 7B, 8(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1465.
- 11 See CPR Sch 2 CCR Ord 27 r 10; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1439, 1441.
- 12 See the County Courts Act 1984 s 71(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1229.

UPDATE

943 Attachment of earnings orders

NOTE 3--Fee is now £100: SI 2008/1054 Sch 1, Fee 11.7 (amended by SI 2009/1499).

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944. Charging orders.

An application for a charging order¹ may be made without notice, and must in general be issued in the court which made the judgment or order². The application notice must be in the form and contain the information required by the relevant practice direction and be verified by a statement of truth³. The judge may make an interim charging order without a hearing, imposing a charge over the judgment debtor's interest and fix a hearing to consider whether to make a final charging order⁴. The court by which a charging order was made may, on the application of the debtor or of any person interested in any property to which the order relates, at any time make an order discharging or varying the charging order⁵.

1 The fee payable on an application for a charging order in the High Court is £5, the fee being payable in respect of each party against whom the order is sought (Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 13.3); and the fee payable on an application for a charging order nisi in a county court is £55, the fee being payable in respect of each party against whom the order is sought (Sch 1, Fee 11.4(a), (b) (substituted by SI 2008/2856)).

2 See CPR 73.3(1), (2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1472.

3 See CPR 73.3(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1473.

4 See CPR 73.4; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1474.

5 See CPR 73.9; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1484-1485.

UPDATE

944 Charging orders

NOTE 1--SI 2008/1054 Sch 1, Fees 11.4(a), (b), 13.3 omitted: SI 2009/1499.

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945. Judgment summons.

An application for the issue of a judgment summons¹ may be made:

- 1264 (1) in the case of an order² of the High Court, to the Principal Registry³, a district registry⁴ or a divorce or civil partnership proceedings county court⁵, or in any other case to the Principal Registry, a district registry or a designated county court⁶, whichever in the opinion of the judgment creditor⁷ is most convenient⁸; and
- 1265 (2) in the case of an order of a divorce or civil partnership proceedings county court, to whichever divorce or civil partnership proceedings county court is in the opinion of the judgment creditor most convenient⁹,

having regard (in either case) to the place where the debtor resides or carries on business and irrespective of the court or registry in which the order was made¹⁰.

The application must be made by filing a request in the prescribed form¹¹ together with the affidavit verifying the amount due under the order and showing how that amount is arrived at¹²; and, except where the application is made to the registry or designated county court in which the order was made, a copy of the order must be exhibited to the affidavit¹³. The judgment creditor must file with the request copies of all written evidence on which he intends to rely¹⁴. A judgment summons may not be issued without the leave of a judge¹⁵ if the debtor is in default under an order of commitment made on a previous judgment summons in respect of the same order¹⁶.

Every judgment summons must be in the prescribed form¹⁷ and must be served on the debtor personally, together with copies of the written evidence¹⁸ not less than ten days before the hearing and at the time of service there must be paid or tendered to the debtor a sum reasonably sufficient to cover his expenses in travelling to and from the court at which he is summoned to appear¹⁹.

Successive judgment summonses may be issued notwithstanding that the judgment debtor has ceased to reside or carry on business at the address stated in the prescribed form of application²⁰ since the issue of the original judgment summons²¹.

Where an applicant has obtained one or more orders in the same application but for the benefit of different persons:

- 1266 (a) he is entitled to issue a judgment summons in respect of those orders on behalf of any judgment creditor without, where the judgment creditor is a child²², seeking leave to act as his litigation friend²³; and
- 1267 (b) only one judgment summons need be issued in respect of those orders²⁴.

On the hearing of the judgment summons, the judge may:

- 1268 (i) where the order is for lump sum provision²⁵ or costs²⁶; or
- 1269 (ii) where the order is for maintenance pending suit or outcome of proceedings²⁷ or other periodical payments²⁸ and it appears to him that the order

would have been varied or suspended if the debtor had made an application for that purpose²⁹,

make a new order for payment of the amount due under the original order, together with the costs of the judgment summons, either at a specified time or by instalments³⁰ (although the court has no power to suspend the original maintenance order³¹).

If the judge makes an order of committal, he may direct its execution to be suspended on terms that the debtor pays to the judgment creditor the amount due, together with the costs of the judgment summons, either at a specified time or by instalments, in addition to any sums accruing due under the original order³². The judgment creditor may apply for the sums payable under a suspended order to be increased³³.

All payments under a new order or an order of committal must be made to the judgment creditor unless the judge otherwise directs³⁴.

Once an order for committal has been made, there is no power to revoke it³⁵.

A debtor who has been committed is entitled to immediate release from custody on its being certified that he has paid in full the sum, including costs, for which he has been committed³⁶.

On hearing a judgment summons, the court may also make an attachment of earnings order if it would have had the power to make such an order had the appropriate application been before it³⁷.

1 For these purposes, unless the context otherwise requires, 'judgment summons' means a summons under the Debtors Act 1869 s 5 (see PARA 642) requiring a debtor to attend court: Family Proceedings Rules 1991, SI 1991/1247, r 7.4(1) (amended by SI 2003/184). For these purposes, unless the context otherwise requires, 'debtor' means a person entitled to enforce an order under the Debtors Act 1869 s 5: Family Proceedings Rules 1991, SI 1991/1247, r 7.4(1).

2 For these purposes, unless the context otherwise requires, 'order' means an order made in family proceedings for the payment of money: Family Proceedings Rules 1991, SI 1991/1247, r 7.4(1). As to the meaning of 'family proceedings' see PARA 737 note 2.

3 As to the meaning of 'Principal Registry' see PARA 737 note 3.

4 As to the meaning of 'district registry' see PARA 737 note 3.

5 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

6 As to the meaning of 'designated county court' see PARA 737 note 3.

7 For these purposes, unless the context otherwise requires, 'judgment creditor' means a person entitled to enforce an order under the Debtors Act 1869 s 5 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(1).

8 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(2)(a) (r 7.4(2) substituted by SI 2005/2922).

9 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(2)(b), (c) (as substituted: see note 8).

10 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(2) (as substituted: see note 8). The fee payable on an application for a judgment summons in the High Court is £90 (Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 13.4); and the fee payable on an application for a judgment summons in a county court is £95 (Sch 1, Fee 11.5). In order for an application for a judgment summons to comply with the Human Rights Act 1998 it must comply with the relevant Practice Direction: *Murbarak v Murbarak* [2001] 1 FCR 193, sub nom *Mubarak v Mubarak* [2001] 1 FLR 698, CA. For the current Practice Direction see *Practice Direction* [2001] 2 All ER 704, sub nom *Practice Direction (family proceedings: committal)* [2001] 1 WLR 1253.

CPR Sch 2 CCR Ord 28 r 3 (which deals among other things with the issue of successive judgment summonses: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1516) applies to a judgment summons, whether issued in the High Court or a designated county court, but as if CCR Ord 28 r 3 did not apply CCR Ord 7 r 19(2): Family Proceedings Rules 1991, SI 1991/1247, r 7.4(6). As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

Witnesses may be summoned to prove the means of the debtor in the same manner as witnesses are summoned to give evidence on the hearing of a cause, and writs of subpoena may for that purpose be issued out of the registry in which the judgment summons is issued: Family Proceedings Rules 1991, SI 1991/1247, r 7.5(2). Where the debtor appears at the hearing, the travelling expenses paid to him, if the judge so directs, may be allowed as expenses of a witness, but, if the debtor appears at the hearing and no order of committal is made, the judge may allow to the debtor, by way of set-off or otherwise, his proper costs, including compensation for loss of time, as on an attendance by a defendant at a trial in court: r 7.5(3). Where a new order or an order of committal is made, the proper officer of the registry in which the judgment summons was issued must send notice of the order to the debtor and, if the original order was made in another registry, to the proper officer of that registry: r 7.5(4). An order of commitment must be directed to the tipstaff, for execution by him, or to the proper officer of the county court within the district of which the debtor is to be found, for execution by a deputy tipstaff: r 7.5(5). As to the meaning of 'proper officer' see PARA 461 note 5.

CCR Ord 25 rr 3, 4, 11 (oral examination of debtors and execution of High Court orders in county courts) and CCR Ord 28 rr 1, 2, 3(2), 7(3), 9(2) (issue of a judgment summons in a county court and the subsequent procedure: see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1516, 1518-1519) do not apply to a judgment summons issued in a designated county court: Family Proceedings Rules 1991, SI 1991/1247, r 7.6(1) (amended by SI 2003/184). CCR Ord 28 r 9(1) (which relates to a judgment summons heard in a county court on a judgment or order of the High Court: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1518) applies to such a summons with appropriate modifications: Family Proceedings Rules 1991, SI 1991/1247, r 7.6(2). CCR Ord 28 r 7(1), (2) (suspension of a committal order: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1519) applies to such a summons subject to the Family Proceedings Rules 1991, SI 1991/1247, r 7.4(10), (11) (see the text and notes 32-34): r 7.6(3).

11 As to the prescribed form of application see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M16 (amended by SI 2003/184; SI 2005/2922).

12 In the affidavit required by the Family Proceedings Rules 1991, SI 1991/1247, r 7.1(1): see PARA 623.

13 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(3) (amended by SI 2005/2922).

14 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(3A) (added by SI 2003/184). The following documents must be served personally on the debtor:

240 (1) where the proceedings are in the High Court and the court has summoned the debtor to attend and he has failed to do so, the notice of the day and time fixed for the adjourned hearing (r 7.4(7A)(a) (r 7.4(7A)-(7C) added by SI 2003/184));

241 (2) where the proceedings are in the county court, an order made under the County Courts Act 1984 s 110(1) (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1517) (Family Proceedings Rules 1991, SI 1991/1247, r 7.4(7A)(b) (as so added)); and

242 (3) in either case, copies of the judgment summons, the affidavit required by r 7.1(1) (see PARA 623) and all written evidence referred to in r 7.4(3A) (r 7.4(7A)(c) (as so added)).

15 As to the meaning of 'judge' see PARA 737 note 3.

16 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(4).

17 For the prescribed form of judgment summons see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M17 (substituted by SI 2003/184).

18 In the evidence referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 7.4(3A) (see the text and note 14).

19 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(5) (amended by SI 2003/184). No person may be committed on an application for a judgment summons unless:

243 (1) where the proceedings are in the High Court, the court has summoned the debtor to attend, he has failed to do so, and he has also failed to attend the adjourned hearing (r 7.4(7B)(a) (as added: see note 14));

244 (2) where the proceedings are in the county court, an order is made under the County Courts Act 1984 s 110(2) (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1518) (Family Proceedings Rules 1991, SI 1991/1247, r 7.4(7B)(b) (as so added)); or

- 245 (3) the judgment creditor proves that the debtor has or has had since the date of the order the means to pay the sum in respect of which he has made default; and has refused or neglected, or refuses or neglects, to pay that sum (r 7.4(7B)(c) (as so added)).

The debtor may not be compelled to give evidence: r 7.4(7C) (as so added).

20 See note 11.

21 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(7).

22 As to the meaning of 'child' see PARA 765 note 1.

23 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(8)(a).

24 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(8)(b).

25 As to lump sum payments see PARA 476 et seq.

26 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(9)(a). As to costs see PARA 1037 et seq.

27 As to maintenance pending suit or the outcome of proceedings see PARA 456.

28 As to periodical payments see PARA 458 et seq.

29 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(9)(b) (amended by SI 2005/2922).

30 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(9) (amended by SI 2005/2922).

31 *Cockburn v Cockburn* [1957] 3 All ER 260, [1957] 1 WLR 1020, CA.

32 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(10). Where an order of committal is suspended on such terms as are mentioned in r 7.4(10):

- 246 (1) all payments thereafter made under the order are deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the original order and, secondly, in or towards the discharge of a debt in respect of which the judgment summons was issued and the costs of the summons (r 7.4(12)(a));

- 247 (2) CCR Ord 28 r 7(4), (5) (applications for a further suspension: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1519) applies to the order, whether it was made in the High Court or a designated county court (Family Proceedings Rules 1991, SI 1991/1247, r 7.4(12)(b) (amended by SI 2005/2922)); and

- 248 (3) the order may not be issued until the judgment creditor has filed an affidavit of default on the part of the debtor (Family Proceedings Rules 1991, SI 1991/1247, r 7.4(12)(c)).

Once a suspended order for committal is activated, the judgment debtor must, in order to secure his release, pay the original sum in respect of which he was found to be in default, or such part thereof which is outstanding: *Riding v Riding* [1958] P 88, [1958] 1 All ER 65, CA.

33 *J Cooke & Sons Ltd v Binding* [1961] 2 QB 200, [1961] 2 All ER 693, CA.

34 Family Proceedings Rules 1991, SI 1991/1247, r 7.4(11).

35 *Wiltshire v Fell* [1960] 1 QB 181, [1959] 3 All ER 862, CA.

36 See the Debtors Act 1869 s 5; and **CONTRACT** vol 9(1) (Reissue) PARA 486.

37 See the Attachment of Earnings Act 1971 s 3(4); and PARA 628.

UPDATE

945 Judgment summons

NOTE 10--SI 2008/1054 Sch 1, Fees 11.5, 13.4 omitted: SI 2009/1499.

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946. Sequestration.

As sequestration is a process of contempt¹, it is a necessary preliminary to the issue of a writ of sequestration that the judgment or order intended to be so enforced should be served personally on the person against whom the process is sought to be enforced²; and the copy of the judgment or order so served must have the requisite penal notice indorsed on it³. Enforcement by a writ of sequestration may, however, proceed in the absence of personal service of the original order if the order is for the judgment debtor to abstain from an act and the court is satisfied that the judgment debtor had notice of the order by being present in court, or was notified of its terms⁴.

An application for permission to issue a writ of sequestration must be made in accordance with Civil Procedure Rules⁵ and may only be heard by a judge⁶. The application notice of motion, stating the grounds of the application and accompanied by a copy of the witness statement or affidavit in support of the application, must be served personally on the person against whose property it is sought to issue the writ⁷. The hearing of the notice of motion will normally take place in open court⁸. Leave to issue a writ of sequestration is within the judge's discretion, and the court should be satisfied that the application is reasonable⁹.

If leave is granted, the judgment creditor must file the order granting leave, an office copy of the original order to be enforced, a praecipe, signed by or on behalf of the solicitor of the person entitled to the writ or, if that person is acting in person, by him, for the grant of the writ of sequestration and a form of writ for sealing¹⁰. Issue of the writ of sequestration takes place on its being sealed by an officer of the appropriate office¹¹.

The sealed writ is then served on the sequestrators. On receipt of the writ, the sequestrators' duty is immediately¹² to enter on the contemnor's property and take possession of all his real and personal property. They act on the instructions of the judgment creditor. Once the sequestrators have taken possession of the property of the contemnor, they are obliged to hold it until the contempt is purged; but the judgment creditor acquires no right in the property sequestered¹³. When the contemnor has cleared his contempt, the sequestration will be ordered to be discharged or dissolved¹⁴.

1 See PARA 649.

2 See CPR Sch 1 RSC Ord 45 r 7(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

3 See CPR Sch 1 RSC Ord 45 r 7(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249.

4 See CPR Sch 1 RSC Ord 45 r 7(6); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249.

5 I.e. CPR Pt 23: see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq.

6 See CPR Sch 1 RSC Ord 46 r 5(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1275.

7 See CPR Sch 1 RSC Ord 46 r 5(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1275.

8 See CPR Sch 1 RSC Ord 46 r 5(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1275. The judge may sit in private in any case in which, if the application were for an order of committal, he would be entitled to do so by

virtue of RSC Ord 52 r 6 (see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARAS 500, 501): see CPR Sch 1 RSC Ord 46 r 5(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1275.

9 *Hulbert and Crowe v Cathcart* [1894] 1 QB 244 at 246, DC.

10 See CPR Sch 1 RSC Ord 46 r 6(2)-(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1273.

11 See CPR Sch 1 RSC Ord 46 r 6(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1273.

12 Any delay may enable a holder for value in good faith to be interposed: *Payne v Drew* (1804) 4 East 523. As to the sequestrators' duty to take possession see **CIVIL PROCEDURE** vol 12 (2009) PARA 1380; and as to the sequestrators' management of property and sale thereof see **CIVIL PROCEDURE** vol 12 (2009) PARA 1384.

13 *Burne v Robinson* (1844) 7 I Eq R 188.

14 See **CIVIL PROCEDURE** vol 12 (2009) PARA 1385.

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947. Writ or warrant of possession.

In the High Court¹ leave is almost always required before a writ of possession may be issued². Notice of application for a writ of possession must be given to all those in possession of the property and the writ of possession should not be issued without their having had sufficient opportunity to apply to the court for relief³. On being granted leave, the judgment creditor must file a praecipe together with the form of writ for sealing⁴. The court will seal the writ and return it to the judgment creditor⁵. The sealed writ should then be served on the under-sheriff in whose area the property is situated, and the sheriff must as soon as reasonably practicable⁶ proceed to deliver to the judgment creditor complete and vacant possession of the property, turning out, by force if need be, all other persons⁷.

In a county court⁸ leave is required if more than six years have elapsed since the order was made giving rise to the right of possession, or if there has been a change of parties⁹. The judgment creditor must file a form of request for the issue of the warrant of possession¹⁰.

1 As to the procedure on an application for a writ of possession in the High Court see CPR Sch 1 RSC Ord 45 r 3, Ord 46; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq. As to the continued application of the Rules of the Supreme Court and the county court rules in matrimonial and civil partnership proceedings see PARA 1005.

2 See CPR Sch 1 RSC Ord 45 r 3(2), Ord 46 r 2; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1274. See also *Hackney London Borough Council v White* (1995) 28 HLR 219, CA. The fee payable on sealing a writ of possession in the High Court is £30, but, where the recovery of a sum of money is sought in addition to a writ of possession, no further fee is payable: Family Proceedings Fees Order 1999, SI 2008/1054, Sch 1, Fee 13.1.

3 *Leicester City Council v Aldwinckle* (1991) 24 HLR 40, CA. Leave to obtain execution of a suspended order for possession for an alleged breach of the terms of the suspension must not be granted without allowing the judgment debtor an opportunity of being heard: *Fleet Mortgage and Investment Co Ltd v Lower Maisonette, 46 Eaton Place Ltd, Lower Maisonette 46 Eaton Place Ltd v Crown Lodge (Belgravia) Ltd* [1972] 2 All ER 737, [1972] 1 WLR 765. Such an application should be made by summons: see *Practice Direction* [1972] 1 All ER 576, sub nom *Practice Direction (possession order: issue of execution)* [1972] 1 WLR 240; CPR Sch 1 RSC Ord 46 r 2(1) (d); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1274.

4 See CPR Sch 1 RSC Ord 46 r 6; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1273.

5 The court has a general jurisdiction to stay the execution of an order granting possession on the grounds of a change in circumstances since the order was made: see CPR Sch 1 RSC Ord 46 r 8; *McPhail v Persons (names unknown)*, *Bristol Corp v Ross* [1973] Ch 447, [1973] 3 All ER 393, CA; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1279-1281.

6 *Six Arlington Street Investments Ltd v Persons Unknown* [1987] 1 All ER 474, [1987] 1 WLR 188.

7 *Upton and Wells Case* (1589) 1 Leon 145.

8 As to the procedure on an application for a warrant of possession in a county court see CPR Sch 2 CCR Ord 26 r 17; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1291-1293.

9 See CPR Sch 2 CCR Ord 26 r 5(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1285.

10 See CPR Sch 2 CCR Ord 26 r 17(2), (3A); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1292. The fee payable on the issue of a warrant of possession in a county court is £95, no further fee being payable where the recovery of a sum of money is sought in addition: Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1, Fee 11.6.

UPDATE

947 Writ or warrant of possession

NOTE 2--Fee is now £50: SI 2008/1054 Sch 1, Fee 13.1 (amended by SI 2009/1499).

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948. Registration in High Court of magistrates' court order.

An application for the registration¹ in the High Court of a magistrates' court order² need not be in writing or on oath³. The court has a discretion whether to grant the application⁴. Where an application for the registration in the High Court of a magistrates' court order is granted:

- 1270 (1) no proceedings for the enforcement of the order may be begun before the registration takes place and no warrant or other process for the enforcement thereof may be issued in consequence of any such proceedings begun before the grant of the application⁵; and
- 1271 (2) the original court⁶ must, on being satisfied in the prescribed manner that no process for the enforcement of the order issued before the grant of the application remains in force, cause a certified copy⁷ of the order to be sent to the prescribed officer of the High Court⁸,

and, on receipt of a certified copy of a magistrates' court order sent to him pursuant to head (2) above, the proper officer⁹ must cause the order to be registered in the High Court by filing the copy and making an entry in the register or, where the copy order is received in a district registry, in the cause book¹⁰ and must send notice to the designated officer for the magistrates' court that the order has been duly registered¹¹.

1 As to the meaning of 'registration' see PARA 664 note 3.

2 As to the meaning of 'magistrates' court order' see PARA 671 note 1.

3 Magistrates' Courts (Maintenance Orders Act 1958) Rules 1959, SI 1959/3, r 1. As to the procedure generally see Pt I (rr 1-9) (amended by SI 1977/1890; SI 1980/1896; SI 1986/1962; SI 1989/384; SI 1992/457; SI 2001/615).

4 See the Maintenance Orders Act 1958 s 2(3); and PARA 671.

5 Maintenance Orders Act 1958 s 2(4)(a).

6 As to the meaning of 'original court' see PARA 666 note 3.

7 As to the meaning of 'certified copy' see PARA 667 note 10.

8 Maintenance Orders Act 1958 s 2(4)(c).

9 As to the meaning of 'proper officer' see PARA 461 note 5.

10 For these purposes 'cause book' includes cause card: Family Proceedings Rules 1991, SI 1991/1247, r 7.22.

11 Family Proceedings Rules 1991, SI 1991/1247, r 7.25 (amended by SI 2001/821; SI 2005/617). Where a sheriff court in Scotland or a magistrates' court in Northern Ireland has made an order for the registration in the High Court of an order previously registered in a magistrates' court in England and Wales, in accordance with the Maintenance Orders Act 1950 s 17(4) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 294), and has sent a certified copy of the maintenance order to the proper officer of the High Court pursuant to the Maintenance Orders Act 1958 s 2(4)(c), then, on receipt of the certified copy, the proper officer must cause the order to be registered in the High Court by filing the copy and making an entry in the register and must send notice of the

registration to the designated officer for the original court and also to the designated officer for the magistrates' court in which the order was registered in accordance with the Maintenance Orders Act 1950 s 17(4): Family Proceedings Rules 1991, SI 1991/1247, r 7.26(1), (2) (amended by SI 2001/821; SI 2005/617). As to the meaning of 'register' see PARA 667 note 12.

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B. INTEREST AND ARREARS

949. Application for leave to enforce arrears.

There is no prescribed procedure governing applications for leave to enforce arrears of maintenance payments¹. A free-standing application should, therefore, be made within the existing proceedings by summons in the High Court or, as the case may be, by notice of application in a county court. When an application for leave is made within the framework of enforcement proceedings, as will usually be the case, it should be made in the supporting affidavit unless there is a specific requirement that it be made in some other manner².

Similarly, there is no prescribed procedure for an application by the debtor for arrears to be remitted. Such applications are usually combined with an application to vary the underlying order³.

The court may refuse leave or may grant leave subject to such restrictions and conditions, including conditions as to the allowing of time for payment or the making of payment by instalments, as that court thinks proper, or may remit the payment of arrears or any part thereof⁴.

¹ Ie notwithstanding the fact that the Matrimonial Causes Act 1973 s 32(3) and the Civil Partnership Act 2004 Sch 5 para 63(4) provide for such rules to be made: see PARA 737. As to the court's power to remit arrears see the Matrimonial Causes Act 1973 s 31(2A); the Civil Partnership Act 2004 Sch 5 para 52; and PARA 567.

² Thus, on an application for the issue of a judgment summons, notice of intention to apply at the hearing for leave to enforce arrears which became due more than 12 months before the date of the proposed summons should be given in the prescribed form. For the prescribed form of request for the issue of a judgment summons see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form M16.

³ Ie where the order is capable of variation. It is unclear whether the court has the power to remit arrears on a free-standing application by the judgment debtor.

⁴ See the Matrimonial Causes Act 1973 s 32(2); the Civil Partnership Act 2004 Sch 5 para 63(3); and PARA 679. As to the powers of a magistrates' court on hearing an application for leave see the Domestic Proceedings and Magistrates' Courts Act 1978 s 32(5); and PARA 657. The court may also make a means of payment order or attachment of earnings order to secure payment under a qualifying periodical payments order in these circumstances: see the Maintenance Enforcement Act 1991 s 1(3), (4); and PARA 645.

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950. Enforcing payments of interest in the county court.

Where the judgment creditor claims interest in the county court¹ and takes proceedings to enforce payment under the relevant judgment, any application for enforcement must be accompanied by two copies of a certificate giving details of the amount of interest claimed and the sum on which it is claimed, the dates from which and to which interest has accrued, and the rate of interest which has been applied and, where more than one rate of interest has been applied, the relevant dates and rates².

The information so required is usually incorporated within or exhibited to the affidavit which must accompany any enforcement application³.

Where the debtor is indebted to the same judgment creditor under two or more judgments, money paid by him must be applied to such of the judgments as the debtor may stipulate or, where no such stipulation is made, according to their priority in time⁴. Money paid by the debtor in respect of any judgment debt is to be appropriated first to discharge or reduce the principal debt and then towards the interest⁵.

1 le under the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184.

2 CCR Ord 25 r 5A. As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

3 See the Family Proceedings Rules 1991, SI 1991/1247, r 7.1(1); and PARA 623.

4 County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 6(1).

5 County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 6(2).

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C. TRANSFER OF PROCEEDINGS

951. Enforcing High Court orders in a county court without transfer.

Attachment of earnings orders¹, charging orders² and judgment summonses³ may be used in the county court to enforce a High Court maintenance order without transfer of the order⁴; and a county court may also enforce High Court costs orders by means of attachment of earnings orders⁵ and charging orders⁶.

See the Attachment of Earnings Act 1971 s 1(2)(a); and PARA 628.

2 See the Charging Orders Act 1979 s 1(2)(b); and PARA 636.

3 See the Administration of Justice Act 1970 s 11(b)(i); and PARA 642.

4 A county court order may not, however, be enforced in the High Court unless the order or proceedings have been transferred to the High Court: see PARA 952. A county court may also enforce magistrates' courts' orders or foreign orders registered in a magistrates' court in each case following registration in the High Court: see PARA 665.

5 The costs of a maintenance order are enforceable by virtue of the Attachment of Earnings Act 1971 s 25(2) (see PARA 628 note 1); and other costs orders are enforceable as judgment debts by virtue of s 1(2)(b) (see PARA 636).

6 See the Charging Orders Act 1979 s 1(2)(c), (d); and PARA 636.

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952. Enforcing county court orders in the High Court following transfer.

Any person who desires the transfer to the High Court of any order made by a designated county court¹ in family proceedings², except an order for periodical payments³ or for the recovery of arrears of periodical payments, must apply to the court without notice by affidavit stating the amount which remains due under the order; and, on the filing of the application, the transfer has effect⁴.

Where an order is so transferred, it has the same force and effect and the same proceedings may be taken on it as if it were an order of the High Court⁵.

As to the meaning of 'designated county court' see PARA 737 note 3.

As to the meaning of 'family proceedings' see PARA 737 note 2.

3 As to orders for periodical payments see PARA 458 et seq.

4 Family Proceedings Rules 1991, SI 1991/1247, r 7.3(1) (amended by SI 2005/2922). There is no corresponding procedure for the transfer of High Court orders, as opposed to High Court proceedings, to a county court for the purpose of enforcement. In practice this does not cause difficulties since High Court maintenance orders are enforceable in a county court by an attachment of earnings order, a charging order or a judgment summons: see PARA 951.

5 Family Proceedings Rules 1991, SI 1991/1247, r 7.3(2).

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953. Enforcing orders following transfer of proceedings.

Proceedings may be transferred from the High Court to a county court and from a county court to the High Court¹; but transfer of proceedings from the High Court to a county court does not affect a judgment creditor's right to enforce in the High Court any judgment or order made in that court before the transfer².

1 See under the Matrimonial and Family Proceedings Act 1984 s 38 (see PARA 745) or, as the case may be, s 39 (see PARA 746) or the County Courts Act 1984 s 41 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 69). See also the Family Proceedings Rules 1991, SI 1991/1247, r 10.10 (cited in PARA 747); and *Practice Direction* [1992] 3 All ER 151, sub nom *Practice Direction (Family Division: distribution of business)* [1992] 1 WLR 586 (cited in PARA 744).

2 See the Matrimonial and Family Proceedings Act 1984 s 38(4); and PARA 745. It is unclear whether orders made in proceedings in a county court prior to their transfer to the High Court remain enforceable in the county court following transfer under the Matrimonial and Family Proceedings Act 1984 s 39 or, as the case may be, the County Courts Act 1984 s 41 since neither of those provisions contains any provision equivalent to the Matrimonial and Family Proceedings Act 1984 s 38(4). It is, therefore, suggested that the High Court will assume exclusive jurisdiction in relation to enforcement on transfer of the proceedings.

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954. Procedural requirements.

A judgment creditor who desires to enforce a judgment or order of the High Court, or a judgment or order which is or has become enforceable as if it were a judgment or order of the High Court, must file in the appropriate court¹, with such documents as are required to be filed for the purpose of enforcing a judgment or order of a county court:

- 1272 (1) an office copy of the judgment or order;
- 1273 (2) a certificate verifying the amount due under the judgment or order;
- 1274 (3) where a writ of execution has been issued to enforce it, a copy of the sheriff's return to the writ; and
- 1275 (4) a copy of the order to transfer the proceedings to the county court².

¹ For these purposes, the 'appropriate court' means the county court in which the relevant enforcement proceedings might be brought if the judgment or order had been obtained in proceedings commenced in a county court; but, if the court in which the relevant enforcement proceedings might be brought is identified by reference to the court in which the judgment or order has been obtained, the appropriate court is the court for the district in which the debtor resides or carries on business: CCR Ord 25 r 11(2). As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

² See CCR Ord 25 r 11(1). As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARAS 623, 1005.

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(4) ORDERS CONCERNING MATRIMONIAL OR CIVIL PARTNERSHIP PROPERTY

955. Procedure on applications.

An application in relation to a property dispute between spouses or civil partners¹ must be made in the High Court, by originating summons, which may be issued out of the Principal Registry² or any district registry³, or in a county court, by originating application in the prescribed form⁴, and must be supported by affidavit⁵. An order in a matrimonial or civil partnership cause in relation to a property dispute⁶ may be made in any financial relief proceedings⁷ on the application of any party thereto by notice of application or summons⁸. An application to a county court must be filed in the court for the district in which the applicant or respondent resides⁹ or, in the case of a matrimonial or civil partnership cause, in the divorce or civil partnership proceedings county court¹⁰ in which any pending matrimonial or civil partnership cause has been commenced by or on behalf of either the applicant or the respondent, or in which any matrimonial or civil partnership cause is intended to be commenced by the applicant¹¹.

Where the application concerns the title to or possession of land, the originating summons or application must state whether the title to the land is registered or unregistered and, if registered, the Land Registry title number¹² and give particulars, so far as known to the applicant, of any mortgage of the land or any interest therein¹³.

The application must be served on the respondent, together with a copy of the affidavit in support and an acknowledgment of service¹⁴. If the respondent intends to contest the application, he must, within 14 days after the time allowed for sending the acknowledgment of service, file an affidavit in answer to the application setting out the grounds on which he relies, and lodge in the court office a copy of the affidavit for service on the applicant¹⁵. If the respondent fails to comply with that requirement, the applicant may apply for directions, and the district judge¹⁶ may give such directions as he thinks fit, including a direction that the respondent is to be debarred from defending the application unless an affidavit is filed within such time as the district judge may specify¹⁷.

A district judge may grant an injunction in proceedings in relation to a property dispute between spouses or civil partners¹⁸ if, but only so far as, the injunction is ancillary or incidental to any relief sought in those proceedings¹⁹.

Where any proceedings for divorce, dissolution, nullity or separation which are either pending in the Principal Registry or are intended to be commenced there by the applicant are or will be treated as pending in a divorce or civil partnership proceedings county court an application in relation to a property dispute between spouses or civil partners²⁰ by one of the parties to the marriage or civil partnership may be made to the Principal Registry as if it were a county court²¹.

¹ I.e. an application under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 (see PARA 224 et seq).

² As to the meaning of 'Principal Registry' see PARA 737 note 3.

3 As to the meaning of 'district registry' see PARA 737 note 3.

4 For the prescribed form of originating application see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form M23 (amended by SI 2003/184; SI 2005/559; SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(1), (12) (rr 3.6(1), (3)(a), (9), (11), 3.7(1)-(3) amended, r 3.6(2), (3)(b) substituted, rr 3.6(3)(c), (12), 3.7(1A), (4) added, by SI 2005/2922). Subject to the provisions of the Family Proceedings Rules 1991, SI 1991/1247, r 3.6, the Family Proceedings Rules 1991, SI 1991/1247, apply, with the necessary modifications, to an application under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 as if the application were a cause, the originating summons or application a petition, and the applicant a petitioner: Family Proceedings Rules 1991, SI 1991/1247, r 3.6(11) (as so amended). As to the meaning of 'cause' see PARA 321 note 1.

6 In an order under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 (see PARA 224 et seq).

7 As to the meaning of financial relief' see PARA 902.

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(2) (as substituted: see note 5).

9 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(3)(a) (as amended: see note 5).

10 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(3)(b), (c) (as substituted and added: see note 5).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(4)(a).

13 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(4)(b). Where particulars of a mortgage are so given, the applicant must file a copy of the originating summons or application, which must be served on the mortgagee; and any person so served may apply to the court in writing, within 14 days after service, for a copy of the affidavit in support, and, within 14 days of receiving such affidavit, may file an affidavit in answer and is entitled to be heard on the application: r 3.6(6).

14 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(5) (amended by SI 2005/559). For the prescribed form of acknowledgment of service see Appendix 1 Form M23A (amended by SI 2005/559).

15 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(7).

16 As to the meaning of 'district judge' see PARA 737 note 3.

17 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(8).

18 In under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 (see PARA 224 et seq).

19 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(9) (as amended: see note 5).

20 In under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 (see PARA 224 et seq).

21 Family Proceedings Rules 1991, SI 1991/1247, r 3.7(1), (1A) (as amended and added: see note 5). Rule 1.4(1) (see PARA 755) applies, with the necessary modifications, to proceedings in, or intended to be commenced in, the Principal Registry under r 3.7(1), (1A) as it applies to matrimonial and civil partnership proceedings: r 3.7(3), (4) (as so amended and added).

In relation to proceedings commenced or intended to be commenced in the Principal Registry under r 3.7(1) or (1A) or transferred from the High Court to the Principal Registry by an order made under the Matrimonial and Family Proceedings Act 1984 s 38 (see PARA 745):

249 (1) s 42 and the rules made thereunder have effect, with the necessary modifications, as they have effect in relation to proceedings commenced in or transferred to the Principal Registry under s 42 (Family Proceedings Rules 1991, SI 1991/1247, r 3.7(2)(a) (as so amended)); and

250 (2) CCR Ord 4 r 8 (which relates to venue) and the Family Proceedings Rules 1991, SI 1991/1247, r 3.6(3) (see the text and notes 9-11) do not apply (r 3.7(2)(b) (as so amended)).

As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

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956. Hearing the application and making the order.

At the hearing of an application in relation to a property dispute between spouses or civil partners¹ the district judge² must³ investigate the allegations made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined and order the disclosure and inspection of any document or require further affidavits⁴. The district judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings⁵.

Subject to any directions given by the court⁶, any party to an application in relation to a property dispute between spouses or civil partners may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to provide a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the district judge for directions⁷.

Pending the final determination of the application, the district judge may make an interim order upon such terms as he thinks just⁸, and after completing his investigation under these provisions he must⁹ make such order as he thinks just¹⁰.

1 Ie an application under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 (see PARA 224 et seq).

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 8, 9(5) (see the text and notes 8-10; and PARA 957) and r 10.10 (see PARA 747).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.6(10), Appendix 4 para 7(1)(c), (3) (r 3.6(10) substituted, Appendix 4 added, by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(4) (as added: see note 4).

6 Where any party to such an application intends on the day appointed for the hearing to apply for directions, he must file and serve on every other party a notice to that effect: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(5) (as added: see note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(6) (as added: see note 4).

8 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(1)(c), (3) (as added: see note 4).

9 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(5) (see PARA 957).

10 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(2) (as added: see note 4). RSC Order 31 r 1 (power to order sale of land) applies to applications to which these provisions apply as though that application were a cause or matter in the Chancery Division: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 8(4) (as so added). As to the continuing application of specific provisions of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

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957. Reference to judge of application made during lives of parties.

The district judge¹ may at any time refer an application in relation to a property dispute between spouses or civil partners², or any question arising thereon, to a judge³ for his decision, and where such an application is so referred or adjourned to a judge the proper officer⁴ must fix a date, time and place for the hearing of the application or the consideration of the question and give notice of that date to all parties⁵. The hearing or consideration must, unless the court otherwise directs, take place in chambers⁶. Where the application is proceeding in a divorce or civil partnership proceedings county court⁷ which is not a court of trial or is pending in the High Court and proceeding in a district registry⁸ which is not in a divorce town or a dissolution town⁹, the hearing or consideration must take place at such court of trial or divorce or dissolution town as in the opinion of the district judge is the nearest or most convenient¹⁰. The judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings¹¹.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 Ie an application under the Married Women's Property Act 1882 s 17 or the Civil Partnership Act 2004 s 66 (see PARA 224 et seq).

3 As to the meaning of 'judge' see PARA 737 note 3.

4 As to the meaning of 'proper officer' see PARA 461 note 5.

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(1)(c), (5), (6) (Appendix 4 added by SI 2005/2922).

6 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(7) (as added: see note 5).

7 As to the meanings of 'divorce county court' and 'civil partnership proceedings county court' see PARA 732.

8 As to the meaning of 'district registry' see PARA 737 note 3.

9 As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2. For these purposes the Royal Courts of Justice are treated as a divorce town or a dissolution town, as the case may be: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(10) (as added: see note 5).

10 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 9(8), (9) (as added: see note 5).

11 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 7(4), 9(11) (as added: see note 5).

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(5) OCCUPATION ORDERS, NON-MOLESTATION ORDERS, TRANSFER OF TENANCY ORDERS AND FORCED MARRIAGE PROTECTION ORDERS

(i) Powers of Courts

958. Jurisdiction of courts.

For the purpose of the statutory provisions relating to occupation orders and non-molestation orders¹, the 'court' means² the High Court, a county court³ or a magistrates' court⁴, and for the purposes of the statutory provisions relating to forced marriage protection orders⁵, the 'court' means⁶ the High Court or a county court⁷.

The Lord Chancellor may, after consulting the Lord Chief Justice⁸, by order:

- 1276 (1) specify proceedings relating to occupation orders, non-molestation orders and forced marriage protection orders⁹ which may only be commenced in¹⁰;
- 1277 (2) specify circumstances in which specified proceedings¹¹ may only be commenced in¹²; and
- 1278 (3) provide that in specified circumstances the whole, or any specified part of any specified proceedings¹³ is to be transferred to¹⁴,

a specified¹⁵ level of court¹⁶, a court which falls within a specified class of court¹⁷ or a particular court determined in accordance with, or specified in, the order¹⁸.

1 Ie for the purposes of the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

2 Ie subject to the provision made by or under the Family Law Act 1996 s 57(2)-(11), to s 59 (see PARA 960) and to any express provision as to the jurisdiction of any court made by any other provision of Pt IV: s 57(2).

3 The Lord Chancellor may, after consulting with the Lord Chief Justice, by order make provision for the Principal Registry of the Family Division of the High Court to be treated as if it were a county court for specified purposes of the Family Law Act 1996 Pt IV or Pt IVA (ss 63A-63S) (see PARA 723 et seq); and any such order may make such provision as the Lord Chancellor thinks expedient, after consulting the Lord Chief Justice, for the purpose of applying, with or without modifications, provisions which apply in relation to the procedure in county courts to the Principal Registry when it acts as if it were a county court: ss 57(9), (10), 63M(3) (s 57(3)-(5), (7), (9), (10) amended, s 57(12) added, by the Constitutional Reform Act 2005 Sch 4 para 253; Family Law Act 1996 ss 63M, 63N, 63P added by the Forced Marriage (Civil Protection) Act 2007 s 1). As to the jurisdiction of county courts see further PARA 959. As to the Principal Registry of the Family Division see PARA 737 note 3.

4 Family Law Act 1996 ss 57(1), 63(1). As to the jurisdiction of magistrates' courts see further PARA 960.

5 Ie for the purposes of the Family Law Act 1996 Pt IVA.

6 Ie subject to any provision made by virtue of the Family Law Act 1996 ss 63M(3), (4) (see note 3): s 63M(2) (as added: see note 3).

7 Family Law Act 1996 s 63M(1) (as added: see note 3). At the date at which this volume states the law magistrates' courts are not competent to hear proceedings relating to forced marriage protection orders, although the Lord Chancellor has power, after consulting with the Lord Chief Justice, by order to provide for

magistrates' courts to be included among the courts who may hear such proceedings: Family Law Act 1996 s 63N(1) (as added: see note 3). Such an order may, in particular, make provision in relation to magistrates' courts which corresponds to provision made in relation to such courts by or under the Family Law Act 1996 Pt IV: s 63N(2) (as so added). Any power to make an order under s 63N (including that power as extended by s 65(2)) may, in particular, be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under Pt IVA or any other enactment: s 63N(3) (as so added). At the date at which this volume states the law this power has not been exercised.

The Lord Chief Justice may nominate a judicial office holder to exercise the Lord Chief Justice's functions under these provisions: Family Law Act 1996 s 63N(4) (as so added). As to the meaning of 'judicial office holder' see the Constitutional Reform Act 2005 s 109(4); and **COURTS**.

8 The Lord Chief Justice may nominate a judicial office holder to exercise his functions under these provisions: Family Law Act 1996 ss 57(12), 63M(3) (as amended and added: see note 3). As to the meaning of 'judicial office holder' see the Constitutional Reform Act 2005 s 109(4); and **COURTS**.

9 ie proceedings relating to occupation orders and non-molestation orders under the Family Law Act 1996 Pt IV or proceedings relating to forced marriage protection orders under Pt IVA.

10 Family Law Act 1996 s 57(3) (as amended: see note 3).

11 See note 9.

12 Family Law Act 1996 s 57(4) (as amended: see note 3).

13 See note 9.

14 Family Law Act 1996 s 57(5) (as amended: see note 3). Such an order may provide for the transfer to be made at any stage, or specified stage, of the proceedings and whether or not the proceedings, or any part of them, have already been transferred (s 57(6)) and may make such provision as the Lord Chancellor thinks appropriate, after consulting with the Lord Chief Justice, for excluding specified proceedings from the operation of the provisions of the Matrimonial and Family Proceedings Act 1984 relating to the transfer of family proceedings (ie s 38 (see PARA 745) or s 39 (see PARA 746)) or any other enactment which would otherwise govern the transfer of those proceedings, or any part of them (Family Law Act 1996 s 57(7) (as so amended)).

The Lord Chancellor may, after consulting the Lord Chief Justice, by order make provision as to the circumstances in which appeals may be made against decisions taken by courts on questions arising in connection with the transfer or proposed transfer of proceedings by virtue of any order under s 57(5): ss 61(5), 63P(1) (s 61(5) amended, s 61(7) added, by the Constitutional Reform Act 2005 Sch 4 para 254; Family Law Act 1996 s 63P(1) as added (see note 3)). Except as so provided no appeal may be made against any such decisions: ss 61(6), 63P(2) (as so added). At the date at which this volume states the law no such orders had been made. The Lord Chief Justice may nominate a judicial office holder to exercise his functions under these provisions: ss 61(7), 63P(3) (as so added).

15 For these purposes, 'specified' means specified by an order under the Family Law Act 1986 s 57: s 57(11). See further the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896; and PARAS 959 et seq, 990.

16 Family Law Act 1996 s 57(3)(a), (4)(a), (5)(a). There are three levels of court, namely the High Court, any county court and any magistrates' court, for the purposes of proceedings relating to occupation orders and non-molestation orders and there are two levels of court, namely the High Court and any county court, for the purposes of proceedings relating to forced marriage protection orders: ss 57(8), 63M(4) (as added: see note 3).

17 Family Law Act 1996 s 57(3)(b), (4)(b), (5)(b).

18 Family Law Act 1996 s 57(3)(c), (4)(c), (5)(c).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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959. County courts.

The classes of county court specified to hear proceedings relating to occupation orders and non-molestation orders¹ are:

- 1279 (1) designated county courts²;
- 1280 (2) family hearing centres³; and
- 1281 (3) care centres⁴,

provided that for these purposes the Principal Registry of the Family Division of the High Court is to be treated as if it were a designated county court, a family hearing centre and a care centre⁵.

1 The proceedings relating to occupation orders and non-molestation orders under the Family Law Act 1996 Pt IV (ss 30-63) (see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders)): for the relevant order-making power see PARA 958. At the date at which this volume states the law no corresponding provision has been made in relation to forced marriage protection orders under Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 2(a) (art 2(a) substituted by SI 2005/2924). 'Designated county courts' are those courts designated for the time being as divorce county courts by an order under the Matrimonial and Family Proceedings Act 1984 s 33 (see PARA 732), as civil partnership proceedings county courts by an order under the Matrimonial and Family Proceedings Act 1984 s 36A (see PARA 732) or as both divorce and civil partnership proceedings county courts by such orders: Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 2(a)(i)-(iii) (as so substituted). Proceedings may be commenced in, transferred to and tried in Lambeth, Shoreditch or Woolwich County Court: art 17.

3 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 2(b). For these purposes 'family hearing centres' are those courts set out in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(b), Sch 1: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 211.

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 2(c). For these purposes 'care centres' means those courts set out in the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, art 2(c), Sch 2 col (ii) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 211): Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 2(c).

5 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 16(1) (amended by SI 2005/2924). As to the Principal Registry of the Family Division see PARA 737 note 3.

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

959 County courts

TEXT AND NOTES--SI 1997/1896 art 2(a)-(c), SI 1991/1677 art 2(b), Sch 1 replaced: Allocation and Transfer of Proceedings Order 2008, SI 2008/2836, art 2, Sch 1. Head (1) omitted and head (4) forced marriage county courts added: SI 2008/2836 art 2(a), (b), (e), Sch 1. The principal registry of the Family Division is treated as if it were one of these classes of county court: SI 2008/2836 art 3(1) (renumbered by SI 2009/871). Proceedings under the Family Law Act 1996 s 43 must be started in a county court, except if they are exceptionally complex, the outcome is important to the public in general, or there is another substantial reason for them to be started in the High Court: SI 2008/2836 arts 6(b), 7. Proceedings under the Family Law Act 1996 Pt IVA (ss 63A-63S) started in a county court must be started in a forced marriage county court, and proceedings under Pt IVA may be started in the High Court only if they are exceptionally complex, the outcome is important to the public in general, or there is another substantial reason for them to be started in the High Court: SI 2008/2836 arts 7, 10.

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960. Magistrates' courts.

The classes of magistrates' courts specified to hear proceedings relating to occupation orders and non-molestation orders¹ are family proceedings courts². A magistrates' court is not competent to entertain any application, or make any order, involving any disputed question as to a party's entitlement to occupy any property by virtue of a beneficial estate or interest³ or contract or by virtue of any enactment giving him the right to remain in occupation, unless it is unnecessary to determine the question in order to deal with the application or make the order⁴. A magistrates' court may decline jurisdiction in any proceedings relating to occupation orders or non-molestation orders if it considers that the case can more conveniently be dealt with by another court⁵.

The power of a magistrates' court to suspend or rescind orders⁶ does not apply in relation to any order made in proceedings relating to occupation orders or non-molestation orders⁷.

1 The proceedings relating to occupation orders and non-molestation orders under the Family Law Act 1996 Pt IV (ss 30-63) (see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders)): for the relevant order-making power see PARA 958. At the date at which this volume states the law magistrates' courts are not competent to hear proceedings relating to forced marriage protection orders under Pt IVA (ss 63A-63S) (see PARA 723 et seq): see s 63M(1); and PARA 958.

2 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 3. For these purposes, 'family proceedings courts' means those courts constituted in accordance with the Magistrates' Courts Act 1980 s 67 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 603): Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 3. As to the jurisdiction of the courts with respect to proceedings relating to occupation orders and non-molestation orders generally see PARA 958.

3 For the determination as to whether a person is entitled to occupy any property by virtue of a beneficial estate or interest see PARA 285.

4 Family Law Act 1996 s 59(1).

5 Family Law Act 1996 s 59(2).

6 The under the Magistrates' Courts Act 1980 s 63(2): see **MAGISTRATES** vol 29(2) (Reissue) PARA 827.

7 Family Law Act 1996 s 59(3).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

960 Magistrates' courts

TEXT AND NOTES 1, 2--SI 1997/1896 art 3 revoked: SI 2008/2836.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/9. JURISDICTION AND PROCEDURE/(5) OCCUPATION ORDERS, NON-MOLESTATION ORDERS, TRANSFER OF TENANCY ORDERS AND FORCED MARRIAGE PROTECTION ORDERS/ (i) Powers of Courts/961. Contempt proceedings.

961. Contempt proceedings.

The powers of the court¹ in relation to contempt of court arising out of a person's failure to comply with an occupation order, a non-molestation order or a forced marriage protection order² may be exercised by:

- 1282 (1) a judge of the High Court, where the order was made by that court³;
- 1283 (2) a judge or district judge of any county court, where the order was made by a county court⁴; and
- 1284 (3) any magistrates' court, where the order was made by a magistrates' court⁵.

These authorities are the 'relevant judicial authorities' for all purposes relating to occupation orders and non-molestation orders and the 'relevant judge' for all purposes relating to forced marriage protection orders⁶.

1 As to the meaning of 'court' see PARA 958.

2 I.e. an order under the Family Law Act 1996 Pt IV (ss 30-63) (see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders)) or Pt IVA (ss 63A-63S) (see PARA 723 et seq).

3 Family Law Act 1996 ss 58, 63(1), 63O, 63S (ss 63O, 63S added by the Forced Marriage (Civil Protection) Act 2007 s 1).

4 Family Law Act 1996 ss 58, 63(1), 63O, 63S (ss 63O, 63S as added: see note 3).

5 Family Law Act 1996 ss 58, 63(1). Magistrates' courts have no jurisdiction in respect of forced marriage protection orders: see PARAS 958, 960.

6 Family Law Act 1996 ss 63(1), 63S (s 63S as added: see note 3).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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(ii) Commencement and Transfer of Proceedings

A. OCCUPATION ORDERS AND NON-MOLESTATION ORDERS

962. Court in which proceedings are to be commenced.

Proceedings under the provisions relating to occupation orders and non-molestation orders¹ may² be commenced in a county court³ or in a family proceedings court⁴; but an application brought by an applicant who is under the age of 18 or an application for the leave of the court by a child under the age of 16⁵ must be commenced in the High Court⁶. Where family proceedings⁷ are pending in a county court or a family proceedings court, an application relating to an occupation order or a non-molestation order may be made in those proceedings⁸.

Where proceedings are commenced in contravention of these requirements, the contravention does not have the effect of making the proceedings invalid⁹.

1 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63) (see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders)).

2 I.e. subject to the Family Law Act 1996 s 59 (see PARA 960) and Sch 7 para 1 (see PARA 310 note 2).

3 I.e. a county court of one of the classes specified in the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 2 (see PARA 959): art 1(2).

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 4(1). As to the meaning of 'family proceedings court' see PARA 960 note 2.

5 I.e. an application under the Family Law Act 1996 s 43: see PARAS 289, 717.

6 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 4(1), (2).

7 As to the meaning of 'family proceedings' see the Family Law Act 1996 s 63; and PARA 289 note 8 (definition applied by the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 1(2)): for this purpose 'family proceedings' includes proceedings which are family business within the meaning of the Matrimonial and Family Proceedings Act 1984 s 32 (see PARA 744 note 2): Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 1(2).

8 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 4(3).

9 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 18.

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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963. Provision for third parties to act on behalf of victims of domestic violence.

As from a day to be appointed¹ rules of court may provide for a prescribed person, or any person in a prescribed category (a 'representative') to act on behalf of another in relation to proceedings² relating to occupation orders and non-molestation orders³. Rules so made may, in particular, authorise a representative to apply for an occupation order or for a non-molestation order for which the person on whose behalf the representative is acting could have applied⁴, and may prescribe:

- 1285 (1) conditions to be satisfied before a representative may make an application to the court on behalf of another⁵; and
- 1286 (2) considerations to be taken into account by the court in determining whether, and if so how, to exercise any of its powers⁶ when a representative is acting on behalf of another⁷.

Any rules so made may be made so as to have effect for a specified period and may make consequential or transitional provision with respect to the expiry of the specified period⁸; and any such rules may be replaced by further rules made under these provisions⁹.

1 At the date at which this volume states the law no day had been appointed for the coming into force of the Family Law Act 1996 s 60 (see the text and notes 2-9).

2 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63) (see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders)).

3 Family Law Act 1996 s 60(1) (not yet in force).

4 Family Law Act 1996 s 60(2) (not yet in force).

5 Family Law Act 1996 s 60(3)(a) (not yet in force).

6 I.e. under the Family Law Act 1996 Pt IV.

7 Family Law Act 1996 s 60(3)(b) (not yet in force).

8 Family Law Act 1996 s 60(4) (not yet in force).

9 Family Law Act 1996 s 60(5) (not yet in force).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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964. Transfer generally.

The provisions relating to the transfer of family proceedings from the High Court to a county court¹ and from a county court to the High Court² do not apply to proceedings³ relating to occupation orders and non-molestation orders⁴. Where an application for an occupation order or a non-molestation order is pending, the court may transfer the proceedings to another court of its own motion or on the application of either party; and any order must be made in the prescribed form⁵. Where an application for an occupation order or a non-molestation order is pending, the court must consider, on the application of either party or of its own motion, whether to exercise its powers to transfer the hearing of that application to another court; and the justices' clerk or the court must make an order for transfer in the prescribed form⁶ if it seems necessary or expedient to do so⁷. Where an order for transfer is made, the designated officer for the court must send a copy of the order to the parties and to the family proceedings court or to the county court to which the proceedings are to be transferred⁸.

Where proceedings are transferred in contravention of the statutory requirements, the contravention does not have the effect of making the proceedings invalid⁹.

1 Ie the Matrimonial and Family Proceedings Act 1984 s 38: see PARA 745.

2 Ie the Matrimonial and Family Proceedings Act 1984 s 39: see PARA 746.

3 Ie proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 6.

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(9) (substituted by SI 1997/1893; SI 2008/2446). For the prescribed form of order for transfer see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL417 (added by SI 1997/1893).

6 For the prescribed form of order for transfer see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL417 (added by SI 1997/1893).

7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(8) (added by SI 1997/1894).

8 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(9) (added by SI 1997/1894; amended by SI 2005/617).

9 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 18.

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

964 Transfer generally

TEXT AND NOTE 7--SI 1991/1991 r 3A(8) substituted: SI 2008/2836.

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964A. Allocation and transfer of proceedings.

As to the transfer of proceedings to specified levels of court see the Allocation and Transfer of Proceedings Order 2008, SI 2008/2836, arts 14-19 (SI 2008/2836 amended by SI 2009/871, SI 2009/3319, SI 2010/986). A county court may transfer proceedings to the High Court only if they are exceptionally complex, the outcome is important to the public in general, or there is another substantial reason (art 18), and the High Court must transfer proceedings to a county court or a magistrates' court if none of these criteria apply (art 19). As to applications following a refusal to order the transfer of proceedings from a magistrates' court to a county court see art 25. Where a county court orders the transfer of proceedings to a magistrates' court, an appeal may be made against that decision where (a) the decision was made by a district judge or deputy district judge of a county court, to a circuit judge, or (b) the decision was made by a district judge or deputy district judge of the principal registry of the Family Division, to a judge of the Family Division (art 26). Where proceedings under the 1996 Act Pt IVA (ss 63A-63S) are to be transferred to a county court, they must be transferred to a forced marriage county court (art 22(1)) and certain of the above provisions regarding transfer apply to such proceedings with modifications (art 22(2), (3)). See also *Practice Direction (allocation and transfer of proceedings)* [2009] 1 FLR 365, [2008] All ER (D) 118 (Nov); *Practice Direction (family proceedings) (allocation to judiciary)* [2009] 1 WLR 824; and *Practice Direction (appeals) (allocation to judiciary)* [2009] 1 WLR 1107, [2009] All ER (D) 128 (Apr). See also **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 211A.

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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965. Transfer from one family proceedings court to another.

A family proceedings court¹ (the 'transferring court') must, on application or of its own motion, transfer proceedings under the provisions relating to occupation orders and non-molestation orders² to another family proceedings court (the 'receiving court') where:

- 1287 (1) the transferring court considers that it would be appropriate for those proceedings to be heard together with other family proceedings³ which are pending in the receiving court⁴; and
 1288 (2) the receiving court by its justices' clerk⁵ consents to the transfer⁶.

1 As to the meaning of 'family proceedings court' see PARA 960 note 2.

2 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

3 As to the meaning of 'family proceedings' see PARA 962 note 7.

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 7(a).

5 I.e. as defined by the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 1(2): see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 212.

6 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 7(b).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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966. Transfer from family proceedings court to county court.

A family proceedings court¹ may, on application or of its own motion, transfer proceedings under the provisions relating to occupation orders and non-molestation orders² to a county court³ where it considers that:

- 1289 (1) it would be appropriate for those proceedings to be heard together with other family proceedings⁴ which are pending in that court⁵;
- 1290 (2) the proceedings involve a conflict with the law of another jurisdiction, some novel and difficult point of law or some question of general public interest⁶; or
- 1291 (3) the proceedings are exceptionally complex⁷.

A family proceedings court must transfer such proceedings to a county court where:

- 1292 (a) a child under the age of 18 is the respondent to the application or wishes to become a party to the proceedings⁸; or
- 1293 (b) a party to the proceedings is a person who is a person lacking capacity⁹, and is incapable of managing and administering his property and affairs¹⁰.

Except where transfer is ordered under head (1) above, the proceedings must be transferred to the nearest county court¹¹.

1 As to the meaning of 'family proceedings court' see PARA 960 note 2.

2 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

3 As to the meaning of 'county court' see PARA 962 note 3.

4 As to the meaning of 'family proceedings' see PARA 962 note 7.

5 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(1)(a).

6 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(1)(b).

7 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(1)(c).

8 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(2)(a).

9 I.e. within the meaning of the Mental Capacity Act 2005: see **MENTAL HEALTH**.

10 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(2)(b) (amended by SI 2007/1898).

11 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(3).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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967. Transfer from family proceedings court to the High Court.

A family proceedings court¹ may, on application or of its own motion, transfer proceedings under the provisions relating to occupation orders and non-molestation orders² to the High Court where it considers that it would be appropriate for those proceedings to be heard together with other family proceedings³ which are pending in the High Court⁴.

1 As to the meaning of 'family proceedings court' see PARA 960 note 2.

2 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

3 As to the meaning of 'family proceedings' see PARA 962 note 7.

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 9.

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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968. Transfer from one county court to another.

A county court¹ may, on application or of its own motion, transfer proceedings under the provisions relating to occupation orders and non-molestation orders² to another county court where:

- 1294 (1) it considers that it would be appropriate for those proceedings to be heard together with other family proceedings³ which are pending in that court⁴;
- 1295 (2) the proceedings involve the determination of a disputed question as to a party's entitlement to occupy any property by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him a right to remain in occupation⁵ and the property in question is situated in the district of another county court⁶; or
- 1296 (3) it seems necessary or expedient to do so⁷.

Without prejudice to these provisions, the Principal Registry of the Family Division⁸ may transfer an order made in proceedings which are pending in the Principal Registry to the High Court for enforcement⁹.

1 As to the meaning of 'county court' see PARA 962 note 3.

2 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

3 As to the meaning of 'family proceedings' see PARA 962 note 7.

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 10(a).

5 I.e. a question of the kind mentioned in the Family Law Act 1996 s 59(1): see PARA 960.

6 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 10(b).

7 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 10(c).

8 As to the Principal Registry of the Family Division see PARA 737 note 3.

9 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 16(2).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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969. Transfer of proceedings from county court to family proceedings court.

A county court¹ may, on application or of its own motion, transfer proceedings under the provisions relating to occupation orders and non-molestation orders² to a family proceedings court³ where:

1297 (1) it considers that it would be appropriate for those proceedings to be heard together with other family proceedings⁴ which are pending in that court⁵; or

1298 (2) it considers:

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27. (a) that the criterion⁶ that it would be appropriate for those proceedings to be heard together with other family proceedings which are pending in that court no longer applies because the proceedings with which the transferred proceedings were to be heard have been determined⁷;

28. (b) either of the criteria⁸ that the proceedings involve a conflict with the law of another jurisdiction, some novel and difficult point of law or some question of general public interest or that the proceedings are exceptionally complex does not apply⁹.

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1 As to the meaning of 'county court' see PARA 962 note 3.

2 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

3 As to the meaning of 'family proceedings court' see PARA 960 note 2.

4 As to the meaning of 'family proceedings' see PARA 962 note 7.

5 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 11(a).

6 I.e. the criterion in the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(1)(a): see PARA 966.

7 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 11(b)(i).

8 I.e. either of the criteria in Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 8(1)(b) or (c): see PARA 966.

9 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 11(b)(ii).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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970. Transfer from county court to the High Court.

A county court¹ may, on application or of its own motion, transfer proceedings under the provisions relating to occupation orders and non-molestation orders² to the High Court where it considers that the proceedings are appropriate for determination in the High Court³.

1 As to the meaning of 'county court' see PARA 962 note 3.

2 I.e. proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

3 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 12.

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/9. JURISDICTION AND PROCEDURE/(5) OCCUPATION ORDERS, NON-MOLESTATION ORDERS, TRANSFER OF TENANCY ORDERS AND FORCED MARRIAGE PROTECTION ORDERS/ (ii) Commencement and Transfer of Proceedings/A. OCCUPATION ORDERS AND NON-MOLESTATION ORDERS/971. Transfer from the High Court to family proceedings court.

971. Transfer from the High Court to family proceedings court.

The High Court may, on application or of its own motion, transfer proceedings under the provisions relating to family homes and domestic violence¹ to a family proceedings court² where it considers that it would be appropriate for those proceedings to be heard together with other family proceedings³ which are pending in that court⁴.

1 le proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

2 As to the meaning of 'family proceedings court' see PARA 960 note 2.

3 As to the meaning of 'family proceedings' see PARA 962 note 7.

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 13.

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/9. JURISDICTION AND PROCEDURE/(5) OCCUPATION ORDERS, NON-MOLESTATION ORDERS, TRANSFER OF TENANCY ORDERS AND FORCED MARRIAGE PROTECTION ORDERS/ (ii) Commencement and Transfer of Proceedings/A. OCCUPATION ORDERS AND NON-MOLESTATION ORDERS/972. Transfer from the High Court to county court.

972. Transfer from the High Court to county court.

The High Court may, on application or of its own motion, transfer proceedings under the provisions relating to occupation orders and non-molestation orders¹ to a county court² where it considers that:

- 1299 (1) it would be appropriate for those proceedings to be heard together with other family proceedings³ which are pending in that court⁴;
- 1300 (2) the proceedings are appropriate for determination in a county court⁵; or
- 1301 (3) it is appropriate for an application made by a child under the age of 18 to be heard in a county court⁶.

1 le proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

2 As to the meaning of 'county court' see PARA 962 note 3.

3 As to the meaning of 'family proceedings' see PARA 962 note 7.

4 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 14(a).

5 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 14(b).

6 Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 14(c).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/9. JURISDICTION AND PROCEDURE/(5) OCCUPATION ORDERS, NON-MOLESTATION ORDERS, TRANSFER OF TENANCY ORDERS AND FORCED MARRIAGE PROTECTION ORDERS/ (ii) Commencement and Transfer of Proceedings/B. FORCED MARRIAGE PROTECTION ORDERS/973. Commencement and transfer of proceedings.

B. FORCED MARRIAGE PROTECTION ORDERS

973. Commencement and transfer of proceedings.

At the date at which this volume states the law no provision had been made for the commencement of proceedings relating to forced marriage protection orders¹ analogous to that made in respect of proceedings relating to occupation orders and non-molestation orders². Regarding transfer, it is provided that where proceedings for a forced marriage protection order are pending, the court may transfer the proceedings to another court of its own motion or on the application of a party or (if not a party) the person who is the subject of the proceedings³.

1 Ie proceedings under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 Ie proceedings under the Family Law Act 1996 Pt IV (ss 30-63): see PARAS 285 et seq, 716 et seq. For the provision made in respect of such orders see the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896; and PARAS 962-972.

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.29(1) (r 3.29 added by SI 2008/2446). For the prescribed form of transfer see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL417 (added by SI 1997/1893).

UPDATE

958-973 Powers of courts ... Commencement and transfer of proceedings

SI 1997/1896 replaced by Allocation and Transfer of Proceedings Order 2008, SI 2008/2836: see PARA 964A.

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(iii) Procedure on Application

A. OCCUPATION ORDERS AND NON-MOLESTATION ORDERS

(A) PROCEDURE IN HIGH COURT AND COUNTY COURTS

974. Form of application.

An application for an occupation order or a non-molestation order¹:

- 1302 (1) must be made in the prescribed form²;
- 1303 (2) must, if made by a child under the age of 16, be made in the prescribed form³ but is to be treated, in the first instance, as an application to the High Court for leave⁴;
- 1304 (3) must, if made in other proceedings which are pending, be made in the prescribed form⁵.

An application in the prescribed form⁶ must be supported by a statement which is signed by the applicant and is sworn to be true⁷. Where an application is made without giving notice, the sworn statement must state the reasons why notice was not given⁸. An application made on notice, together with the sworn statement and a notice in the prescribed form⁹ must be served by the applicant on the respondent personally not less than two days before the date on which the application will be heard¹⁰; but the court may abridge the period so specified¹¹. Where the applicant is acting in person, service of the application must be effected by the court, if the applicant so requests; but this does not affect the court's power to order substituted service¹².

A copy of an application for an occupation order¹³ must be served by the applicant by first-class post on the mortgagee¹⁴ or, as the case may be, the landlord of the dwelling house¹⁵ in question, with a notice in the prescribed form¹⁶ informing him of his right to make representations in writing or at any hearing¹⁷. Where the application is for the transfer of a tenancy, notice of the application must be served by the applicant on the other cohabitant¹⁸, spouse¹⁹, or civil partner²⁰, and on the landlord²¹; and any person so served is entitled to be heard on the application²². After he has served the application, the applicant must file a statement in the prescribed form²³.

Any order or decision granting or varying an order (or refusing to do so) in proceedings in which an application is made in accordance with these provisions for:

- 1305 (a) an occupation order²⁴ declaring that the applicant is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation, or has home rights²⁵;
- 1306 (b) an occupation order containing any of the prescribed provisions²⁶ where the applicant or the respondent has home rights²⁷; or
- 1307 (c) a transfer of tenancy²⁸,

is to be treated as a final order²⁹ and, on an appeal from such an order, the judge may exercise his own discretion in substitution for that of the district judge³⁰.

1 le an application for an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(1) (r 3.8 substituted by SI 1997/1893). For the prescribed form of application see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL401 (added by SI 1997/1893 and substituted by SI 2005/2922).

The Family Proceedings Rules 1991, SI 1991/1247, r 9.2A (see PARA 776) does not apply to an application for an occupation order or a non-molestation order under the Family Law Act 1996 Pt IV (ss 30-63): Family Proceedings Rules 1991, SI 1991/1247, r 3.8(10) (as so substituted).

The Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7 (see PARA 976) applies, with the necessary modifications, to: (1) an application for an occupation order under the Family Law Act 1996 s 33 (see PARAS 292-293), s 35 (see PARAS 297-298) or s 36 (see PARAS 301-302); and (2) an application for the transfer of a tenancy (see PARA 310 et seq): Family Proceedings Rules 1991, SI 1991/1247, r 3.8(13) (as so substituted; amended by SI 2005/2922).

The provisions of the Family Proceedings Rules 1991, SI 1991/1247, r 3.6(7)-(9) (see PARA 955) apply, with the necessary modifications, to an application for the transfer of a tenancy, as they apply to an application under r 3.6 (see PARA 955): r 3.8(14) (as so substituted; amended by SI 2005/2922).

3 See note 3.

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(2) (as substituted: see note 3).

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(3) (substituted by SI 1997/1893). For the prescribed form of application see note 3.

6 See note 3.

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(4) (as substituted: see note 3).

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(5) (as substituted: see note 3).

9 See note 3.

10 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(6) (as substituted: see note 3).

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(7) (as substituted: see note 3).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(8) (as substituted: see note 3).

13 le under the Family Law Act 1996 s 33 (see PARAS 292-293), s 35 (see PARAS 297-298) or s 36 (see PARAS 301-302).

14 As to the meaning of 'mortgagee' see PARA 285 note 3.

15 As to the meaning of 'dwelling house' see PARA 285 note 2.

16 For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL416 (added by SI 1997/1893; amended by SI 2001/821; SI 2005/2922).

17 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(11) (as substituted: see note 3).

18 le as that term is defined in the Family Law Act 1996 Sch 5: see PARA 311 note 7.

19 le as that term is defined in Family Act 1996 Sch 5: see PARA 311 note 5.

20 le as that term is defined in Family Act 1996 Sch 5: see PARA 311 note 6.

21 le as that term is defined in Family Act 1996 Sch 5: see PARA 311 note 20.

22 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(12) (as substituted (see note 3); amended by SI 2005/2922).

23 Family Proceedings Rules 1991, SI 1991/1247, r 3.8(15) (as substituted: see note 3). For the prescribed form of statement see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL415 (added by SI 1997/1893).

24 Is an occupation order as described in the Family Law Act 1996 s 33(4): see PARA 293.

25 Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(6)(a) (r 8.1A added by SI 1997/1893).

26 Is any of the provisions specified in the Family Law Act 1996 s 33(3): see PARA 293.

27 Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(6)(b) (as added: see note 26).

28 Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(6)(c) (as added: see note 26). As to transfer of tenancy orders see PARA 310 et seq.

29 Is for the purposes of CCR Ord 37 r 6. As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

30 Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(6) (as added: see note 26). The provisions of CCR Ord 37 r 6 apply accordingly: Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(6) (as so added).

UPDATE

974 Form of application

NOTE 2--SI 1991/1247 Appendix 1, Form FL401 further substituted: SI 2009/2027.

TEXT AND NOTE 4--Words 'but is ... leave' in head (2) omitted: SI 1991/1247 r 3.8(2) (amended by SI 2008/2836).

TEXT AND NOTES 25-30--SI 1991/1247 r 8.1A revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and PARA 900.

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975. Hearing of applications.

An application for an occupation order or a non-molestation order¹ must be dealt with in chambers unless the court otherwise directs². Where an order is made on an application made without notice, a copy of the order together with a copy of the application and of the sworn statement in support must be served by the applicant on the respondent personally³.

Where the application is for an occupation order⁴, a copy of any order made on the application must be served by the applicant by first-class post on the mortgagee⁵ or, as the case may be, the landlord of the dwelling house⁶ in question⁷.

A copy of an order made on an application heard with notice must be served by the applicant on the respondent personally⁸. Where the applicant is acting in person, service of a copy of any order made on the hearing of the application must be effected by the court, if the applicant so requests⁹.

¹ ie an application for an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

² Family Proceedings Rules 1991, SI 1991/1247, r 3.9(1) (r 3.9 substituted, r 3.9A added, by SI 1997/1893). The respondent must have an opportunity to test by cross-examination the affidavit evidence of the applicant, particularly in respect of the reasonableness or otherwise of the applicant's attitude, where an occupation order is sought: *Harris v Harris* [1986] 1 FLR 12, [1986] Fam Law 16, CA. An occupation order is a Draconian order which should not be made on affidavit evidence alone. Where there is a conflict of evidence on the affidavits, there should be oral evidence and an opportunity to cross-examine: *Whitlock v Whitlock* [1990] FCR 129, [1989] 1 FLR 208, CA; *Tuck v Nicholls* [1989] FCR 300, [1989] 1 FLR 283, CA. If there are hotly contested cross-allegations, it will rarely be proper to grant an occupation order on affidavits without cross-examination: *Shipp v Shipp* [1988] 1 FLR 345, [1988] Fam Law 168, CA. Where an occupation order has been obtained without notice, a party seeking leave to apply must not be turned away because the list is too full, unless the matter has been referred to a judge for decision: *G v G (exclusion order)* [1990] FCR 572, [1990] 1 FLR 395, CA. When an unrepresented respondent is before the court, he should be reminded by the court of his right to challenge affidavit evidence by cross-examination: *Harris v Harris*. When both parties are before the court, the court can and should reach a decision: *Rennick v Rennick* [1978] 1 All ER 817, [1977] 1 WLR 1455, CA.

³ Family Proceedings Rules 1991, SI 1991/1247, r 3.9(2) (as substituted: see note 2). Any occupation order made on the hearing must be issued in Appendix 1, Form FL404 (added by SI 1997/1893 and substituted by SI 2007/1622), and any non-molestation order made on the hearing must be issued in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL404a (added by SI 2007/1622): Family Proceedings Rules 1991, SI 1991/1247, rr 3.9(6)(b), (c) (as so substituted; amended by SI 2007/1622). A copy of Form FL404a (in the case of a non-molestation order) or FL406 (in the case of an occupation order) and a statement showing that the respondent has been served with the order or informed of its terms (whether by being present when the order was made or by telephone or otherwise) must be delivered to the officer for the time being in charge of any police station for the applicant's address or of such other police station as the court may specify: Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(1A) (r 3.9A as so added; r 3.9A(1), (1B) added by SI 2007/1622). The documents must be delivered by the applicant, if the applicant is responsible for serving the order on the respondent in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 3.9(2) or (4) (see text and note 8), or the court, if the court is responsible for serving the order on the respondent in accordance with r 3.9(5) (see the text and note 9): r 3.9A(1B) (as so added).

A record of the hearing must be made in Appendix 1, Form FL405 (added by SI 1997/1893): Family Proceedings Rules 1991, SI 1991/1247, rr 3.9(6)(a) (as so substituted).

⁴ ie under the Family Law Act 1996 s 33 (see PARA 292), s 35 (see PARA 297) or s 36 (see PARA 301).

- 5 As to the meaning of 'mortgagee' see PARA 285 note 3.
- 6 As to the meaning of 'dwelling house' see PARA 285 note 2.
- 7 Family Proceedings Rules 1991, SI 1991/1247, r 3.9(3) (as substituted: see note 2). The court may direct that a further hearing be held in order to consider any representations made by a mortgagee or a landlord: r 3.9(7) (as so substituted).
- 8 Family Proceedings Rules 1991, SI 1991/1247, r 3.9(4) (as substituted: see note 2).
- 9 Family Proceedings Rules 1991, SI 1991/1247, r 3.9(5) (as substituted: see note 2).

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976. Investigative matters.

At the hearing of an application for an occupation order where one party has an estate or interest or home rights or has no existing right to occupy¹ the district judge² must³ investigate the allegations made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined and order the disclosure and inspection of any document or require further affidavits⁴. The district judge may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings⁵.

Subject to any directions given by the court⁶, any party to an application for an occupation order in these circumstances may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to provide a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the district judge for directions⁷.

1 le an application for an order under the Family Law Act 1996 s 33 (see PARAS 292-293), s 35 (see PARAS 297-298) or s 36 (see PARAS 301-302).

2 As to the meaning of 'district judge' see PARA 737 note 3.

3 le subject to the Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 paras 8, 9(5) (see PARAS 708-709, 891-892, 956-957) and r 10.10 (see PARA 747).

4 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(1)(d), (3) (Appendix 4 added by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(4) (as added: see note 4).

6 Where any party to such an application intends on the day appointed for the hearing to apply for directions, he must file and serve on every other party a notice to that effect: Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(5) (as added: see note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, Appendix 4 para 7(6) (as added: see note 4).

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(B) PROCEDURE IN MAGISTRATES' COURTS

977. Application for order.

An application to a magistrates' court for an occupation order or a non-molestation order¹, including an application for such an order which is made in other proceedings which are pending, must be made in the prescribed form² which:

1308 (1) must be supported by a statement which is signed and declared to be true³;

1309 (2) may, with the leave of the justices' clerk or of the court, be made without notice, in which case the applicant must file⁴ with the designated officer for the court⁵, or the court, the application at the time when the application is made or as directed by the justices' clerk and the statement in support of the application must state the reason why the application is made without notice⁶.

An application on notice, together with any statement supporting it and a notice in the prescribed form⁷, must be served by the applicant on the respondent⁸ personally not less than two business days⁹ prior to the date on which the application will be heard¹⁰, although the court or justices' clerk may abridge that period¹¹.

Where the applicant is acting in person, service of the application may, with the leave of the justices' clerk, be effected in accordance with the normal mode¹² of service¹³.

A copy of an application for an occupation order¹⁴ must be served by the applicant by first-class post on the mortgagee¹⁵ or, as the case may be, the landlord of the dwelling house¹⁶ in question, with a notice in the prescribed form¹⁷ informing him of his right to make representations in writing or at any hearing¹⁸.

The applicant must file a statement in the prescribed form¹⁹ after he has served the application²⁰.

1 le an application for an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(1), (2) (r 3A added by SI 1997/1894). For the prescribed form of application see the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1, Form FL401 (added by SI 1997/1893; substituted by SI 2005/2930). The Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 33A (disclosure of addresses: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 207) applies for the purpose of preventing the disclosure of addresses where an application is made in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL401 as it applies for that purpose in proceedings under the Children Act 1989: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(12) (as so added).

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(3) (as added (see note 2); substituted by SI 2007/1628).

4 As to the meaning of 'file' see PARA 894 note 2.

5 As to the meaning of 'court' see PARA 894 note 9.

6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(4) (as added (see note 2); amended by SI 2005/617; SI 2007/1628). As to delegation of his functions by a justices' clerk see PARA 1035.

7 For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL402 (added by SI 1997/1893).

8 As to the meaning of 'respondent' see PARA 894 note 4.

9 As to the meaning of 'business day' see PARA 1029 note 6.

10 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(5) (as added: see note 2).

11 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(6) (as added: see note 2).

12 In accordance with the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4: see PARA 1029.

13 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(7) (as added: see note 2).

14 In an order under the Family Law Act 1996 s 33 (see PARAS 292-293), s 35 (see PARAS 297-298) or s 36 (see PARAS 301-302).

15 As to the meaning of 'mortgagee' see PARA 285 note 3.

16 As to the meaning of 'dwelling house' see PARA 285 note 2.

17 For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL416 (added by SI 1997/1894; amended by SI 2005/617; SI 2005/2930).

18 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(10) (as added: see note 2).

19 For the prescribed form of statement see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL415 (added by SI 1997/1894).

20 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 3A(11) (as added: see note 2).

UPDATE

977 Application for order

NOTE 2--SI 1991/1991 Sch 1 FL401 substituted: SI 2009/2025.

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978. Provision of information as to orders made.

Where an occupation order or a non-molestation order¹ is made, the hearing and the order so made must be recorded², and:

- 1310 (1) where the order is made on an application made without notice, a copy of the order together with a copy of the record of the reasons for the court's decision³, a copy of the application and of any statement supporting it must be served by the applicant on the respondent⁴ personally⁵;
- 1311 (2) where the applicant is acting in person, service of a copy of an order made on an application made without notice must be effected by the designated officer for the court, if the applicant so requests⁶; and
- 1312 (3) where the application is for an occupation order⁷, a copy of any order made on the application must be served by the applicant by first-class post on the mortgagee⁸ or, as the case may be, the landlord of the dwelling house⁹ in question¹⁰.

A copy of an order made on an application heard with notice must be served by the applicant on the respondent personally¹¹; and, where the applicant is acting in person, service of a copy of the order made on an application heard with notice may, with the leave of the justices' clerk, be effected in accordance with the normal mode¹² of service¹³.

The court may direct that a further hearing be held in order to consider any representations made by a mortgagee or a landlord¹⁴.

1 le an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(1) (r 12A added, r 20 substituted, by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(1), (2) amended, r 20(1A), (1B) added, by SI 2007/1628). A record of the hearing must be made on the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL405 (added by SI 1997/1893); any occupation order made on the hearing must be issued on Form FL404 (added by SI 1997/1893; substituted by SI 2007/1622) and any non-molestation order made on the hearing must be issued on Form FL404a (added by SI 2007/1622): Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(1) (as so added and amended).

Where a non-molestation order is made in a magistrates' court a copy of the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL404a (added by SI 1997/1894) and a statement showing that the respondent has been served with the order or informed of its terms (whether by being present when the order was made or by telephone or otherwise), must be delivered to the officer for the time being in charge of any police station for the applicant's address or of such other police station as the court may specify: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(1A) (as so substituted and added). Those documents must be delivered by the applicant, if the applicant is responsible for serving the order on the respondent in accordance with r 12A(2) (see PARA 978) or r 12(5) (see PARA 899) or the designated officer for the court, if the designated officer for the court is responsible for serving the order on the respondent in accordance with r 12A(3) (see PARA 978): r 20(1B) (as so substituted and added).

3 le the reasons for a decision made in pursuance of the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12(5)(b) (see PARA 899).

4 As to the meaning of 'respondent' see PARA 894 note 4.

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(2) (as added and amended: see note 2).

6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(3) (as added (see note 2); amended by SI 2005/617). As to delegation of such functions see PARA 1035.

7 le an order under the Family Law Act 1996 s 33 (see PARAS 292-293), s 35 (see PARAS 297-298) or s 36 (see PARAS 301-302).

8 As to the meaning of 'mortgagee' see PARA 285 note 3.

9 As to the meaning of 'dwelling house' see PARA 285 note 2.

10 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(4) (as added: see note 2).

11 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(5) (as added: see note 2).

12 le in accordance with the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4: see PARA 1029.

13 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(6) (as added: see note 2).

14 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12A(7) (as added: see note 2).

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979. Application for variation, extension or discharge.

An application to vary, extend or discharge an occupation order or a non-molestation order¹ must be made in the prescribed form².

1 I.e. an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12B (added by SI 1997/1894). The Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 12 (see PARAS 896, 899) and r 12A (see PARA 978) apply to the hearing of an application in relation to an occupation order or a non-molestation order: r 12B (as so added). For the prescribed form of application see the Form FL403 (added by SI 1997/1894).

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B. FORCED MARRIAGE PROTECTION ORDERS

980. Form of application and service of notice.

An application for a forced marriage protection order¹, including an application for a forced marriage protection order which is made in other proceedings which are pending, must be made in the prescribed form², and if it is made by an organisation it must state the name and address of the person submitting the application³ and the position which that person holds in the organisation⁴. An application without notice must be supported by a sworn statement explaining why notice has not been given⁵. In every application made on notice the applicant must serve a copy of the application, together with the notice of proceedings⁶ on the respondent⁷, the person who is the subject of the proceedings⁸, if not the applicant⁹, and any other person directed by the court¹⁰, personally not less than two days before the date on which the application will be heard (although the court may abridge the period¹¹). Service of the application will be effected by the court if the applicant so requests¹². The applicant must file a statement¹³ after the application has been served¹⁴.

Any order or decision granting or varying a forced marriage protection order (or refusing to do so) is treated as a final order¹⁵ and, on an appeal from such an order, the judge may exercise his own discretion in substitution for that of the district judge¹⁶.

1 le an application for an order under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.26(1) (rr 3.25, 3.26, 3.28 added by SI 2008/2446). For the prescribed form see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL401A (added by SI 2008/2446).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.26(2)(a) (as added: see note 2).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.26(2)(b) (as added: see note 2).

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.26(3) (as added: see note 2).

6 le notice of proceedings in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL402A (added by SI 2008/2446).

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.28(1)(a) (as added: see note 2). As to the meaning of 'respondent' see PARA 714 note 4.

8 'Person who is the subject of the proceedings' means the person who will be protected by the forced marriage protection order applied for or being considered by the court of its own motion, if that order is made, or who is being protected by such an order: Family Proceedings Rules 1991, SI 1991/1247, r 3.25(1) (as added: see note 2).

9 Family Proceedings Rules 1991, SI 1991/1247, r 3.28(1)(b) (as added: see note 2).

10 Family Proceedings Rules 1991, SI 1991/1247, r 3.28(1)(c) (as added: see note 2).

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.28(2) (as added: see note 2).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.28(3) (as added: see note 2). This does not affect the court's power to order substituted service: r 3.28(3) (as so added).

13 For the prescribed form of statement see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL415 (added by SI 1997/1893).

14 Family Proceedings Rules 1991, SI 1991/1247, r 3.28(4) (as added: see note 2).

15 le for the purposes of CCR Ord 37 r 6. As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

16 Family Proceedings Rules 1991, SI 1991/1247, r 8.1B(3) (added by SI 2008/2446). The provisions of CCR Ord 37 r 6 apply accordingly: Family Proceedings Rules 1991, SI 1991/1247, r 8.1B(3) (as so added).

UPDATE

980 Form of application and service of notice

NOTE 2--SI 1991/1247 Appendix 1 Form FL401A substituted: SI 2009/2027.

TEXT AND NOTE 16--SI 1991/1247 r 8.1B revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and PARA 900.

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981. Parties to proceedings.

In proceedings for a forced marriage protection order¹ a person may file a request² for that person or another person to be joined as a party³ or to cease to be a party⁴, and as soon as practicable after receiving such a request the court must:

- 1313 (1) in the case only of a request for a person to be joined as a party, grant the request⁵;
- 1314 (2) order that the request be considered at a hearing, and fix a date for the hearing⁶; or
- 1315 (3) invite written representations as to whether the request should be granted, to be filed within a specified period, and upon expiry of that period act under the above provisions as it sees fit⁷.

The proper officer⁸ must inform the person making the request, the applicant and the respondent⁹, the person who is the subject of the proceedings (if different), and any other person directed by the court of the court's action under these provisions¹⁰. The court may also direct¹¹ that a person who would not otherwise be a respondent under these provisions be joined as a party to the proceedings¹² or that a party to the proceedings cease to be a party¹³.

1 le proceedings under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 For the prescribed form of request see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL431 (added by SI 2008/2446).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(1)(a) (r 3.30 added by SI 2008/2446).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(1)(b) (as added: see note 3).

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(2)(a) (as added: see note 3).

6 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(2)(b) (as added: see note 3).

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(2)(c) (as added: see note 3).

8 As to the meaning of 'proper officer' see PARA 461 note 5.

9 As to the meaning of 'respondent' see PARA 714 note 4.

10 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(2)(i)-(iv) (as added: see note 3).

11 Such a direction may be made by the court of its own motion as well as upon a request under the Family Proceedings Rules 1991, SI 1991/1247, r 3.30(1) (see the text and notes 1-4): r 3.30(3) (as added: see note 3).

12 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(3)(a) (as added: see note 3).

13 Family Proceedings Rules 1991, SI 1991/1247, r 3.30(3)(b) (as added: see note 3).

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982. Claim to withhold inspection or disclosure of a document

In proceedings for a forced marriage protection order¹ a person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest². Such an order, unless the court orders otherwise, must not be served on any other person and must not be open to inspection by any person³.

A person who wishes to claim that he has a right or duty to withhold inspection of a document, or part of a document, must state in writing that he has such a right or duty and the grounds on which he claims that right or duty⁴. For the purpose of deciding an application to withhold disclosure⁵ or a claim to withhold inspection⁶ the court may require the person seeking to withhold disclosure or inspection to produce the relevant document to the court and may invite any person, whether or not a party, to make representations⁷.

These provisions do not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest⁸.

1 I.e. proceedings under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.32(1) (r 3.32 added by SI 2008/2446). An application to withhold disclosure must be supported by evidence: Family Proceedings Rules 1991, SI 1991/1247, r 3.32(7) (as so added).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.32(2) (as added: see note 2).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.32(3) (as added: see note 2). Such a statement must be made to the person wishing to inspect the document: r 3.23(4) (as so added). A claim to withhold inspection must be supported by evidence: r 3.32(7) (as so added). A party or, if different, the person who is the subject of the proceedings may apply to the court to decide whether such a claim should be upheld: r 3.23(5) (as so added).

5 I.e. an application under the Family Proceedings Rules 1991, SI 1991/1247, r 3.32(1) (see the text and notes 1-2).

6 I.e. an application under the Family Proceedings Rules 1991, SI 1991/1247, r 3.32(3) (see the text and note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.32(6) (as added: see note 2).

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.32(8) (as added: see note 2).

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983. Orders for disclosure against a person not a party to proceedings

Where in proceedings for a forced marriage protection order¹ an application, supported by evidence, is made to the court under any Act for disclosure by a person who is not a party to the proceedings², the court may make an order only where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the proceedings or to save costs³. Such an order must specify the documents or the classes of documents which the non-party must disclose and require the non-party, when making disclosure, to specify any of those documents which are no longer in his control or in respect of which he claims a right or duty to withhold inspection⁴, and may require the non-party to indicate what has happened to any documents which are no longer in his control and specify the time and place for disclosure and inspection⁵.

1 le proceedings under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.31(1), (2) (r 3.31 added by SI 2008/2446).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.31(3) (as added: see note 1).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.31(4) (as added: see note 1).

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.31(5) (as added: see note 1).

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984. Hearing of applications.

An application for a forced marriage protection order¹ must be dealt with in chambers unless the court otherwise directs². The court may direct the withholding of any submissions made, or any evidence adduced, for or at the hearing in order to protect the person who is the subject of the proceedings or any other person³ or for any other good reason⁴, and the applicant must, personally as soon as reasonably practical, serve on the respondent⁵, the person being protected by the order (if neither the applicant nor a respondent) and any other person named in the order a copy of the order⁶, a copy of the record of the hearing⁷ and, where the order is made without notice, a copy of the application together with any statement supporting it⁸: the court may direct that a further hearing be held to consider any representations made by any such person⁹.

1 le an application for an order under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(1) (r 3.33 added by SI 2008/2446). A forced marriage protection order made on the hearing must be issued in Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL405 (added by SI 1997/1893). A record of the hearing must be made in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL404B (added by SI 2008/2446): Family Proceedings Rules 1991, SI 1991/1247, rr 3.33(2), (3) (as so added).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(4)(a) (as added: see note 2).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(4)(b) (as added: see note 2).

5 As to the meaning of 'respondent' see PARA 714 note 4. Service of the documents mentioned in the Family Proceedings Rules 1991, SI 1991/1247, rr 3.33(5), must be effected by the court if the applicant so requests or where the court made the order of its own motion: r 3.33(6) (as added: see note 2).

6 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5)(a) (as added: see note 2).

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5)(b) (as added: see note 2).

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5)(c) (as added: see note 2). A copy of Form FL406A and a statement showing that the respondents and any other persons directed by the court to be served with the order have been so served or informed of its terms (whether by being present when the order was made or by telephone or otherwise) must be delivered to the officer for the time being in charge of any police station for the applicant's address or of such other police station as the court may specify: Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(1A), 3.35(3) (r 3.9A as so added; r 3.9A(1), (1B) added by SI 2007/1622; Family Proceedings Rules 1991, SI 1991/1247, r 3.35 added by SI 2008/2446). The documents must be delivered by the applicant, if the applicant is responsible for serving the order in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5) (see the text and notes 5-7), or the court, if the court is responsible for serving the order in accordance with r 3.33(6) (see PARA 993) or r 3.34(3) (see PARA 724): rr 3.9A(1B), 3.35(4) (as so added).

9 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(7) (as added: see note 2).

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985. Application for variation, extension or discharge.

An application to vary, extend or discharge a forced marriage protection order¹ must be made in the prescribed form². The court may direct the withholding of any submissions made, or any evidence adduced, for or at the hearing in order to protect the person who is the subject of the proceedings or any other person³ or for any other good reason⁴, and the applicant must, personally as soon as reasonably practical, serve on the respondent⁵, the person being protected by the order (if neither the applicant nor a respondent) and any other person named in the order a copy of the order⁶, a copy of the record of the hearing⁷ and, where the order is made without notice, a copy of the application together with any statement supporting it⁸: the court may direct that a further hearing be held to consider any representations made by any such person⁹.

Any order or decision granting or varying a forced marriage protection order (or refusing to do so) is treated as a final order¹⁰ and, on an appeal from such an order, the judge may exercise his own discretion in substitution for that of the district judge¹¹.

1 le an application to vary, extend or discharge an order under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(8) (r 3.33 added by SI 2008/2446). An application to vary, extend or discharge a forced marriage protection order must be made in Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL403A (added by SI 2008/2446): Family Proceedings Rules 1991, SI 1991/1247, r 3.33(8) (as so added).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(4)(a) (as added: see note 2).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(4)(b) (as added: see note 2).

5 As to the meaning of 'respondent' see PARA 714 note 4. Service of the documents mentioned in the Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5), must be effected by the court if the applicant so requests or where the court made the order of its own motion: r 3.33(6) (as added: see note 2).

6 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5)(a) (as added: see note 2).

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5)(b) (as added: see note 2).

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(5)(c) (as added: see note 2).

9 Family Proceedings Rules 1991, SI 1991/1247, r 3.33(7) (as added: see note 2).

10 le for the purposes of CCR Ord 37 r 6. As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

11 Family Proceedings Rules 1991, SI 1991/1247, r 8.1B(3) (added by SI 2008/2446). The provisions of CCR Ord 37 r 6 apply accordingly: Family Proceedings Rules 1991, SI 1991/1247, r 8.1B(3) (as so added).

UPDATE

985 Application for variation, extension or discharge

TEXT AND NOTE 11--SI 1991/1247 r 8.1B revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and PARA 900.

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(iv) Appeals

986. Appeals against occupation orders and non-molestation orders.

The designated officer for the magistrates' court from which an appeal against an occupation order or a non-molestation order¹ is brought must be served with the prescribed documents². Where an appeal lies to the High Court, the documents required to be filed³ must be filed in the registry of the High Court which is nearest to the magistrates' court from which the appeal is brought⁴. A district judge⁵ may dismiss such an appeal for want of prosecution and may deal with any question of costs arising out of the dismissal or withdrawal of an appeal⁶.

1 le an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders). As to appeals see PARA 308 (occupation orders) and PARA 721 (non-molestation orders). On an appeal against such an order, the Family Proceedings Rules 1991, SI 1991/1247, r 4.22(2)-(5), (7), (8) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 304, 305), r 8.1(5), (6) (see PARA 737) and r 8.2(4)(e), (6) (see PARA 900) apply subject to the provisions of r 8.1A(2)-(6) and with the necessary modifications: r 8.1A(1) (r 8.1A added by SI 1997/1893).

2 Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(2) (as added (see note 1); amended by SI 2001/821; SI 2005/617). The documents so prescribed are those mentioned in the Family Proceedings Rules 1991, SI 1991/1247, r 4.22(2) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 304, 305): r 8.1A(2) (as so added and amended).

3 le under the Family Proceedings Rules 1991, SI 1991/1247, r 4.22(2) (see note 2).

4 Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(3) (as added: see note 1).

5 As to the meaning of 'district judge' see PARA 737 note 3.

6 Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(5) (as added: see note 1).

UPDATE

986 Appeals against occupation orders and non-molestation orders

TEXT AND NOTES--SI 1991/1247 r 8.1A revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and PARA 900.

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987. Appeals against forced marriage protection orders.

A district judge¹ may dismiss an appeal against a forced marriage protection order² for want of prosecution and may deal with any question of costs arising out of the dismissal or withdrawal of an appeal³.

1 As to the meaning of 'district judge' see PARA 737 note 3.

2 Ie an order under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq). On an appeal against such an order, the Family Proceedings Rules 1991, SI 1991/1247, r 4.22(2)-(5) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 304, 305), r 8.1(5), (6) (see PARA 737) and r 8.2(4)(e), (6) (see PARA 900) apply subject to the provisions of r 8.1B and with the necessary modifications: r 8.1B(1) (r 8.1B added by SI 2008/2446).

3 Family Proceedings Rules 1991, SI 1991/1247, r 8.1B(2) (as added: see note 2).

UPDATE

987 Appeals against forced marriage protection orders

TEXT AND NOTES--SI 1991/1247 r 8.1B revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and PARA 900.

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(v) Enforcement and Arrest

988. Attachment of powers of arrest to occupation orders.

If the court¹ makes an occupation order² and it appears to the court that the respondent has used or threatened violence against the applicant or a relevant child³, it must attach a power of arrest to one or more provisions of the order unless satisfied that in all the circumstances of the case the applicant or child will be adequately protected without such a power of arrest⁴.

These provisions do not apply in any case where the occupation order is made without notice⁵, but in such a case the court may attach a power of arrest to one or more provisions of the order if it appears to it that the respondent has used or threatened violence against the applicant or a relevant child and that there is a risk of significant harm⁶ to the applicant or child, attributable to conduct of the respondent, if the power of arrest is not attached to those provisions immediately⁷. If the court so attaches a power of arrest to any provisions of an occupation order, it may provide that the power of arrest is to have effect for a shorter period than the other provisions of the order⁸; and any period specified for those purposes may be extended by the court, on one or more occasions, on an application to vary or discharge the occupation order⁹.

1 As to the meaning of 'court' see PARA 958.

2 I.e. an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders).

3 As to the meanings of 'child' and 'relevant child' see PARA 290 note 5.

4 Family Law Act 1996 s 47(2) (s 47(2)-(5) amended by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 38). Where a power of arrest is attached to one or more of the provisions of an occupation order the relevant provisions must be set out in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL406 (added by SI 1997/1893), and the form must not include any provisions of the order to which the power of arrest was not attached: Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(1) (r 3.9A substituted by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(1) substituted by SI 2007/1622). Where a power of arrest is attached to one or more of the provisions of an occupation order made in a magistrates' court the relevant provisions must be set out in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL406 (added by SI 1997/1894) and the form must not include any provisions of the order to which the power of arrest was not attached: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(1) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(1) further substituted, r 20(1A), (1B) added, by SI 2007/1628). A copy of Form FL406, and a statement showing that the respondent has been served with the order or informed of its terms (whether by being present when the order was made or by telephone or otherwise), must be delivered to the officer for the time being in charge of any police station for the applicant's address or of such other police station as the court may specify: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(1A) (as so added). Those documents must be delivered by the applicant, if the applicant is responsible for serving the order on the respondent in accordance with r 12A(2) (see PARA 978) or r 12(5) (see PARA 899) or the designated officer for the court, if the designated officer for the court is responsible for serving the order on the respondent in accordance with r 12A(3) (see PARA 978): r 20(1B) (as so added).

A power of arrest may be attached to an occupation order even though the respondent is under the age of 18 years: *Re H (a minor) (occupation order: power of arrest)* [2001] 1 FCR 370, sub nom *Re H (respondent under 18: power of arrest)* [2001] 1 FLR 641, CA. See also *Hale v Tanner (Practice Note)* [2000] 1 WLR 2377n, sub nom *Hale v Tanner* [2000] 3 FCR 62, CA.

Where, at a hearing which has been held in private, an occupation order is made to which a power of arrest is attached and the person to whom it is addressed was not given notice of the hearing and was not present at the hearing, the terms of the order and the name of the person to whom it is addressed must be announced in open court at the earliest opportunity. This may be either on the same day when the court proceeds to hear cases in open court or, where there is no further business in open court on that day, at the next listed sitting of the court. Where a person arrested under a power of arrest cannot conveniently be brought before the relevant judicial authority sitting in a place normally used as a courtroom within 24 hours after the arrest, he may be brought before the relevant judicial authority at any convenient place but, as the liberty of the subject is involved, the press and public should be permitted to be present, unless security needs to make this impracticable. Any order of committal made otherwise than in public or in a courtroom open to the public must be announced in open court at the earliest opportunity. This may be either on the same day when the court proceeds to hear cases in open court or, where there is no further business in open court on that day, at the next listed sitting of the court. The announcement must state the name of the person committed, in general terms the nature of the contempt of the court in respect of which the order of committal has been made and the length of the period of committal: *Practice Direction* [1998] 2 All ER 927, [1998] 1 WLR 476. See also *Practice Direction* [2001] 2 All ER 704, sub nom *Practice Direction (family proceedings: committal)* [2001] 1 WLR 1253.

Where an order or warrant for the arrest or committal of any person has been made or issued in proceedings under the Family Law Act 1996 Pt IV pending in the Principal Registry which are treated as pending in a county court, the order or warrant may, if the court so directs, be executed by the tipstaff within any county court district: Family Proceedings Rules 1991, SI 1991/1247, r 7.2(3A) (added by SI 1997/1893). As to the meaning of 'Principal Registry' see PARA 737 note 3.

5 le by virtue of the Family Law Act 1996 s 45(1): see PARA 290.

6 As to the meanings of 'harm' and 'significant harm' see PARA 290 notes 2, 4.

7 Family Law Act 1996 s 47(3) (as amended: see note 4).

8 Family Law Act 1996 s 47(4) (as amended: see note 4).

9 Family Law Act 1996 s 47(5) (as amended: see note 4). As to the variation or discharge of orders on an application by the respondent or an applicant see s 49; and PARA 309.

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989. Attachment of powers of arrest to forced marriage protection orders.

If the court¹ intends to make a forced marriage protection order², other than where the order is made without notice³, and considers that the respondent⁴ has used or threatened violence against the person being protected or otherwise in connection with the matters being dealt with by the order⁵, the court must attach a power of arrest to one or more provisions of the order unless it considers that, in all the circumstances of the case, there will be adequate protection without such a power⁶.

If the court intends to make a forced marriage protection order without notice⁷ and considers that the respondent has used or threatened violence against the person being protected or otherwise in connection with the matters being dealt with by the order⁸, the court may attach a power of arrest to one or more provisions of the order if it considers that there is a risk of significant harm⁹ to a person, attributable to conduct of the respondent, if the power of arrest is not attached to the provisions immediately¹⁰. If the court so attaches a power of arrest it may provide that the power of arrest is to have effect for a shorter period than the other provisions of the order¹¹; and any period specified for those purposes may be extended by the court, on one or more occasion, on an application to vary or discharge the order¹².

1 As to the meaning of 'court' see PARA 958.

2 I.e. an order under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq).

3 I.e. otherwise than by virtue of the Family Law Act 1996 s 63D (see PARAS 727, 730).

4 For these purposes 'respondent' includes any person who is not a respondent but to whom an order is directed: Family Law Act 1996 s 63H(7) (ss 63G, 63H added by the Forced Marriage (Civil Protection) Act 2007 s 1).

5 Family Law Act 1996 s 63H(1) (as added: see note 4)

6 Family Law Act 1996 s 63H(2) (as added: see note 4). Where a power of arrest is attached to one or more of the provisions of a forced marriage protection order the relevant provisions must be set out in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL406A (added by SI 2008/2446), and the form must not include any provisions of the order to which the power of arrest was not attached: Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(1), 3.35(1), (2) (r 3.9A substituted by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(1) substituted by SI 2007/1622; Family Proceedings Rules 1991, SI 1991/1247, r 3.35 added by SI 2008/2446).

7 I.e. by virtue of the Family Law Act 1996 s 63D (see PARAS 727, 730).

8 Family Law Act 1996 s 63H(3) (as added: see note 4).

9 As to the meanings of 'harm' and 'significant harm' see PARA 290 notes 2, 4.

10 Family Law Act 1996 s 63H(4) (as added: see note 4).

11 Family Law Act 1996 s 63H(5) (as added: see note 4).

12 Family Law Act 1996 s 63H(6) (as added: see note 4). If a power of arrest has been attached to provisions of a forced marriage protection order by virtue of s 63H the court may vary or discharge the order so far as it

confers a power of arrest (whether or not there is a variation or discharge of any other provision of the order):
see s 63G(6), (7) (as so added).

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990. Arrest under attached powers.

If a power of arrest is attached to provisions of an occupation order¹ or a forced marriage protection order² a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of any such provision and, in relation to a forced marriage protection order, a person whom he has reasonable cause for suspecting to be in contempt of court in relation to the order³. A person so arrested must be brought before the relevant judge or judicial authority⁴ within the period of 24 hours⁵ beginning at the time of his arrest⁶.

1 Ie an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders). As to the attachment of powers of arrest to occupation orders see PARA 988.

2 Ie an order under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq). As to the attachment of powers of arrest to forced marriage protection orders see PARA 989.

3 Family Law Act 1996 ss 47(6), 63I(1), (2) (ss 63I, 63K added by the Forced Marriage (Civil Protection) Act 2007 s 1).

4 As to the relevant judge or judicial authority for these purposes see PARA 961.

5 In so reckoning any period of 24 hours, no account is to be taken of Christmas Day, Good Friday or any Sunday: Family Law Act 1996 ss 47(7), 63I(4) (as added: see note 3).

6 Family Law Act 1996 ss 47(7)(a), 63I(3) (as added: see note 3). If the matter is not then disposed of forthwith, the relevant judge or judicial authority before whom the arrested person is brought may remand him: ss 47(7)(b), 63K(1) (as so added). An order for remand must be in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL409 (added by SI 1997/1893): Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(9) (added by SI 1997/1893). As to remand see PARA 993.

If a remanded person is granted bail he may be required by the relevant judge or judicial authority to comply, before release on bail or later, with such requirements as appear to that authority to be necessary to secure that he does not interfere with witnesses or otherwise obstruct the course of justice: Family Law Act 1996 ss 47(12), 63K(4), (5) (as so added).

It is provided for the purposes of powers of arrest attached to occupation orders that where a person is brought before a relevant judicial authority in accordance with the Family Law Act 1996 s 47(7)(a) and the matter is not disposed of forthwith, the matter may be transferred to be disposed of by the relevant judicial authority which attached the power of arrest (ie under s 47(2) or (3): see PARA 988), if different: Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 15. It is also provided for the purposes of powers of arrest attached to occupation orders that when the arrested person is brought before the relevant judicial authority, the attendance of the arresting officer will not be necessary, unless the arrest itself is in issue. A written statement from the arresting officer as to the circumstances of the arrest should normally be sufficient. In those cases where the arresting officer was also a witness to the events leading to the arrest and his evidence regarding those events is required, arrangements should be made for him to attend at a subsequent hearing to give evidence: *Practice Direction* [2000] 1 All ER 544, sub nom *Practice Direction (arresting officer: attendance)* [2000] 1 WLR 83.

UPDATE

990 Arrest under attached powers

NOTE 6--SI 1997/1896 art 15 now Allocation and Transfer of Proceedings Order 2008, SI 2008/2836, art 23. For corresponding provision in relation to the 1996 Act Pt IVA see SI 2008/2836 art 24. See further PARA 964A.

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991. Arrest absent attached powers.

If the court¹ has made an occupation order² or a forced marriage protection order³ but there is no applicable attached power of arrest⁴, or if the court has made a non-molestation order⁵ (to which powers of arrest cannot be attached), an application may be made for the arrest of any person who has failed to comply with the order or, in the case of a forced marriage protection order, is otherwise in contempt of court in respect of it⁶. The relevant judge or judicial authority must not issue a warrant on such an application unless the application is substantiated on oath⁷ and the relevant judge or judicial authority has reasonable grounds for believing that the respondent has failed to comply with the order or, in the case of a forced marriage protection order, is otherwise in contempt of court in respect of it⁸.

If a person is brought before a court by virtue of a warrant so issued and the court does not dispose of the matter forthwith, the court may remand him⁹.

1 As to the meaning of 'court' see PARA 958.

2 I.e. an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders). As to the attachment of powers of arrest to occupation orders see PARA 988.

3 I.e. an order under the Family Law Act 1996 Pt IVA (ss 63A-63S) (see PARA 723 et seq). As to the attachment of powers of arrest to forced marriage protection orders see PARA 989.

4 I.e. where the court has not attached a power of arrest to any provisions of the order under the Family Law Act 1996 s 47(2) or (3) (see PARA 988) or s 63H (see PARA 989), or has attached that power only to certain provisions of the order, or in the case of a forced marriage protection order such a power was attached for a shorter period than other provisions of the order and that period has expired: ss 47(8)(b), 63J(1) (s 47(8) amended by the Domestic Violence, Crime and Victims Act 2004 Sch 10 para 38(5); Family Law Act 1996 ss 63J, 63K added by the Forced Marriage (Civil Protection) Act 2007 s 1).

5 I.e. an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 716 et seq (non-molestation orders).

6 Family Law Act 1998 ss 47(8), 63J(2) (as amended and added: see note 4). In the case of an occupation order or a non-molestation order, an application for a warrant may be made to the relevant judicial authority (see PARA 961) at any time the applicant considers that the respondent has failed to comply with the order (s 47(8) (as so amended)), and in the case of a forced marriage protection order an interested party may apply to the relevant judge (see PARA 961) for the issue of a warrant for the arrest of a person if the interested party considers that the person has failed to comply with the order or is otherwise in contempt of court in relation to the order (s 63J(2) (as so added)).

An application for the issue of a warrant under these provisions must be made in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL407 (added by SI 1997/1893) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL407 (added by SI 1997/1894) (in the case of an occupation order or a non-molestation order) or the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL407A (added by SI 2008/2446) (in the case of a forced marriage protection order) and, in the case of a forced marriage protection order, must be accompanied by a sworn statement: Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(3), 3.35(6) (r 3.9A added by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, r 3.35 added by SI 2008/2446); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(3) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(3) amended by SI 2005/617; SI 2007/1628). The warrant must be issued in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL408 (added by SI 1997/1893) or, as the case may be, the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL408 (added by SI 1997/1894) and, if issued by a magistrates' court, must be delivered by the designated officer for the court to the officer for the time being in charge of any police station

for the respondent's address or of such other police station as the court may specify: Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(3), (3B), 3.35(6) (as so added); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(3) (as so substituted and amended).

An application for the issue of a warrant of arrest made in the case of non-compliance with a forced marriage protection order by a person who is neither the person being protected by the order nor (if different) the person who applied for the order is treated, in the first instance, as an application for leave and the court must either grant the application or direct that a date be fixed for the hearing of the application and fix a date, and must in either case inform the person applying for the issue of the warrant, the person being protected by the order, and any other person directed by the court, of the court's action: rr 3.9A(3A), 3.35(6) (as so added).

For these purposes 'interested party', in relation to a forced marriage protection order, means:

251 (1) the person being protected by the order (Family Law Act 1996 s 63J(4)(a) (as so added));

252 (2) (if a different person) the person who applied for the order (s 63J(4)(b) (as so added)); or

253 (3) any other person (s 63J(4)(c) (as so added)),

but no application may be made under s 63J(2) by a person falling within head (3) without the leave of the relevant judge: s 63J (as so added).

7 Family Law Act 1998 ss 47(9)(a), 63J(3)(a) (as added: see note 4).

8 Family Law Act 1998 ss 47(9)(b), 63J(3)(b) (as added: see note 4). It is provided for the purposes of arrest owing to non-compliance with occupation orders and non-molestation orders that where a person is brought before a court by virtue of a warrant duly issued under s 47(9), and the matter is not disposed of forthwith, the matter may be transferred to be disposed of by the relevant judicial authority or court which issued the warrant, if different: Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997, SI 1997/1896, art 15.

9 Family Law Act 1998 ss 47(10), 63K(1) (as added: see note 4). An order for remand must be in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL409 (added by SI 1997/1893): Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(9) (added by SI 1997/1893). If a remanded person is granted bail he may be required by the relevant judge or judicial authority to comply, before release on bail or later, with such requirements as appear to that authority to be necessary to secure that he does not interfere with witnesses or otherwise obstruct the course of justice: Family Law Act 1996 ss 47(12), 63K(4), (5) (as so added). As to remand see PARA 993.

UPDATE

991 Arrest absent attached powers

NOTE 8--SI 1997/1896 art 15 now Allocation and Transfer of Proceedings Order 2008, SI 2008/2836, art 23. For corresponding provision in relation to the 1996 Act Pt IVA see SI 2008/2836 art 24. See further PARA 964A.

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992. Powers of court following arrest.

Where a person is arrested¹ for non-compliance with an occupation order, a non-molestation order or a forced marriage protection order the court before which a person is brought following his arrest may:

- 1316 (1) determine whether the facts, and the circumstances which led to the arrest, amounted to disobedience of the order²; or
- 1317 (2) adjourn the proceedings³.

The court may adjourn consideration of the penalty to be imposed for contempts found proved and such consideration may be restored if the respondent or arrested person does not comply with any conditions specified by the court⁴.

1 For these purposes 'arrest' means arrest under a power of arrest attached to an occupation order or a forced marriage protection order under the Family Law Act 1996 s 47(2) or (3) or s 63H(2) or (4) (see PARAS 986, 989) or under a warrant of arrest issued on an application under s 47(8) or s 63J(2) (which applies also to non-molestation orders) (see PARA 991): Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(10), 3.35(1), (11) (r 3.9A added by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(10) amended by SI 2007/1622; Family Proceedings Rules 1991, SI 1991/1247, r 3.35 added by SI 2008/2446); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(22) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(22) amended by SI 2007/1628).

RSC Ord 52 r 7 (power to suspend execution of committal order), RSC Ord 52 r 2 (application for leave), CCR Ord 29 r 1 (committal for breach of order), CCR Ord 29 r 1A (undertakings), CCR Ord 29 r 3 (discharge of person in custody) and CCR Ord 29 r 1 have effect, with the necessary and specified modifications, to the enforcement of occupation orders, non-molestation orders and forced marriage protection orders: see the Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(5), 3.35(7) (as so added). As to the continued application of the Rules of the Supreme Court 1965, SI 1965/1776, and the County Court Rules 1981, SI 1981/1687, in matrimonial proceedings see PARA 1005.

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(4)(a) (as added: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(4)(a) (as substituted: see note 1).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(4)(b) (as added: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(4)(b) (as so substituted). Where an adjournment is ordered the arrested person may be released and: (1) unless the court directs otherwise, be dealt with within 14 days of the day on which he was arrested (Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(4)(b)(i) (as so added); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(4)(b)(i) (as so substituted)); and (2) be given not less than two days' notice of the adjourned hearing (Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(4)(b)(ii) (as so added); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(4)(b)(ii) (as so substituted)). These provisions do not prevent the issue of a notice under CCR Ord 29 r 1(4) or, as the case may be, the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(8) (see PARAS 996-997) if the arrested person is not dealt with within the period mentioned in the Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(4)(b)(i) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(4)(b)(i): Family Proceedings Rules 1991, SI 1991/1247, r 3.9A(4) (as so added); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(4) (as so substituted). As to the continuing application of specific provisions of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

4 Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(6), 3.35(8) (as added: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(18) (as substituted: see note 1).

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993. Provisions as to remand.

Where a court has power to remand a person¹ who has failed to comply with an occupation order, a non-molestation order or a forced marriage protection order the court² may:

- 1318 (1) remand that person in custody, that is to say, commit him to custody to be brought before the court at the end of the period of remand or at such earlier time as the court may require³; or
- 1319 (2) remand him on bail⁴.

Where a person is brought before the court after remand, the court may further remand him⁵. The court must not⁶ remand a person for a period exceeding eight clear days, except that:

- 1320 (a) if the court remands him on bail, it may remand him for a longer period if he and the other party consent⁷; and
- 1321 (b) if the court adjourns a case⁸, the court may remand him for the period of the adjournment⁹.

If the court is satisfied that any person who has been remanded under these provisions is unable, by reason of illness or accident, to appear or be brought before the court at the expiration of the period for which he was remanded, the court may, in his absence, remand him for a further time¹⁰. Where a person remanded on bail¹¹ is bound to appear before the court at any time and the court has no power to remand him¹², the court may in his absence enlarge his recognisance and those of any sureties for him to a later time; and the enlargement of his recognisance is to be deemed to be a further remand¹³.

1 le under the Family Law Act 1996 s 47 or s 63K: see PARAS 990-991.

2 For these purposes, 'court' means the High Court or a county court and includes: (1) in relation to the High Court, a judge of that court; and (2) in relation to a county court, a judge or district judge of that court: Family Law Act 1996 ss 47(11), 63K(2), (3)(a), Sch 5 para 1 (s 63K added by the Forced Marriage (Civil Protection) Act 2007 s 1).

3 Family Law Act 1996 Sch 5 para 2(1)(a). Where the court has power under these provisions to remand a person in custody, it may, if the remand is for a period not exceeding three clear days, commit him to the custody of a constable: Sch 5 para 2(6).

4 Family Law Act 1996 Sch 5 para 2(1)(b). A person may be remanded on bail either by taking from him a recognisance, with or without sureties, conditioned as provided below (Sch 5 para 2(1)(b)(i)) or by fixing the amount of the recognisances with a view to their being taken subsequently in accordance with Sch 5 para 4 (see below) and in the meantime committing the person to custody in accordance with head (1) in the text (Sch 5 para 2(1)(b)(ii)). The recognisance of the person making the application must be in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL410 (added by SI 1997/1893) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL410 (added by SI 1997/1894) and that of a surety in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL411 (added by SI 1997/1893) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL411 (added by SI 1997/1894): Family Proceedings Rules 1991, SI 1991/1247, rr 3.10(6)(a), 3.36(1) (r 3.10 substituted by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, r 3.36 added by SI 2008/2446);

Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(4)(a) (r 21 substituted by SI 1997/1894). A bail notice in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1, Form FL412 (added by SI 1997/1893) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL412 (added by SI 1997/1894) must be given to the respondent where he is remanded on bail: Family Proceedings Rules 1991, SI 1991/1247, r 3.10(6)(b) (as so substituted); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(4)(b) (as so substituted).

Where a person is remanded on bail, the court may direct that his recognisance be conditioned for his appearance either before that court at the end of the period of remand (Family Law Act 1996 Sch 5 para 2(3)(a)) or at every time and place to which during the course of the proceedings the hearing may from time to time be adjourned (Sch 5 para 2(3)(b)). Where a recognisance is conditioned for a person's appearance in accordance with Sch 5 para 2(1)(b), the fixing of any time for him next to appear is to be deemed to be a remand; but the court is not deprived by Sch 5 para 2(3) or (4) of power at any subsequent hearing to remand him afresh: Sch 5 para 2(4).

Where under Sch 5 para 2(1)(b)(ii) the court fixes the amount in which the principal and his sureties, if any, are to be bound, the recognisance may thereafter be taken by such person as may be prescribed by rules of court, and the same consequences follow as if it had been entered into before the court: Sch 5 para 4. The persons so prescribed for proceedings relating to an occupation order or a non-molestation order are: (1) a district judge; (2) a justice of the peace; (3) a justices' clerk; (4) a police officer of the rank of inspector or above or in charge of a police station; and (5) where the person making the application is in his custody, the governor or keeper of a prison, and the persons prescribed for proceedings relating to a forced marriage protection order are a district judge, a police officer of the rank of inspector or above or in charge of a police station and, where the person making the application is in his custody, the governor or keeper of a prison: Family Proceedings Rules 1991, SI 1991/1247, rr 3.10(4), 3.36(1), (4) (r 3.10 substituted by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, r 3.36 added by SI 2008/2446).

5 Family Law Act 1996 Sch 5 para 3.

6 Is subject to the Family Law Act 1996 Sch 5 para 3 (see the text and note 5).

7 Family Law Act 1996 Sch 5 para 2(5)(a).

8 Is under the Family Law Act 1996 s 48(1) or s 63L(1): see PARA 994.

9 Family Law Act 1996 s 63K(3)(b), Sch 5 para 2(5)(b) (s 63K as added: see note 2).

10 Family Law Act 1996 Sch 5 para 3(1). Notwithstanding anything in Sch 5 para 2(1) (see the text and notes 1-4), the power of the court under Sch 5 para 3(1) to remand a person on bail for a further time may be exercised by enlarging his recognisance and those of any sureties for him to a later time: Sch 5 para 3(2).

11 Is under the Family Law Act 1996 Sch 5 para 2: see the text and notes 1-4.

12 Is under the Family Law Act 1996 Sch 5 para 3(1): see the text and notes 8-10.

13 Family Law Act 1996 Sch 5 para 3(3).

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994. Remand for medical examination and report.

If the relevant judge or judicial authority¹ has reason to consider that a medical report will be required, any power to remand a person² may be exercised for the purpose of enabling a medical examination and report to be made³. If such powers are so exercised, the adjournment must not be for more than four weeks at a time unless the relevant judge or judicial authority remands the accused in custody⁴. If the relevant judge or judicial authority so remands the accused, the adjournment must not be for more than three weeks at a time⁵.

If there is reason to suspect that a person who has been arrested⁶ is suffering from a mental illness, impairment or disorder⁷ the relevant judge or judicial authority has the same power to make an order to remand an accused person for a report on his mental condition⁸ as the Crown Court has in the case of an accused person⁹.

1 As to the relevant judge and the relevant judicial authority see PARA 961.

2 Ie under the Family Law Act 1996 s 47(7)(b) or (10) or s 63K(1): see PARAS 990-991.

3 Family Law Act 1996 ss 48(1), 63L(1) (s 63L added by the Forced Marriage (Civil Protection) Act 2007 s 1).

4 Family Law Act 1996 ss 48(2), 63L(2) (s 63L as added: see note 3).

5 Family Law Act 1996 ss 48(3), 63L(3) (s 63L as added: see note 3).

6 Ie under the Family Law Act 1996 s 47(6) or s 63I(2) (see PARA 990) or under a warrant issued on an application under s 47(8) or s 63J(2) (see PARA 991).

7 Ie as defined: see the Family Law Act 1996 ss 48(4), 63L(3) (s 48(4) amended by the Mental Health Act 2007 Sch 1 para 20; Family Law Act 1996 s 63L as added (see note 3)).

8 Ie under the Mental Health Act 1983: see **MENTAL HEALTH**.

9 Family Law Act 1996 ss 48(4), 63L(5) (as amended and added: see notes 3, 7). See further the Family Proceedings Rules 1991, SI 1991/1247, rr 3.9A(7), (8), 3.35(1), (9) (r 3.9A added by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, r 3.35 added by SI 2008/2446).

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995. Applications for bail.

An application for bail made by an arrested person¹ may be made either orally or in writing² and where it is made in writing, it must contain:

- 1322 (1) the full name of the person making the application³;
- 1323 (2) the address of the place where the person making the application is detained at the time when the application is made⁴;
- 1324 (3) the address where the person making the application would reside if he were to be granted bail⁵;
- 1325 (4) the amount of the recognisance in which he would agree to be bound⁶; and
- 1326 (5) the grounds on which the application is made and, where a previous application has been refused, full particulars of any change in circumstances which has occurred since that refusal⁷,

and must be signed by the person making the application or by a person duly authorised by him in that behalf or, where the person making the application is a minor or is for any reason incapable of acting, by a litigation friend acting on his behalf⁸. Where the proceedings relate to an occupation order or a non-molestation order the person making the bail application must serve a copy of it on the applicant for the order; and where the proceedings relate to a forced marriage protection order the person making the bail application must serve a copy of it on the applicant for the order, the (or any other) respondent to the application for the order, the person being protected by the order (if different) and any other person named in the order⁹.

The person having custody of the person making the application must release the person making the application:

- 1327 (a) on receipt of a certificate signed by or on behalf of the district judge stating that the recognisance of any sureties required have been taken, or on being otherwise satisfied that all such recognisances have been taken¹⁰; and
- 1328 (b) on being satisfied that the person making the application has entered into his recognisance¹¹.

¹ ie a person arrested under a power of arrest attached to an occupation order or a forced marriage protection order under the Family Law Act 1996 s 47(2) or (3) or s 63H(2) or (4) (see PARA 989) or under a warrant of arrest issued on an application under s 47(8) or s 63J(2) (which applies also to non-molestation orders) (see PARA 991); Family Proceedings Rules 1991, SI 1991/1247, rr 3.10(1), 3.36(1), (2) (r 3.10 substituted by SI 1997/1893; Family Proceedings Rules 1991, SI 1991/1247, r 3.10(1) amended by SI 2007/1622; Family Proceedings Rules 1991, SI 1991/1247, r 3.36 added by SI 2008/2446); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(1) (r 21 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(1) amended by SI 2007/1628). Note that magistrates' courts do not exercise any powers relating to forced marriage protection orders.

² Family Proceedings Rules 1991, SI 1991/1247, r 3.10(1) (as substituted and amended: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(1) (as so substituted and amended).

- 3 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(2)(a) (as substituted: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(2)(a) (as so substituted).
- 4 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(2)(b) (as substituted: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(2)(b) (as so substituted).
- 5 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(2)(c) (as substituted: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(2)(c) (as so substituted).
- 6 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(2)(d) (as substituted: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(2)(d) (as so substituted).
- 7 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(2)(e) (as substituted: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(2)(e) (as so substituted).
- 8 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(3) (as substituted: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(3) (as so substituted).
- 9 Family Proceedings Rules 1991, SI 1991/1247, rr 3.10(3), 3.36(3) (as substituted and added: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(3) (as so substituted). The recognisance of the person making the application must be in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL410 (added by SI 1997/1893) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL410 (added by SI 1997/1894) and that of a surety in the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form FL411 (added by SI 1997/1893) or the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL411 (added by SI 1997/1894): Family Proceedings Rules 1991, SI 1991/1247, r 3.10(6)(a) (as substituted: see note 1); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 21(4)(a) (as so substituted).
- 10 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(5)(a) (as substituted: see note 1).
- 11 Family Proceedings Rules 1991, SI 1991/1247, r 3.10(5)(b) (as substituted: see note 1).

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996. Enforcement of occupation orders and non-molestation orders by committal.

An occupation order or a non-molestation order is not to be enforced by committal order unless:

- 1329 (1) a copy of the order in the prescribed form¹ has been served personally on the respondent²; and
- 1330 (2) where the order requires the respondent to do an act, the copy has been so served before the expiration of the time within which he was required to do the act and was accompanied by a copy of any order, made between the date of the order and the date of service, fixing that time³.

If the order made is, or includes, a non-molestation order, or where the order is an occupation order and the court so directs, the designated officer for the court must, at the time when the order is drawn up, issue a copy of the order, indorsed with or incorporating a notice as to the consequences of disobedience, for such service⁴.

If the respondent fails to obey the order, the designated officer for the court must, at the request of the applicant, issue a notice in the prescribed form⁵ warning the respondent that an application will be made for him to be committed and the notice must be served on him personally⁶. The request for issue of the notice is to be treated as a complaint and must:

- 1331 (a) identify the provisions of the order which it is alleged have been disobeyed⁷;
- 1332 (b) list the ways in which it is alleged that the order has been disobeyed⁸; and
- 1333 (c) be supported by a statement which is signed and is declared to be true and which states the grounds on which the application is made⁹,

and, unless service is dispensed with¹⁰, a copy of the statement must be served with the notice¹¹.

If a committal order¹² is made, it must include provision for the issue of a warrant of committal¹³ and, unless the court otherwise orders, a copy of the order must be served personally on the person to be committed either before or at the time of the execution of the warrant, or the order for the issue of the warrant may be served on the person to be committed at any time within 36 hours after the execution of the warrant¹⁴.

1 For the prescribed form of copy of the order see the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL404 (added by SI 1997/1893) or Form FL404a (added by SI 2007/1622), as the case may be.

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(5), (6)(a) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(6)(a) amended by SI 2007/1628). An order requiring a person to abstain from doing an act may be enforced by committal order notwithstanding that a copy of the order has not been served personally if the court is satisfied that, pending such service, the respondent had notice thereof either by being present when

the order was made or by being notified of the terms of the order, whether by telephone or otherwise: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(11) (as so substituted). The court may dispense with service of a copy of the order under r 20(6) if the court thinks it just to do so: r 20(12) (as so substituted). Where service of a notice to show cause is so dispensed with and a committal notice is made, the court may of its own motion fix a date and time when the person to be committed is to be brought before the court: r 20(13) (as so substituted).

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(6)(b) (as substituted: see note 2).

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(7) (as substituted (see note 2); amended by SI 2005/617).

5 For the prescribed form of notice see the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1, Form FL418 (added by SI 1997/1894).

6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(8) (as substituted (see note 2); amended by SI 2005/617). The court may dispense with service of a notice if the court thinks it just to do so: r 20(12) (as so substituted). Where service of a notice to show cause is so dispensed with and a committal notice is made, the court may of its own motion fix a date and time when the person to be committed is to be brought before the court: r 20(13) (as so substituted).

Where a transfer direction given by the Secretary of State under the Mental Health Act 1983 s 48 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 536) is in force in respect of a person remanded in custody by the court, the designated officer for the court must notify the governor of the prison to which that person was remanded, and the hospital where he is detained, of any committal hearing which that person is required to attend; and the designated officer for the court must give notice in writing to the hospital where that person is detained of any further remand: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(20) (as substituted (see note 2); amended by SI 2005/617).

7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9)(a) (as substituted: see note 2).

8 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9)(b) (as substituted: see note 2).

9 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9)(c) (as substituted: see note 2).

10 *Ie* under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(12) (see note 6).

11 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9) (as substituted: see note 2).

12 *Ie* an order in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL419 (added by SI 1997/1894).

13 *Ie* in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL420 (added by SI 1997/1894).

14 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(10) (as substituted: see note 2). The court by which an order of committal is made may by order direct that the execution of the order of committal is to be suspended for such period or on such terms or conditions as it may specify: r 20(16) (as so substituted). Where execution of an order of committal is so suspended, the applicant for the order of committal must, unless the court otherwise directs, serve on the person against whom it was made a notice informing him of the making and terms of the order: r 20(17) (as so substituted).

Where a person in custody under a warrant or order desires to apply to the court for a discharge, he must make his application in writing attested by the governor of the prison showing that he has purged or is desirous of purging his contempt; and the designated officer for the court must, not less than one day before the application is heard, service notice of it on the party, if any, at whose instance the warrant or order was issued: r 20(15) (as so substituted; amended by SI 2005/617). An order discharging the respondent from custody must be in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL421 (added by SI 1997/1894): Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(21) (as so substituted).

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997. Enforcement of undertakings by committal.

For the purposes of the enforcement of an undertaking¹ a copy of the appropriate form² recording the undertaking must be delivered by the designated officer for the court to the party giving the undertaking:

- 1334 (1) by handing a copy of the document to him before he leaves the court building³;
- 1335 (2) where his place of residence is known, by posting a copy to him at his place of residence⁴; or
- 1336 (3) through his solicitor⁵,

and, where delivery cannot be effected in this way the designated officer must deliver a copy of the document to the party for whose benefit the undertaking is given and that party must cause it to be served personally as soon as is practicable⁶.

If the undertaking relates to a non-molestation order, or where the undertaking relates to an occupation order and the court so directs, the designated officer for the court must, at the time when the undertaking is made, issue a copy of it, indorsed with or incorporating a notice as to the consequences of disobedience, for such service⁷.

If the respondent breaches the undertaking the designated officer for the court must, at the request of the applicant, issue a notice in the prescribed form⁸ warning the respondent that an application will be made for him to be committed and the notice must be served on him personally⁹. The request for issue of the notice is to be treated as a complaint and must:

- 1337 (a) identify the provisions of the undertaking which it is alleged have been broken¹⁰;
- 1338 (b) list the ways in which it is alleged that the undertaking has been broken¹¹; and
- 1339 (c) be supported by a statement which is signed and is declared to be true and which states the grounds on which the application is made¹²,

and, unless service is dispensed with¹³, a copy of the statement must be served with the notice¹⁴.

If a committal order¹⁵ is made, it must include provision for the issue of a warrant of committal¹⁶ and, unless the court otherwise orders, a copy of the order must be served personally on the person to be committed either before or at the time of the execution of the warrant or the order for the issue of the warrant may be served on the person to be committed at any time within 36 hours after the execution of the warrant¹⁷.

¹ As to undertakings see PARA 291 (undertakings relating to occupation orders) and PARA 720 (undertakings relating to non-molestation orders).

² I.e. the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL422 (added by SI 1997/1894).

- 3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(6)(a), (14)(a) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(6)(a) amended by SI 2007/1628; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(14) amended by SI 2005/617).
 - 4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(6)(b), (14)(a) (as substituted and amended: see note 3).
 - 5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(6)(c), (14)(a) (as substituted and amended: see note 3).
 - 6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(6), (14)(a) (as substituted and amended: see note 3).
 - 7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(7) (as substituted (see note 3); amended by SI 2005/617).
 - 8 For the prescribed form of notice see the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1, Form FL418 (added by SI 1997/1894).
 - 9 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(8) (as substituted (see note 3); amended by SI 2005/617). The court may dispense with service of a notice if the court thinks it just to do so: r 20(12), (14)(b) (as so substituted). Where service of a notice to show cause is so dispensed with and a committal notice is made, the court may of its own motion fix a date and time when the person to be committed is to be brought before the court: r 20(13) (as so substituted).
 - 10 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9)(a) (as substituted: see note 3).
 - 11 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9)(b) (as substituted: see note 3).
 - 12 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9)(c) (as substituted: see note 3).
 - 13 Ie under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(12) (see PARA 996 note 6).
 - 14 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(9) (as substituted: see note 3).
 - 15 Ie an order in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL419 (added by SI 1997/1894).
 - 16 Ie in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL420 (added by SI 1997/1894).
 - 17 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(10) (as substituted: see note 3). The court by which an order of committal is made may by order direct that the execution of the order of committal is to be suspended for such period or on such terms or conditions as it may specify: r 20(16) (as so substituted). Where execution of an order of committal is so suspended, the applicant for the order of committal must, unless the court otherwise directs, serve on the person against whom it was made a notice informing him of the making and terms of the order: r 20(17) (as so substituted).
- Where a person in custody under a warrant or order desires to apply to the court for a discharge, he must make his application in writing attested by the governor of the prison showing that he has purged or is desirous of purging his contempt; and the designated officer for the court must, not less than one day before the application is heard, service notice of it on the party, if any, at whose instance the warrant or order was issued: r 20(15) (as so substituted; amended by SI 2005/617). An order discharging the respondent from custody must be in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL421 (added by SI 1997/1894); Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(21) (as so substituted).

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998. Power of magistrates' court to suspend execution of committal order.

If a magistrates' court has power¹ to commit a person to custody for breach of an occupation order or a non-molestation order², the court may by order direct that the execution of the order of committal is to be suspended for such period or on such terms and conditions as it may specify³.

1 Ie under the Magistrates' Courts Act 1980 s 63(3): see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 6.

2 Ie an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

3 Family Law Act 1996 s 50(1), (2)(a). As to procedure on dealing with contempt before a magistrates' court generally see *Practice Direction (Magistrates' courts: contempt* (2001) Times, 11 June.

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999. Power of magistrates' court to order hospital admission or guardianship.

A magistrates' court has the same power to make a hospital order, a guardianship order or an interim hospital order¹ in the case of a person suffering from mental disorder² who could otherwise be committed to custody for breach of an occupation order or a non-molestation order³ as a magistrates' court has⁴ in the case of a person convicted of an offence punishable on summary conviction with imprisonment⁵.

1 le under the Mental Health Act 1983 ss 37, 38: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 491.

2 le a mental disorder within the meaning of the Mental Health Act 1983 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402); Family Law Act 1996 s 51(1) (amended by the Mental Health Act 2007 Sch 1 para 20(1), (3)).

3 le an order under the Family Law Act 1996 Pt IV (ss 30-63): see PARA 285 et seq (occupation orders) and PARA 716 et seq (non-molestation orders).

4 le under the Mental Health Act 1980 s 37 or, as the case may be, s 38.

5 Family Law Act 1996 ss 50(2)(a), 51(1), (2) (s 51(1) amended: see note 2). Where the magistrates' court makes a hospital order in the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Sch 1 Form FL413 (added by SI 1997/1894) or a guardianship order in Sch 1 Form FL414 (added by SI 1997/1894) under the Mental Health Act 1983, the designated officer for the court must send to the hospital any information which will be of assistance in dealing with the patient and inform the applicant when the respondent is being transferred to hospital: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(19) (r 20 substituted by SI 1997/1894; Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 20(19) amended by SI 2005/617).

Where an appeal is brought against the making of a hospital order or a guardianship order a copy of any written evidence considered by the magistrates' court under the Mental Health Act 1983 s 37(2)(a) (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 491) must be sent by the designated officer to the registry of the High Court in which the documents relating to the appeal are duly filed in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 8.1A(3) (see PARA 986): r 8.1A(4) (added by SI 1997/1893; amended by SI 2005/617).

UPDATE

999 Power of magistrates' court to order hospital admission or guardianship

NOTE 5--SI 1991/1247 r 8.1A revoked: SI 2009/636. See now SI 1991/1247 rr 8.A1, 8.2, 8.2A-8.2H; and PARA 900.

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(6) DECLARATIONS OF MARITAL OR CIVIL PARTNERSHIP STATUS

1000. Domicile and residence of parties.

A court has jurisdiction to entertain an application for a declaration of marital or civil partnership status¹ if, and only if, either of the parties to the marriage or civil partnership to which the application relates:

- 1340 (1) is domiciled² in England and Wales on the date of the application³;
- 1341 (2) has been habitually resident⁴ in England and Wales throughout the period of one year ending with that date⁵; or
- 1342 (3) died before that date and either was at death domiciled in England and Wales or had been habitually resident in England and Wales throughout the period of one year ending with the date of death⁶.

The court also has jurisdiction to entertain an application in relation to the validity of a civil partnership if the two people concerned registered as civil partners of each other in England and Wales and it appears to the court to be in the interests of justice to assume jurisdiction in the case⁷.

In relation to a marriage, where an application for a declaration of validity is made to a court by any person other than a party to the marriage to which the application relates, the court⁸ must refuse to hear the application if it considers that the application does not have a sufficient interest in the determination of that application⁹.

Provision is also made in connection with the recognition of divorces, dissolutions annulments and separations obtained outside England and Wales¹⁰.

1 le under the Family Law Act 1986 s 55(1) or the Civil Partnership Act 2004 s 58: see PARA 421.

2 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

3 Family Law Act 1986 s 55(2)(a); Civil Partnership Act 2004 s 224(a)(i).

4 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59.

5 Family Law Act 1986 s 55(2)(b); Civil Partnership Act 2004 s 224(a)(ii).

6 Family Law Act 1986 s 55(2)(c); Civil Partnership Act 2004 s 224(a)(iii).

7 Civil Partnership Act 2004 s 224(b).

8 As to the meaning of 'court' see PARA 346 note 2.

9 Family Law Act 1986 s 55(3) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 para 4(b)).

10 See PARA 20.

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1001. Contents for petitions for declarations.

Unless otherwise directed, a petition by which proceedings are begun for a declaration of marital or civil partnership status¹ must state:

- 1343 (1) the names of the parties to the marriage or civil partnership to which the application relates and the residential address of each of them at the date of the presentation of the petition²;
- 1344 (2) the place and date of any ceremony of marriage to which the application relates or the place at, and the date on which, the civil partnership was registered³;
- 1345 (3) the grounds on which the application is made and all other material facts alleged by the petitioner to justify the making of the declaration⁴;
- 1346 (4) whether there have been or are any continuing proceedings⁵ in any court, tribunal or authority in England and Wales or elsewhere between the parties which relate to, or are capable of affecting, the validity or subsistence of the marriage or civil partnership or the divorce, dissolution, annulment or legal separation to which the application relates, or which relate to the matrimonial or civil partnership status of either of the parties⁶;
- 1347 (5) where it is alleged that the court has jurisdiction based on domicile⁷, which of the parties to the marriage or civil partnership to which the application relates is domiciled in England and Wales on the date of the presentation of the petition, or died before that date and was at death domiciled in England and Wales⁸;
- 1348 (6) where it is alleged that the court has jurisdiction based on habitual residence⁹, which of the parties to the marriage or civil partnership to which the application relates has been habitually resident in England and Wales, or died before that date and had been habitually resident in England and Wales throughout the period of one year ending with the date of death¹⁰;
- 1349 (7) where the petitioner was not a party to the marriage or civil partnership to which the application relates, particulars of his interest in the determination of the application¹¹; and
- 1350 (8) where the proceedings are for a declaration that the validity of a divorce, dissolution, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage or civil partnership either is or is not entitled to recognition in England and Wales, the date and place of the divorce, dissolution, annulment or legal separation¹².

There must be annexed to the petition a copy of the certificate of any marriage or civil partnership to which the application relates or, as the case may be, a certified copy of any decree of divorce or annulment or order for dissolution, nullity or legal separation to which the application relates¹³. A petition must be supported by an affidavit by the petitioner verifying the petition and giving particulars of every person whose interest may be affected by the proceedings and his relationship to the petitioner¹⁴.

¹ See under the Family Law Act 1986 s 55 or the Civil Partnership Act 2004 s 58: see PARAS 421, 1000. Any declaration as to marital or civil partnership status, and any application for such a declaration, must be in the form prescribed by rules of court: Family Law Act 1986 s 60(1); Civil Partnership Act 2004 s 61(1). For the

prescribed form of declaration see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form M29 and Form M29A (as added by SI 2005/2922).

Rules of court may make provision:

- 254 (1) as to the information required to be given by any applicant for such a declaration (Family Law Act 1986 s 60(2)(a); Civil Partnership Act 2004 s 61(2)(a)); and
- 255 (2) requiring notice of an application for such a declaration to be served on the Attorney General and on persons who may be affected by any declaration applied for (Family Law Act 1986 s 60(2)(c) (amended by the Family Law Reform Act 1987 Sch 2 para 96); Civil Partnership Act 2004 s 61(2)(b)).

The rules of court so made are the Family Proceedings Rules 1991, SI 1991/1247, rr 3.12, 3.12A, 3.16: see the text and notes 2-13; and PARAS 1001, 1003. Rules of court in relation to marital status may also make provision as to the persons who are to be parties to proceedings on such an application: Family Law Act 1986 s 60(2)(b).

2 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(a), 3.12A(1)(a) (rr 3.12(1)(d), 3.16(1) amended, r 3.12A added, by SI 2005/2922). The parties to the marriage or civil partnership in respect of which a declaration is sought are to be petitioner and respondent respectively to the application, unless a third party is applying for a declaration, in which case he is to be the petitioner and the parties to the marriage or civil partnership are to be respondents to the application: Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(5), 3.12A(6) (as so added).

3 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(b), 3.12A(1)(b) (as added: see note 2).

4 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(c), 3.12A(1)(c) (as added: see note 2).

5 Such proceedings include any which are instituted otherwise than in a court of law in any country outside England and Wales, if they are instituted before a tribunal or other authority having power under the law having effect there to determine questions of status, and are to be treated as continuing if they have begun and have not been finally disposed of: Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(d), 3.12A(2) (as added: see note 2).

6 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(d), 3.12A(1)(d), (e) (as amended and added: see note 2). In relation to any such proceedings the petition must also state:

- 256 (1) the nature, and either the outcome or present state of those proceedings (rr 3.12(1)(d)(i), 3.12A(1)(e)(ii) (as so amended and added));
- 257 (2) the court, tribunal or authority before which they were begun (rr 3.12(1)(d)(ii), 3.12A(1)(e)(ii) (as so added));
- 258 (3) the date when they were begun (rr 3.12(1)(d)(iii), 3.12A(1)(e)(iii) (as so added));
- 259 (4) the names of the parties to them (rr 3.12(1)(d)(iv), 3.12A(1)(e)(iv) (as so added));
- 260 (5) the date or expected date of the trial (rr 3.12(1)(d)(v), 3.12A(1)(e)(v) (as so added)); and
- 261 (6) any other facts relevant to the question whether the petition should be stayed under the Domicile and Matrimonial Proceedings Act 1973 Sch 1 (see PARA 840 et seq) or the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921 (see PARA 840 et seq) (Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(d)(vi), 3.12A(1)(e)(vi) (as so added)).

7 As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

8 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(e), 3.12A(1)(f) (as added: see note 2).

9 As to habitual residence see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 59. Where the jurisdiction of the court to entertain a petition is based on habitual residence, the petition must include a statement of the addresses and places of residence of the person so resident and the length of residence at each place either during the period of one year ending with the date of the presentation of the petition or, if that person is dead, throughout the period of one year ending with the date of death: Family Proceedings Rules 1991, SI 1991/1247, r 3.16(2).

10 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(f), 3.12A(1)(g) (as added: see note 2).

11 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(1)(g), 3.12A(1)(h) (as added: see note 2).

12 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(2), 3.12A(3) (as added: see note 2).

13 Family Proceedings Rules 1991, SI 1991/1247, rr 3.12(3), 3.12A(4) (as added: see note 2). Where a copy so produced is not in English it must, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit: rr 3.12(4), 3.12A(5) (as so added).

14 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(1) (as amended: see note 2). If the petitioner is under the age of 18 the affidavit must, unless otherwise directed, be made by his litigation friend: r 3.16(1) proviso (as so amended). Such an affidavit may contain statements of information or belief with the sources and grounds thereof: r 3.16(3).

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1002. Intervention by the Attorney General.

On an application to a court for a declaration as to marital or civil partnership status¹, the court² may at any stage of the proceedings of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Attorney General³.

The Attorney General, whether or not he is sent papers in relation to an application to a court for a declaration as to marital or civil partnership status may:

- 1351 (1) intervene in the proceedings on that application in such manner as he thinks necessary or expedient⁴; and
- 1352 (2) argue before the court any question in relation to the application which the court considers it necessary to have fully argued⁵.

Where any costs are incurred by the Attorney General in connection with any such application to a court, the court may make such order as it considers just as to the payment of those costs by parties to the proceedings⁶.

1 le under the Family Law Act 1986 s 55 or the Civil Partnership Act 2004 s 58: see PARA 421.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Family Law Act 1986 s 59(1) (s 59(1)-(3) amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 para 8); Civil Partnership Act 2004 s 60(1).

4 Family Law Act 1986 s 59(2)(a) (as amended: see note 3); Civil Partnership Act 2004 s 60(2)(a).

5 Family Law Act 1986 s 59(2)(b) (as amended: see note 3); Civil Partnership Act 2004 s 60(2)(b).

6 Family Law Act 1986 s 59(3) (as amended: see note 3); Civil Partnership Act 2004 s 60(3).

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1003. Procedure on petition.

A copy of a petition for a declaration as to marital or civil partnership status¹ and every document accompanying it must be sent by the petitioner to the Attorney General at least one month before the petition is filed; and it is not necessary thereafter to serve these documents on him². If the Attorney General has notified the court that he wishes to intervene in the proceedings³, the proper officer⁴ must send to him a copy of any answer⁵.

When all answers to the petition have been filed, the petitioner must issue and serve on all respondents to the application a request for directions as to any other persons who should be made respondents to the petition or given notice of the proceedings⁶. When so giving directions, the court must consider whether it is desirable that the Attorney General should argue before it any question relating to the proceedings, and, if it does so consider and the Attorney General agrees to argue the question, the Attorney General need not file an answer and the court must give directions requiring him to serve on all parties to the proceedings a summary of his argument⁷. Persons given notice of proceedings pursuant to such directions are entitled, within 21 days after service of the notice on them, to apply to the court to be joined as parties⁸. The Attorney General may file an answer to the petition within 21 days after directions have been so given⁹; and no directions for trial are to be given until the relevant period¹⁰ has expired¹¹.

In deciding whether it is necessary or expedient to intervene in the proceedings, the Attorney General may have a search made for, and may inspect and bespeak a copy of, any document filed or lodged in the court offices which relates to any other family proceedings referred to in the proceedings¹².

The court¹³ may direct that the whole or any part of the proceedings be heard in private; and an application for such a direction must be heard in private unless the court otherwise directs¹⁴.

1 See PARA 1001.

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(4) (amended by SI 2001/821).

3 See PARA 1002.

4 As to the meaning of 'proper officer' see PARA 461 note 5.

5 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(5) (substituted by SI 2001/821).

6 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(6).

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(7) (amended by SI 2001/821).

8 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(8).

9 I.e. under the Family Proceedings Rules 1991, SI 1991/1247, r 3.16(7) (see the text and note 7).

10 I.e. the period referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 3.16(8) (see the text and note 8).

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(9).

- 12 Family Proceedings Rules 1991, SI 1991/1247, r 3.16(10).
- 13 As to the meaning of 'court' see PARA 346 note 2.
- 14 Family Law Act 1986 s 60(4); Civil Partnership Act 2004 s 61(4), (5).

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1004. Making and effect of declarations.

Where, on an application to a court for a declaration as to marital or civil partnership status¹ the truth of the proposition to be declared is proved to the satisfaction of the court², the court must make the declaration unless to do so would manifestly be contrary to public policy³. On the dismissal of the application, a court does not have power to make any declaration for which an application has not been made⁴.

No declaration as to marital or civil partnership status may be made otherwise than under the relevant provisions⁵ by any court⁶; nor is any declaration to be made⁷ by any court that a marriage or civil partnership was at its inception void⁸ (although nothing in these provisions affects the powers of the court to grant a decree of nullity of marriage or a nullity order in respect of a civil partnership⁹).

No proceedings for a declaration as to marital or civil partnership status affect any final judgment or decree already pronounced or any final judgment or order already made or made by any court of competent jurisdiction¹⁰.

1 Ie under the Family Law Act 1986 s 55 or the Civil Partnership Act 2004 s 59: see PARA 287.

2 As to the meaning of 'court' see PARA 346 note 2.

3 Family Law Act 1986 s 58(1) (s 58(1), (3) amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 7); Civil Partnership Act 2004 s 59(1). For the prescribed form of declaration see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Forms M29, M29A (SI 2005/2922). Any declaration so made is binding on Her Majesty and all other persons: Family Law Act 1986 s 58(2); Civil Partnership Act 2004 s 59(2).

4 Family Law Act 1986 s 58(3) (as amended: see note 3); Civil Partnership Act 2004 s 59(3).

5 Ie under the Family Law Act 1986 Pt III (ss 55-62) or the Civil Partnership Act 2004 s 58.

6 Family Law Act 1986 s 58(4); Civil Partnership Act 2004 s 59(4).

7 Ie whether under the Family Law Act 1986 Pt III or the Civil Partnership Act 2004 s 58 or otherwise.

8 Family Law Act 1986 s 58(5)(a); Civil Partnership Act 2004 s 59(5).

9 Family Law Act 1986 s 58(6); Civil Partnership Act 2004 s 59(6).

10 Family Law Act 1986 s 60(3); Civil Partnership Act 2004 s 61(3).

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(7) ADMINISTRATIVE PROVISIONS

(i) Rules of Court

1005. Rules of procedure in the High Court and magistrates' courts.

Until a day to be appointed¹, the power to make rules of court for the purpose of family proceedings² in the High Court or county courts is exercisable by a committee known as the Family Proceedings Rule Committee³ which is to consist of:

- 1353 (1) the President of the Family Division⁴;
- 1354 (2) one puisne judge attached to that Division⁵;
- 1355 (3) one district judge⁶ of the Principal Registry of that Division⁷;
- 1356 (4) two circuit judges⁸;
- 1357 (5) one district judge appointed under the County Courts Act 1984⁹;
- 1358 (6) two persons who have a Supreme Court qualification¹⁰; and
- 1359 (7) two persons who have been granted by an authorised body¹¹ the right to conduct litigation in relation to all proceedings in the Supreme Court¹².

Such rules:

- 1360 (a) may make different provision for different cases or different areas, including different provision for a specific court, or for specific proceedings, or a specific jurisdiction, specified in the rules¹³;
- 1361 (b) may modify or exclude the application of any provision of the County Courts Act 1984¹⁴;
- 1362 (c) may authorise for the purposes of the law relating to contempt of court, the publication in such circumstances as may be specified of information relating to family proceedings held in private¹⁵; and
- 1363 (d) may provide for the enforcement in the High Court of orders made in a divorce county court or a civil partnership proceedings county court¹⁶.

Subject to the provisions of the Family Proceedings Rules¹⁷ and of any enactment, the County Court Rules¹⁸ and the Rules of the Supreme Court¹⁹ continue to apply, in place of the Civil Procedure Rules²⁰ and with the necessary modifications, to family proceedings in a county court and the High Court respectively²¹.

At the date at which this volume states the law family proceedings in the magistrates' courts are governed by the Family Proceedings Courts Rules²².

As from a day to be appointed²³ family proceedings in the High Court, county courts and magistrates' courts are to be governed by a unified set of rules to be called 'Family Procedure Rules'²⁴, to be made by a committee known as the Family Procedure Rule Committee²⁵. At the date at which this volume states the law no date had been appointed for these purposes.

1 The Matrimonial and Family Proceedings Act 1984 s 40 (see the text and notes 3-15) is repealed by the Courts Act 2003 Sch 8 para 278(1), Sch 10. At the date at which this volume states the law no such day had been appointed.

2 As to the meaning of 'family proceedings' see **PARA 737** note 2.

3 Family proceedings rules must be signed by a majority of the members of the Family Proceedings Rule Committee and submitted to the Lord Chancellor who may allow or disallow rules so made: Matrimonial and Family Proceedings Act 1984 s 40A(1), (2), (6) (ss 40A, 40B added by the Constitutional Reform Act 2005 Sch 4 para 381). If the Lord Chancellor disallows rules, he must give the Committee written reasons for doing so: Matrimonial and Family Proceedings Act 1984 s 40A(3) (as so added). Rules so made and allowed by the Lord Chancellor come into force on such day as the Lord Chancellor directs and are to be contained in a statutory instrument to which the Statutory Instruments Act 1946 applies as if the instrument contained rules made by a Minister of the Crown: Matrimonial and Family Proceedings Act 1984 s 40A(4) (as so added). If the Lord Chancellor gives the Family Proceedings Rule Committee written notice that he thinks it is expedient for Family Proceedings rules to include provision that would achieve a purpose specified in the notice the Committee must make such Family Proceedings rules as it considers necessary to achieve the specified purpose: s 40B(1), (2) (as so added). Those rules must be made within a reasonable period after the Lord Chancellor gives notice to the Committee and made in accordance with s 40A: s 40B(3) (as so added).

The Matrimonial and Family Proceedings Act 1984 s 40(1) (see the text and notes 4-15) is without prejudice to the powers of the following authorities to make rules in respect of the matters referred to below and rules in respect of those matters are to continue to be made by those authorities and are not to be made by the authority constituted by s 40(1): s 40(2) (prospectively repealed: see note 1). The rules and rule-making authorities are:

262 (1) adoption rules made under the Adoption Act 1958 s 9(3) (repealed), the Adoption Act 1968 s 12(1) (repealed), the Adoption Act 1976 s 66(1) or, as from a day to be appointed, the Adoption and Children Act 2002 s 141(1) (Matrimonial and Family Proceedings Act 1984 s 40(2)(a) (amended by the Constitutional Reform Act 2005 Sch 1 para 18(a), Sch 18 Pt 1; prospectively amended by the Adoption and Children Act 2002 Sch 3 para 44, Sch 5; and as so prospectively repealed);

263 (2) probate rules made under the Supreme Court Act 1981 s 127 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) **PARA 81**) (Matrimonial and Family Proceedings Act 1984 s 40(2)(b) (amended by the Constitutional Reform Act 2005 Sch 1 para 18(b), Sch 18 Pt 1; prospectively amended by Sch 11 para 1(2); and as so prospectively repealed)); and

264 (3) Family Procedure Rules made by the Family Procedure Rule Committee under the Courts Act 2003 s 75 (see **COURTS**) in respect of:

4. (a) all causes and matters (whether at first instance or appeal) relating to adoption including the exercise of the inherent jurisdiction of the High Court with respect to minors (Matrimonial and Family Proceedings Act 1984 s 40(2)(c)(i) (added by SI 2005/2744; and as so prospectively repealed)); and

66

5. (b) all proceedings for the purpose of enforcing an order made in proceedings described in above (Matrimonial and Family Proceedings Act 1984 s 40(2)(c)(ii) (as so added and prospectively repealed)).

67

In exercise of the power so conferred the Family Proceedings Rules 1991, SI 1991/1247, and the Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005, SI 2005/2921, have been made.

4 Matrimonial and Family Proceedings Act 1984 s 40(1)(a) (s 40(1) amended by the Constitutional Reform Act 2005 Sch 4 para 380(2); Matrimonial and Family Proceedings Act 1984 s 40 prospectively repealed (see note 1)). As to the President of the Family Division see **COURTS** vol 10 (Reissue) **PARA 515**; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA 303**.

5 Matrimonial and Family Proceedings Act 1984 s 40(1)(b) (prospectively repealed: see note 1). The Lord Chief Justice must appoint this person after consulting the Lord Chancellor, and the appointment is for such period as the Lord Chancellor determines after consulting the Lord Chief Justice: Matrimonial and Family Proceedings Act 1984 s 40(3), (3ZA), (3ZC) (s 40(3) substituted, s 40(3ZA)-(3ZC) added, by the Constitutional Reform Act 2005 Sch 4 para 380(3); Matrimonial and Family Proceedings Act 1984 s 40 as so prospectively repealed).

6 As to district judges see **COURTS** vol 10 (Reissue) **PARA 661**.

7 Matrimonial and Family Proceedings Act 1984 s 40(1)(c) (s 40(1)(c)-(g) substituted by the Courts and Legal Services Act 1990 Sch 18 para 50; Matrimonial and Family Proceedings Act 1984 s 40 prospectively repealed (see note 1)). The Lord Chief Justice must appoint this person after consulting the Lord Chancellor, and the appointment is for such period as the Lord Chancellor determines after consulting the Lord Chief Justice: Matrimonial and Family Proceedings Act 1984 s 40(3), (3ZA), (3ZC) (as substituted, added and prospectively repealed: see notes 1, 5). As to the Principal Registry of the Family Division see PARA 737 note 3.

8 Matrimonial and Family Proceedings Act 1984 s 40(1)(d) (as substituted and prospectively repealed: see notes 1, 7). The Lord Chief Justice must appoint this person after consulting the Lord Chancellor, and the appointment is for such period as the Lord Chancellor determines after consulting the Lord Chief Justice: Matrimonial and Family Proceedings Act 1984 s 40(3), (3ZA), (3ZC) (as substituted, added and prospectively repealed: see notes 1, 5).

9 Matrimonial and Family Proceedings Act 1984 s 40(1)(e) (as substituted and prospectively repealed: see notes 1, 7). The Lord Chief Justice must appoint this person after consulting the Lord Chancellor, and the appointment is for such period as the Lord Chancellor determines after consulting the Lord Chief Justice: Matrimonial and Family Proceedings Act 1984 s 40(3), (3ZA), (3ZC) (as substituted, added and prospectively repealed: see notes 1, 5).

10 Matrimonial and Family Proceedings Act 1984 s 40(1)(f) (as substituted and prospectively repealed: see notes 1, 7). As to the meaning of 'Supreme Court qualification' see the Courts and Legal Services Act 1990 s 71; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 742. As from a day to be appointed the Supreme Court is renamed the Senior Courts, and the Matrimonial and Family Proceedings Act 1984 s 40(1)(f) is accordingly amended by the Constitutional Reform Act 2005 Sch 11 para 4(3). At the date at which this volume states the law no such day had been appointed.

The Lord Chancellor must appoint these persons after consulting the Lord Chief Justice, and the term of such appointment is for such period as the Lord Chancellor determines after consulting the Lord Chief Justice: Matrimonial and Family Proceedings Act 1984 s 40(3), (3ZB), (3ZC) (as substituted, added and prospectively repealed: see notes 1, 5).

11 *Ie* under the Courts and Legal Services Act 1990 Pt II (ss 17-70): see **LEGAL PROFESSIONS** vol 65 (2008) PARA 329 *et seq*.

12 Matrimonial and Family Proceedings Act 1984 s 40(1)(g) (as substituted and prospectively repealed: see notes 1, 7). As from a day to be appointed the Supreme Court is renamed the Senior Courts, and the Matrimonial and Family Proceedings Act 1984 s 40(1)(g) is accordingly amended by the Constitutional Reform Act 2005 Sch 11 para 4(3). At the date at which this volume states the law no such day had been appointed.

The Lord Chancellor must appoint these persons after consulting the Lord Chief Justice, and the term of such appointment is for such period as the Lord Chancellor determines after consulting the Lord Chief Justice: Matrimonial and Family Proceedings Act 1984 s 40(3), (3ZB), (3ZC) (as substituted, added and prospectively repealed: see notes 1, 5).

13 Matrimonial and Family Proceedings Act 1984 s 40(3A) (added by the Civil Procedure Act 1997 Sch 2 para 3; prospectively repealed (see note 1)).

14 Matrimonial and Family Proceedings Act 1984 s 40(4)(a) (s 40(4) amended by the Civil Procedure Act 1997 Sch 2 para 3(b); prospectively repealed (see note 1)). As to the jurisdiction of county courts to award any relief which could have been awarded by the High Court where proceedings are transferred to a county court see the Matrimonial and Family Proceedings Act 1984 s 38(5); and PARA 745.

15 Matrimonial and Family Proceedings Act 1984 s 40(4)(aa) (added by the Children Act 2004 s 62(5); prospectively repealed (see note 1)).

16 Matrimonial and Family Proceedings Act 1984 s 40(4)(b) (amended by the Civil Partnership Act 2004 Sch 27 para 95; prospectively repealed (see note 1)). As to divorce and civil partnership proceedings county courts see PARA 732.

17 *Ie* the Family Proceedings Rules 1991, SI 1991/1247 (see note 3).

18 *Ie* the County Court Rules 1981, SI 1981/1687.

19 See the Rules of the Supreme Court (Revision) 1965, SI 1965/1776.

20 In general, the Civil Procedure Rules (*ie* the Civil Procedure Rules 1998, SI 1998/3132: see **CIVIL PROCEDURE**) do not apply to family proceedings, except to the extent that they are applied to those proceedings by another enactment: CPR 2.1(1), (2), Table.

21 Family Proceedings Rules 1991, SI 1991/1247, r 1.3(1) (amended by SI 1999/1012). For these purposes, any provision of the Family Proceedings Rules 1991, SI 1991/1247, authorising or requiring anything to be done in family proceedings is to be treated as if it were, in the case of proceedings pending in a county court, a provision of the County Court Rules 1981, SI 1981/1687, and, in the case of proceedings pending in the High Court, a provision of the Rules of the Supreme Court (Revision) 1965, SI 1965/1776: Family Proceedings Rules 1991, SI 1991/1247, r 1.3(2). References in r 1.3 to the County Court Rules 1981, SI 1981/1687, and the Rules of the Supreme Court (Revision) 1965, SI 1965/1776, are references to the County Court Rules 1981, SI 1981/1687, and the Rules of the Supreme Court (Revision) 1965, SI 1965/1776, in force immediately before 26 April 1999 and references thereto in the Family Proceedings Rules 1991, SI 1991/1247, are to be read accordingly: Family Proceedings (Miscellaneous Amendments) Rules 1999, SI 1999/1012, r 3(1).

22 At the date at which this volume states the law the rules relating to family proceedings in magistrates' courts are those made under the Magistrates' Courts Act 1980 s 144: see Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991; and **MAGISTRATES** vol 29(2) (Reissue) PARA 588.

23 At the date at which this volume states the law the Courts Act 2003 s 75 (see the text and notes 24-25) is in force only for the purpose of making Family Procedure Rules in respect of matters relating to adoption, including appeals and the enforcement of an order made in such proceedings: see the Courts Act 2003 (Commencement No 11 and Transitional Provision) Order 2005, SI 2005/2744, art 2(2)(a).

24 Courts Act 2003 s 75(1) (not yet wholly in force). 'Family proceedings', in relation to a court, means proceedings in that court which are family proceedings as defined by either the Magistrates' Courts Act 1980 s 65 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 739) or the Matrimonial and Family Proceedings Act 1984 s 32 (see PARA 737): Courts Act 2003 s 75(3). The power to make Family Procedure Rules includes power to make different provision for different areas, including different provision for a specified court or description of courts or for specified descriptions of proceedings or a specified jurisdiction: s 75(4).

25 Courts Act 2003 s 75(2). Any power to make Family Procedure Rules is to be exercised with a view to securing that the family justice system is accessible, fair and efficient and the rules are both simple and simply expressed: s 75(2).

UPDATE

1005 Rules of procedure in the High Court and magistrates' courts

NOTES 3, 10, 12--2005 Act Sch 11 in force on 1 October 2009: SI 2009/1604.

NOTE 3--Head (2). Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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(ii) Administration in the High Court

A. ADMINISTRATION

1006. Mode of making applications.

Every application in family proceedings¹ must²:

- 1364 (1) be made to a district judge³; and
- 1365 (2) if the proceedings are pending in the High Court, be made by summons, or, if the proceedings are pending in a designated county court⁴, be made⁵ with or without notice⁶.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 Ie except where the Family Proceedings Rules 1991, SI 1991/1247, or any rules applied thereby, otherwise provide.

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.9(a). As to the meaning of 'district judge' see PARA 737 note 1.

4 As to the meaning of 'designated county court' see PARA 737 note 3.

5 Ie in accordance with CCR Ord 13 r 1 (applications in the course of proceedings). As to the continuing application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.9(b) (amended by SI 2005/2922).

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the

interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1007. Computation of time.

Any period of time¹ must be reckoned in accordance with the following provisions²:

- 1366 (1) where the act is required to be done not less than a specified period before a specified date, the period starts immediately after the date on which the act is done and ends immediately before the specified date³;
- 1367 (2) where the act is required to be done within a specified period after or from a specified date, the period starts immediately after that date⁴;
- 1368 (3) where the period in question, being a period of seven days or less, would otherwise include a day which is not a business day⁵, that day is to be excluded⁶; and
- 1369 (4) where the time so fixed for doing an act in the court office expires on a day on which the office is closed, and for that reason the act cannot be done on that day, the act is in time if done on the next day on which the office is open⁷.

¹ ie any period of time fixed by the Family Proceedings Rules 1991, SI 1991/1247, or by any rules applied by the Family Proceedings Rules 1991, SI 1991/1247, or by any decree, judgment, order or direction for doing any act: r 1.5(1).

² Family Proceedings Rules 1991, SI 1991/1247, r 1.5(1).

³ Family Proceedings Rules 1991, SI 1991/1247, r 1.5(2).

⁴ Family Proceedings Rules 1991, SI 1991/1247, r 1.5(3).

⁵ For these purposes, unless the context otherwise requires, 'business day' means any day other than: (1) a Saturday, Sunday, Christmas Day or Good Friday; or (2) a bank holiday under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321), in England and Wales: Family Proceedings Rules 1991, SI 1991/1247, rr 1.2(1), 1.5(6).

⁶ Family Proceedings Rules 1991, SI 1991/1247, r 1.5(4).

⁷ Family Proceedings Rules 1991, SI 1991/1247, r 1.5(5).

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any

administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1008. Mode of giving notice.

Unless otherwise directed, any notice which is required¹ to be given to any person must be in writing and may be given in any manner in which service may be effected under the relevant provisions² of the Rules of the Supreme Court³.

¹ I.e. the Family Proceedings Rules 1991, SI 1991/1247.

² I.e. under RSC Ord 65 r 5. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

³ Family Proceedings Rules 1991, SI 1991/1247, r 10.7.

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the

proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1009. Restriction on disclosure of addresses.

Nothing in the Family Proceedings Rules¹ is to be construed² as requiring any party to reveal the address of their private residence, or that of any child³, save by order of the court⁴. In proceedings relating to forced marriage protection orders⁵, a party is also not required to reveal the address of the person who is the subject of the proceedings or any witness, unless the court directs otherwise⁶.

Where a party declines to reveal an address⁷ he must give notice of that address to the court in the prescribed form⁸ and that address must not be revealed to any person save by order of the court⁹.

1 Ie the Family Proceedings Rules 1991, SI 1991/1247.

2 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, r 2.3: see PARA 756.

3 As to the meaning of 'child' see PARA 765 note 1.

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.21(1) (amended by SI 1991/2113). As to the meaning of 'court' see PARA 747 note 7.

5 Ie proceedings under the Family Law Act 1996 Pt IV (ss 63A-63S) (see PARAS 723 et seq, 958).

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.21(1A) (added by SI 2008/2446).

7 Ie in reliance on the Family Proceedings Rules 1991, SI 1991/1247, r 10.21(1) (see the text and notes 1-4).

8 For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form C8 (added by SI 1994/3155).

9 Family Proceedings Rules 1991, SI 1991/1247, r 10.21(2) (amended by SI 1994/3155; SI 2005/2446).

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1010. Proceedings in respect of polygamous marriages.

Where a petition, originating application or originating summons asks for matrimonial relief¹ in respect of a marriage where either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person (a 'polygamous marriage'), the petition, originating application or originating summons:

- 1370 (1) must state that the marriage in question is polygamous²;
- 1371 (2) must state whether or not there is, to the knowledge of the petitioner or applicant, any living spouse of his or hers additional to the respondent or, as the case may be, any living spouse of the respondent additional to the petitioner or applicant (an 'additional spouse')³; and
- 1372 (3) if there is any additional spouse, must give his or her full name and address and the date and place of his or her marriage to the petitioner or applicant or, as the case may be, to the respondent, or state, so far as may be applicable, that such information is unknown to the petitioner or applicant⁴.

The court⁵ may⁶ order that any additional spouse be added as a party to the proceedings or be given notice of the proceedings or of any application in the proceedings for any specified order⁷. Any such order may be made at any stage of the proceedings and either on the application of any party or by the court of its own motion; and, where an additional spouse is mentioned in a petition or an acknowledgment of service of a petition, the petitioner must, on making any application in the proceedings or, if no previous application has been made in the proceedings, on making a request for directions for trial, ask for directions as to whether an order should be⁸ so made⁹. Any person to whom notice is given pursuant to such an order¹⁰ is entitled, without filing an answer or affidavit, to be heard in the proceedings or on the application to which the notice relates¹¹.

1 Ie within the meaning of the Matrimonial Causes Act 1973 s 47(2): see PARA 884.

2 Family Proceedings Rules 1991, SI 1991/1247, r 3.11(1), (2)(a) (r 3.11(1) amended by SI 1996/816).

3 Family Proceedings Rules 1991, SI 1991/1247, r 3.11(2)(b).

4 Family Proceedings Rules 1991, SI 1991/1247, r 3.11(2)(c).

5 As to the meaning of 'court' see PARA 747 note 7.

6 Ie without prejudice to its powers under RSC Ord 15 (which deals with parties) or CCR Ord 15 (which deals with amendment). As to the continued application of the Rules of the Supreme Court and the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

7 Family Proceedings Rules 1991, SI 1991/1247, r 3.11(3).

8 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 3.11(3) (see the text and notes 5-7).

9 Family Proceedings Rules 1991, SI 1991/1247, r 3.11(4).

10 See the text and notes 8-9.

11 Family Proceedings Rules 1991, SI 1991/1247, r 3.11(5).

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1011. Drawing up of decrees and orders.

Except in the case of a consent order¹, every decree, every civil partnership order, every order made in open court and every other order which is required to be drawn up must be drawn up:

- 1373 (1) in the case of a decree or order made at a designated county court², by the proper officer³ of that court⁴;
- 1374 (2) in the case of a decree or order made at the Royal Courts of Justice⁵, by the proper officer of the Principal Registry⁶;
- 1375 (3) in the case of a decree or order made at a divorce town or at a dissolution town⁷, by the proper officer of the registry for that town⁸.

1 le except in a case to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.61 applies: see PARA 714.

2 As to the meaning of 'designated county court' see PARA 737 note 3.

3 As to the meaning of 'proper officer' see PARA 461 note 5.

4 Family Proceedings Rules 1991, SI 1991/1247, r 2.43(1)(a) (amended by SI 2005/2922). CCR Ord 22 r 7 (which deals with (inter alia) the settlement of judgments) does not apply to a decree or civil partnership order made in a cause pending in a designated county court: Family Proceedings Rules 1991, SI 1991/1247, r 2.43(2) (amended by SI 2005/2922). As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005. As to the meaning of 'cause' see PARA 321 note 1.

5 As to the meaning of 'Royal Courts of Justice' see PARA 813 note 4.

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.43(1)(b) (amended by SI 2005/2922). As to the meaning of 'Principal Registry' see PARA 737 note 3.

7 As to the meanings of 'divorce town' and 'dissolution town' see PARA 813 note 2.

8 Family Proceedings Rules 1991, SI 1991/1247, r 2.43(1)(c) (amended by SI 2005/2922).

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any

administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1012. Filing of documents.

Where the file of any family proceedings¹ has been sent from one designated county court² or registry to another for the purpose of a hearing or for some other purpose, any document needed for that purpose and required to be filed is to be filed in the other court or registry³.

- 1 As to the meaning of 'family proceedings' see PARA 737 note 3.
- 2 As to the meaning of 'designated county court' see PARA 737 note 3.
- 3 Family Proceedings Rules 1991, SI 1991/1247, r 10.19 (amended by SI 2005/2922).

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the

proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1013. Inspection etc of documents retained in court.

A party to any family proceedings¹ or his solicitor or the Queen's Proctor² or a person appointed³ to be the litigation friend of a child⁴ in any family proceedings may⁵ have a search made for, and may inspect and bespeak a copy of, any document filed or lodged in the court office in those proceedings⁶.

No document filed or lodged in the court office other than a decree, civil partnership order or other order made in open court is⁷ to be open to inspection by any person without the leave of the district judge⁸; and no copy of any such document, or of an extract from any such document, is to be taken by, or issued to, any person without such leave⁹.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545; and as to interventions by the Queen's Proctor see PARA 852 et seq.

3 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 2.57 (see PARA 510) or r 9.5 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 231) or Appendix 4 para 2 (see PARA 533).

4 As to the meaning of 'child' see PARA 765 note 1.

5 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, r 10.21: see PARA 1009.

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.20(1) (amended by SI 2005/2922). Any person not entitled to a copy of any such document who intends to make an application under the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986), Cm 33) (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 799) in a contracting state other than the United Kingdom must, if he satisfies the court that he intends to make such an application, be entitled to obtain a copy bearing the seal of the court of any order relating to the custody of the child in respect of whom the application is to be made: Family Proceedings Rules 1991, SI 1991/1247, r 10.10(2) (amended by SI 1992/2067). As to the meaning of 'contracting state' for these purposes see the Child Abduction and Custody Act 1985 s 2; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 802.

7 Ie except as provided by the Family Proceedings Rules 1991, SI 1991/1247, r 2.36(4), (5) (see PARA 815), r 3.16(10) (see PARA 1003), r 10.20A (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 313) and r 10.20(1), (2) (see the text and notes 1-6).

8 As to the meaning of 'district judge' see PARA 737 note 3.

9 Family Proceedings Rules 1991, SI 1991/1247, r 10.20(3) (amended by SI 2005/2922). These provisions are essentially compliant with the right to a public hearing under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq): see *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] Fam 155, [2004] 3 All ER 875.

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or

negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

1013 Inspection etc of documents retained in court

NOTE 6--See also *Practice Direction (family proceedings: requests to inspect files following pronouncements of decrees nisi)* [2009] 2 FLR 1079.

NOTE 7--SI 1991/1247 r 10.20A replaced: see SI 1991/1247 Pt XI (rr 11.1-11.9) (added by SI 2009/857).

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1014. Official shorthand notes.

Unless the judge¹ otherwise directs, an official shorthand note² must be taken of the proceedings at the trial in open court of every cause pending in the High Court³. An official shorthand note may be taken of any other proceedings before a judge or district judge⁴ if directions for the taking of such a note are given by the Lord Chancellor⁵. The shorthand writer must sign the note and certify it to be a correct shorthand note of the proceedings and must retain the note unless he is directed by the district judge to forward it to the court⁶. On being so directed, the shorthand writer must furnish the court with a transcript of the whole or such part as may be directed of the shorthand note⁷.

Any party, any person who has intervened in a cause or the Queen's Proctor⁸ is entitled to require from the shorthand writer a transcript of the shorthand note; and the shorthand writer must, at the request of any person so entitled, supply that person with a transcript of the whole or any part of the note on payment of the shorthand writer's charges authorised by any scheme in force providing for the taking of official shorthand notes of legal proceedings⁹.

Except as mentioned above, the shorthand writer must not, without the permission of the court, furnish the shorthand note or a transcript of the whole or any part thereof to anyone¹⁰.

1 As to the meaning of 'judge' see PARA 737 note 3.

2 For these purposes, references to a 'shorthand note' include references to a record of the proceedings made by mechanical means and, in relation to such a record, references to the shorthand writer have effect as if they were references to the person responsible for transcribing the record: Family Proceedings Rules 1991, SI 1991/1247, r 10.15(7).

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.15(1).

4 As to the meaning of 'district judge' see PARA 737 note 3.

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.15(2).

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.15(3).

7 Family Proceedings Rules 1991, SI 1991/1247, r 10.15(4).

8 As to the Queen's Proctor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 545; and as to interventions by the Queen's Proctor see PARA 704 et seq.

9 Family Proceedings Rules 1991, SI 1991/1247, r 10.15(5) (amended by SI 2001/821).

10 Family Proceedings Rules 1991, SI 1991/1247, r 10.15(6).

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or

negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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1015. Restriction on newspaper reports.

It is not lawful to print or publish, or cause to be printed or published:

- 1376 (1) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals¹;
- 1377 (2) in relation to judicial proceedings for dissolution of marriage or civil partnership, for nullity of marriage or civil partnership, or for judicial or legal separation, any particulars other than:
 - .20
 - 29. (a) the names, address and occupations of the parties and witnesses²;
 - 30. (b) a concise statement of the charges, defences and countercharges in support of which evidence has been given³;
 - 31. (c) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon⁴; and
 - 32. (d) the summing up of the judge and the finding of the jury, if any, and the judgment of the court and observations made by the judge in giving judgment⁵;
 - .21
 - 1378 (3) any proceedings⁶ by a wife against her husband for maintenance pending suit⁷;
 - 1379 (4) any proceedings⁸ for reasonable maintenance by one spouse or civil partner against another⁹;
 - 1380 (5) any proceedings¹⁰ for declarations as to marital or civil partnership status¹¹.

There are also certain restrictions on the publication of information relating to proceedings before any court sitting in private¹².

1 See the Judicial Proceedings (Regulation of Reports) Act 1926 s 1(1)(a); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434. As to restrictions on reports of family proceedings in magistrates' courts see **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 435; and as to taking photographs or sketching in court see **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 437.

2 See the Judicial Proceedings (Regulation of Reports) Act 1926 s 1(1)(b)(i); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434.

3 See the Judicial Proceedings (Regulation of Reports) Act 1926 s 1(1)(b)(ii); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434.

4 See the Judicial Proceedings (Regulation of Reports) Act 1926 s 1(1)(b)(iii); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434.

5 See the Judicial Proceedings (Regulation of Reports) Act 1926 s 1(1)(b)(v); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434.

6 See under the Matrimonial Causes Act 1973 s 22: see PARA 456.

7 See the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 s 2(1)(b); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434.

- 8 le under the Matrimonial Causes Act 1973 s 27 or the Civil Partnership Act 2004 Sch 5 Pt 9: see PARA 542 et seq.
- 9 See the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 s 2(1)(c), (da); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434.
- 10 le under the Family Law Act 1986 Pt III (ss 55-62) or the Civil Partnership Act 2004 s 58: see PARAS 421-422 and 1000 et seq.
- 11 See the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 s 2(1)(d), (db); and **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434.
- 12 See the Administration of Justice Act 1960 s 12: and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 431.

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

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1016. Court bundles.

The following provisions apply to:

- 1381 (1) all hearings¹ of whatever nature² before a judge of the Family Division of the High Court wherever the court may be sitting³;
- 1382 (2) all hearings of family proceedings in the Royal Courts of Justice⁴;
- 1383 (3) all hearings in the Principal Registry of the Family Division⁵; and
- 1384 (4) all hearings in family proceedings in all other courts except for family proceedings courts⁶.

A bundle for the use of the court at the hearing⁷ must be provided by the party in the position of applicant at the hearing or, if there are cross-applications, by the party whose application was first in time, or if that person is a litigant in person, by the first listed respondent who is not a litigant in person⁸. It must contain copies of all documents relevant to the hearing⁹ in chronological order, paginated¹⁰ and indexed and divided into separate sections, as follows:

- 1385 (a) preliminary documents and other case management documents required by any other practice directions¹¹;
- 1386 (b) applications and orders¹²;
- 1387 (c) statements and affidavits (which must be dated in the top right corner of the front page)¹³;
- 1388 (d) experts' reports and other reports including those of a guardian, children's guardian or litigation friend¹⁴; and
- 1389 (e) other documents, divided into further sections as may be appropriate¹⁵.

Where the nature of the hearing is such that a complete bundle of all documents is unnecessary, the bundle may comprise only those documents necessary for the hearing but the summary must commence with a statement that the bundle is limited or incomplete and the bundle must if reasonably practicable be in a form agreed by all parties¹⁶.

At the commencement of the bundle there must be inserted the following documents (the 'preliminary documents')¹⁷:

- 1390 (i) an up to date¹⁸ summary of the background to the hearing confined to those matters which are relevant to the hearing and the management of the case and limited, if practicable, to one A4 page¹⁹;
- 1391 (ii) a statement of the issue or issues to be determined at that hearing and at the final hearing²⁰;
- 1392 (iii) a position statement by each party including a summary of the order or directions sought by each party²¹;
- 1393 (iv) an up to date²² chronology, if it is a final hearing or if the summary under head (i) above is insufficient²³;
- 1394 (v) skeleton arguments, if appropriate, with copies of all authorities relied on²⁴; and
- 1395 (vi) a list of essential reading for that hearing²⁵.

Following completion of the hearing the party responsible for the bundle must retrieve it from the court immediately, or if that is not practicable, they must collect it from the court within five working days²⁶. Provision is also made as to the format of the bundle²⁷, the timetable for preparing and lodging the bundle²⁸ and the procedure for taking cases out of the list²⁹.

Failure to comply with any of these requirements may result in the judge removing the case from the list or putting the case further back in the list and may also result in a wasted costs order or some other adverse order³⁰.

1 'Hearings' includes all appearances before a judge or district judge, whether with or without notice to other parties and whether for directions or for substantive relief: *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 2.2.

2 See *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 2.1.

3 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 2.1(a).

4 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 2.1(b).

5 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 2.1(c).

6 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 2.1(d).

7 These provisions apply whether a bundle is being lodged for the first time or is being re-lodged for a further hearing: *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 2.3.

8 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 3.1.

9 Copies of notes of contact visits should normally not be included in the bundle unless directed by a judge: *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.1.

10 The party preparing the bundle must paginate it and if possible the contents of the bundle must be agreed by all parties: *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 3.2.

11 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.1(a).

12 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.1(b).

13 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.1(c).

14 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.1(d).

15 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.1(e).

16 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.6.

17 Each of the preliminary documents must state on the front page immediately below the heading the date when it was prepared and the date of the hearing for which it was prepared: *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.3. The summary of the background, statement of issues, chronology, position statement and skeleton arguments must be cross-referenced to the relevant pages of the bundle: *Practice Direction (family proceedings: court bundles)* para 4.4. The summary of the background, statements of issues, chronology and reading list must in the case of a final hearing, each consist of a single document in a form agreed by all parties: *Practice Direction (family proceedings: court bundles)* para 4.5. Where the parties disagree as to the content the fact of their disagreement and their differing contentions must be set out at the appropriate places in the document: *Practice Direction (family proceedings: court bundles)* para 4.5.

18 Where the bundle is re-lodged it must be updated as appropriate before it is re-lodged and all superseded documents (and in particular all outdated summaries, statements of issues, chronologies, skeleton arguments and similar documents) must be removed from the bundle: *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.7.

19 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.2(i).

- 20 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.2(ii).
- 21 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.2(iii).
- 22 See note 18.
- 23 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.2(iv).
- 24 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.2(v).
- 25 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 4.2(vi).
- 26 *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 9.1. Bundles which are not collected in due time may be destroyed: *Practice Direction (family proceedings: court bundles)* para 9.1. The bundle must be re-lodged for the next and any subsequent hearings: see *Practice Direction (family proceedings: court bundles)* para 9.2.
- 27 See *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 paras 5.1-5.2.
- 28 See *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 paras 6.1-8.2. In every case a time estimate must be prepared: see *Practice Direction (family proceedings: court bundles)* paras 10.1-10.2.
- 29 See *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 11.
- 30 See *Practice Direction (family proceedings: court bundles)* [2006] 1 WLR 2843 para 12. As to 'wasted costs' see CPR 48.7; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1811.

UPDATE

1006-1016 Administration

New provision has been made regarding attendance at private hearings: SI 1991/1247 r 10.28 (added by SI 2009/857). When proceedings are held in private, except in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation, no person must be present during any hearing other than (1) an officer of the court; (2) a party to the proceedings; (3) a litigation friend for any party, or legal representative instructed to act on that party's behalf; (4) an officer of the service or Welsh family proceedings officer (see PARA 831 NOTE 4); (5) a witness; (6) duly accredited representatives of news gathering and reporting organisations; and (7) any other person whom the court permits to be present: r 10.28(1), (3). Proceedings held 'in private' means proceedings at which the general public have no right to be present: r 10.28(2). 'Duly accredited' refers to accreditation in accordance with any administrative scheme for the time being approved for the purposes of r 10.28 by the Lord Chancellor: r 10.28(8).

At any stage of the proceedings the court may direct that duly accredited representatives of news gathering and reporting organisations must not attend the proceedings or any part of them, where satisfied that (a) this is necessary (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced: r 10.28(4). Generally representatives of the media should be entitled to attend: *D v D (divorce: media presence)* [2009] EWHC 946 (Fam), [2009] 2 FLR 324. The burden of satisfying the court that the media should be excluded lies on the party applying for the exclusion: *Re X (a child) (rights of media attendance)* [2009] EWHC 1728 (Fam), [2009] EMLR 489. The fact that the parties are high profile is not a sufficient reason for excluding the media: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] EMLR 469. The court may exercise the power so conferred of its own motion or pursuant to representations made by any of

the persons referred to below, and in either case having given to any duly accredited representative of a news gathering and reporting organisation who is in attendance an opportunity to make representations: SI 1991/1247 r 10.28(5). At any stage of the proceedings, the following persons may make the representations referred to above: (A) a party to the proceedings; (B) any witness in the proceedings; (C) where appointed, any children's guardian; (D) where appointed, an officer of the service or Welsh family proceedings officer, on behalf of the child the subject of the proceedings; or (E) the child, if of sufficient age and understanding: r 10.28(6). The above provisions do not affect any power of the court to direct that witnesses must be excluded until they are called for examination: r 10.28(7).

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B. PROVISIONS AS TO SERVICE

1017. Service on solicitors.

Where a document is required in any family proceedings¹ to be sent to any person who is acting by a solicitor service is to be effected, subject to any other direction or order:

1396 (1) by sending the document by first-class post to the solicitor's address for service²;

1397 (2) where that address includes a numbered box at a document exchange³, at that document exchange or at a document exchange which transmits documents every business day⁴ to that document exchange⁵; or

1398 (3) by fax⁶.

Where no other mode of service is prescribed, directed or ordered, service may additionally be effected by leaving the document at the solicitor's address⁷.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 Family Proceedings Rules 1991, SI 1991/1247, rr 10.1, 10.2(1)(a).

3 For these purposes, unless the context otherwise requires, 'document exchange' means any document exchange for the time being approved by the Lord Chancellor: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1).

4 As to the meaning of 'business day' see PARA 1007 note 4.

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.2(1)(b). Any document which is left at a document exchange in accordance with this provision is deemed, unless the contrary is proved, to have been served on the second day after the day on which it is left: r 10.2(2).

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.2(1)(c). For these purposes, 'fax' has the meaning given by RSC Ord 1 r 4(1): Family Proceedings Rules 1991, SI 1991/1247, r 10.2(1)(c). Service by fax is to be in accordance with the provisions of RSC Ord 65 r 5(2B): Family Proceedings Rules 1991, SI 1991/1247, r 10.2(1)(c). As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005.

7 Family Proceedings Rules 1991, SI 1991/1247, r 10.2(3).

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1018. Service on parties acting in person.

Where in any family proceedings¹ a document is required to be sent to any person who is acting in person, service must be effected² by sending the document by first-class post to the address given by him or, if he has not given an address for service, to his last known address³. Where no other mode of service is prescribed, directed or ordered, service may additionally be effected⁴ by delivering the document to him or by leaving it at the address specified⁵ above⁶.

Where it appears to the district judge⁷ that it is impracticable to deliver the document to the person to be served and that, if the document were left at, or sent by post to, the address specified above⁸ it would be unlikely to reach him, the district judge may dispense with service of the document⁹.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, r 10.3(3) (see the text and notes 3-9) and to any other direction or order.

3 Family Proceedings Rules 1991, SI 1991/1247, rr 10.1, 10.3(1).

4 Ie subject to the Family Proceedings Rules 1991, SI 1991/1247, r 10.3(3) (see the text and notes 1-9).

5 Ie the address specified in the Family Proceedings Rules 1991, SI 1991/1247, r 10.3(1).

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.3(2).

7 As to the meaning of 'district judge' see PARA 737 note 3.

8 See note 5.

9 Family Proceedings Rules 1991, SI 1991/1247, r 10.3(3).

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1019. Service on child or protected party.

Where a petition¹ is required to be served on a child or protected party² it must be served:

1399 (1) in the case of a child who is not also a protected party, on his father or guardian or, if he has no father or guardian, on the person with whom he resides or in whose care he is³;

1400 (2) in the case of a protected party:

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33. (a) on the person (if any) who is the attorney of a registered enduring power of attorney, donee of a lasting power of attorney or deputy of the protected party⁴;

34. (b) if there is no attorney of a registered enduring power of attorney, donee of a lasting power of attorney or deputy of the protected party, on the Official Solicitor if he has consented⁵ to be the litigation friend of the protected party⁶; or

35. (c) in any other case, on the person with whom the protected party resides or in whose care he is⁷,

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although the court may order that a document which has been, or is to be, served on the child or protected party or on a person other than one mentioned in head (1) or (2) above is to be deemed to be duly served on the child or protected party⁸.

Where a document is served in accordance with these provisions it must be indorsed with a notice in the prescribed form⁹ and, after service has been effected, the person at whose instance the document was served must, unless the Official Solicitor is the litigation friend of the child or protected party or the court otherwise directs, file an affidavit by the person on whom the document was served stating whether the contents of the document were, or its purport was, communicated to the child or protected party and, if not, the reasons for not doing so¹⁰.

1 le a document to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.9 applies: see PARA 776.

2 As to the meanings of 'child' and 'protected party' for these purposes see PARA 765 note 1.

3 Family Proceedings Rules 1991, SI 1991/1247, r 9.3(1)(a) (amended by SI 1992/2067; SI 2007/2187).

4 Family Proceedings Rules 1991, SI 1991/1247, r 9.3(1)(b)(i) (rr 9.2(3), (4), (7), 9.3(1), (2) amended, r 9.3(1)(b)(i)-(iii) substituted, by SI 2007/2187). As to lasting and enduring powers of attorney see **AGENCY** vol 1 (2008) PARA 194 et seq. As to deputies see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 757.

5 le under the Family Proceedings Rules 1991, SI 1991/1247, r 9.2(4) (as amended: see note 4), which provides that where a person entitled to defend any family proceedings is a protected party and there is no person with authority as a deputy to defend the proceedings in his name or on his behalf, then:

265 (1) the Official Solicitor must, if he consents, be the protected party's litigation friend (although at any stage of the proceedings an application may be made on not less than four days' notice to the Official Solicitor, for the appointment of some other person as guardian) (r 9.2(4)(a) (as so amended)); and

- 266 (2) in any other case, an application may be made on behalf of the protected party for the appointment of a litigation friend (r 9.2(4)(b) (as so amended)),

and there must be filed in support of an application under r 9.2 (see generally **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 225; **MENTAL HEALTH** vol 30(2) (Reissue) PARA 703):

- 267 (a) a written consent to act by the proposed litigation friend (r 9.2(7)(a) (as so amended));

- 268 (b) where the person is a protected party and the proposed litigation friend has authority as a deputy to conduct the proceedings in his name or on his behalf, an office copy, sealed with the seal of the Court of Protection, of the document conferring his authority to act (r 9.2(7)(b) (as so amended)); and

- 269 (c) except where the proposed litigation friend is authorised as mentioned above, a certificate by the solicitor acting for the person under disability:

6. (i) that he knows or believes that the person to whom the certificate relates is a child or protected party, stating (in the case of a protected party) the grounds of his knowledge or belief and, where the person is a protected party, that there is no person with authority as a deputy to conduct the proceedings in the name of a protected party or on his behalf (r 9.2(7)(c)(i) (as so amended)); and

68

7. (ii) that the person named in the certificate as litigation friend has no interest in the cause or matter in question adverse to that of the child or protected party and that he is a proper person to be litigation friend (r 9.2(7)(c)(ii) (as so amended)).

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Where a person has authority as a deputy to conduct legal proceedings in the name of a protected party or on his behalf, that person is, subject to r 9.2(2) (see generally **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 225), entitled to be litigation friend of the protected party in any family proceedings to which his power extends: r 9.2(3) (as so amended).

6 Family Proceedings Rules 1991, SI 1991/1247, r 9.3(1)(b)(ii) (as substituted: see note 4).

7 Family Proceedings Rules 1991, SI 1991/1247, r 9.3(1)(b)(iii) (as substituted: see note 4).

8 Family Proceedings Rules 1991, SI 1991/1247, r 9.3(1) proviso (as amended: see note 4).

9 For the prescribed form of notice see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Form M24.

10 Family Proceedings Rules 1991, SI 1991/1247, r 9.3(2) (as amended: see note 4).

UPDATE

1019 Service on child or protected party

TEXT AND NOTE 3--For 'father' substitute 'parent': SI 1991/1247 r 9.3(1)(a) (further amended by SI 2009/636).

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1020. Service by bailiff in proceedings in Principal Registry.

Where, in any family proceedings¹ pending in the Principal Registry² which are treated as pending in a designated county court³, a document is to be served by bailiff, it must be sent for service to the proper officer⁴ of the county court within the district of which the document is to be served⁵.

- 1 As to the meaning of 'family proceedings' see PARA 737 note 2.
- 2 As to the meaning of 'Principal Registry' see PARA 737 note 3.
- 3 As to the meaning of 'designated county court' see PARA 737 note 3.
- 4 As to the meaning of 'proper officer' see PARA 461 note 5.
- 5 Family Proceedings Rules 1991, SI 1991/1247, r 10.4 (amended by SI 2005/2922).

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1021. Proof of service by officer of court.

Where a petition is sent to any person by an officer of the court, he must note the date of posting in the records of the court¹. A record so made is² evidence of the facts stated in it³. Where the court has authorised notice by advertisement to be substituted for service and the advertisement has been inserted by some person other than the proper officer⁴, that person must file copies of the newspapers containing the advertisement⁵.

1 Family Proceedings Rules 1991, SI 1991/1247, r 10.5(1).

2 ¹le without prejudice to the County Courts Act 1984 s 133 (proof of summonses etc): see **COURTS** vol 10 (Reissue) PARA 736.

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.5(2).

4 As to the meaning of 'proper officer' see PARA 25 note 3.

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.5(3).

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1022. Service out of England and Wales.

Any document in family proceedings¹ may be served out of England and Wales without leave either in the manner prescribed for service within the jurisdiction² or, where the proceedings are pending in the High Court, in accordance with the relevant rules of court relating to the service of writs abroad³ or, where the proceedings are pending in a designated county court⁴, in accordance with the relevant rules of court⁵ relating to the service of process abroad⁶.

Where a petition is to be served on a person out of England and Wales:

- 1401 (1) the time within which that person must give notice of intention to defend⁷ is to be determined having regard to the normal practice⁸ requiring an order for leave to serve a writ out of the jurisdiction to limit the time for an appearance⁹; and
- 1402 (2) if the petition is to be served otherwise than in accordance with the normal procedure¹⁰, and there is reasonable ground for believing that the person to be served does not understand English, the petition must be accompanied by a translation, approved by the district judge¹¹, of the notice in the prescribed form¹², in the official language of the country in which service is to be effected or, if there is more than one official language of that country, in any one of those languages which is appropriate to the place where service is to be effected, except in relation to a document which is to be served in a country in which the official language, or one of the official languages, is English¹³.

Where a document specifying the date of hearing of any proceedings is to be served out of England and Wales, the date must be fixed having regard to the time which would be limited under head (1) above for giving notice of intention to defend if the document were a petition¹⁴.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 Ie in the manner prescribed by the Family Proceedings Rules 1991, SI 1991/1247.

3 Ie RSC Ord 11 rr 5, 6. As to the continued application of the Rules of the Supreme Court in matrimonial and civil partnership proceedings see PARA 1005. Where the document is served in accordance with RSC Ord 11 rr 5, 6, they and RSC Ord 11 r 8 (expenses incurred by the Secretary of State) have effect in relation to service of the document as they have effect in relation to service of notice of a writ, except that the official certificate of service referred to in RSC Ord 11 r 5(5), must, if the document was served personally, show the server's means of knowledge of the identity of the person served: Family Proceedings Rules 1991, SI 1991/1247, r 10.6(2).

4 As to the meaning of 'designated county court' see PARA 737 note 3.

5 Ie CCR Ord 8 rr 8-10. As to the continued application of the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005. Where the document is so served, CCR Ord 8 rr 8-10 have effect subject to the following modifications: (1) the document need not be served personally on the person required to be served so long as it is served in accordance with the law of the country in which service is effected; (2) the official certificate or declaration with regard to service referred to in CCR Ord 8 r 10(6) must, if the document was served personally, show the server's means of knowledge of the identity of the person served; and (3) in CCR Ord 8 r 10(7) the words 'or in the manner in which default summonses are required to be served' are omitted: Family Proceedings Rules 1991, SI 1991/1247, r 10.6(3).

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.6(1) (amended by SI 2005/2922). As to substituted service outside the jurisdiction see *Buckley v Buckley* (1912) 107 LT 590; *Palmer v Palmer*, *Re Thomasson's*

Petition [1921] P 378. In some countries there is a danger of coming into collision with the authorities: see *Trubner v Trubner and Cristiani* (1889) 15 PD 24; *Stumpel v Stumpel and Zepfel* (1900) 70 LJP 6; *Wray v Wray and D'Almeida* [1901] P 132. See also *Reece v Reece* (1924) 132 LT 349. As to summary proceedings see *Pilcher v Pilcher* [1955] P 318 at 324, [1955] 2 All ER 644 at 647, DC (no means whereby in general service out of jurisdiction can be effected).

7 As to the meaning of 'notice of intention to defend' see PARA 779 note 1.

8 le the practice adopted under RSC Ord 11 r 4(4).

9 Family Proceedings Rules 1991, SI 1991/1247, r 10.6(4)(a) (amended by SI 2005/2922). For the prescribed form of notice (which must be amended accordingly) see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1 Forms M5, M5A (Form M5 amended by SI 1992/456; SI 1992/2067; SI 1993/295; SI 1994/3155; SI 1996/816; SI 1998/1901; SI 2001/821; SI 2003/2839; SI 2005/264; SI 2005/559; Family Proceedings Rules 1991, SI 1991/1247, Form M5A added by SI 2005/2922).

10 le otherwise than in accordance with RSC Ord 11 rr 5, 6 or CCR Ord 8 rr 8-10.

11 As to the meaning of 'district judge' see PARA 737 note 3.

12 See note 9.

13 Family Proceedings Rules 1991, SI 1991/1247, r 10.6(4) (amended by SI 2005/2922). See also *Goff v Goff* [1934] P 107 (service set aside where impossible to make effective order varying settlement).

14 Family Proceedings Rules 1991, SI 1991/1247, r 10.6(5).

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1023. Service of orders.

Where an order made in family proceedings¹ has been drawn up, the proper officer² of the court must, unless otherwise directed, send a copy of the order to every party affected by it³. Where a party against whom the order is made is acting by a solicitor, a copy may, if the district judge⁴ thinks fit, be sent to that party as if he were acting in person, as well as to his solicitor⁵. It is not necessary for the person in whose favour the order was made to prove that a copy of the order has reached any other party to whom it is required to be sent⁶.

1 As to the meaning of 'family proceedings' see PARA 737 note 2.

2 As to the meaning of 'proper officer' see PARA 461 note 5.

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.17(1). Rule 10.17 is without prejudice to RSC Ord 45 r 7 (service of an order to do or abstain from doing an act), CCR Ord 29 r 1 (orders enforceable by committal), and any other rule or enactment for the purposes of which an order is required to be served in a particular way: Family Proceedings Rules 1991, SI 1991/1247, r 10.17(4). As to the continued application of the Rules of the Supreme Court and the County Court Rules in matrimonial and civil partnership proceedings see PARA 1005.

4 As to the meaning of 'district judge' see PARA 737 note 3.

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.17(2).

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.17(3).

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C. HUMAN RIGHTS APPLICATIONS

1024. Information to be given.

A party who seeks to rely on any provision of, or right arising under, the Human Rights Act 1998¹ or seeks a remedy available under that Act:

- 1403 (1) must state that fact in his originating document² or, as the case may be, answer³; and
- 1404 (2) must in his originating document or, as the case may be, answer:
^{.24}
 - 36. (a) give precise details of the Convention right⁴ which it is alleged has been infringed and details of the alleged infringement⁵;
 - 37. (b) specify the relief sought⁶; and
 - 38. (c) state if the relief sought includes a declaration of incompatibility⁷.^{.25}

A party who seeks to amend his originating document or, as the case may be, answer to include the matters referred to in heads (1) and (2) above must, unless the court⁸ orders otherwise, do so as soon as possible and in any event not less than 28 days before the hearing⁹.

1 As to the Human Rights Act 1998 see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 For these purposes, 'originating document' means a petition, application, originating application, originating summons or other originating process: Family Proceedings Rules 1991, SI 1991/1247, r 10.26(1) (r 10.26 added by SI 2000/2267).

3 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(2)(a) (as added: see note 2). For these purposes, 'answer' means an answer or other document filed or served by a party in reply to an originating document, but not an acknowledgment of service: r 10.26(1) (as so added).

4 As to the meaning of 'Convention right' see the Human Rights Act 1998 s 1(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** (definition applied by the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(1) (as added: see note 2)).

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(2)(b)(i) (as added: see note 2).

6 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(2)(b)(ii) (as added: see note 2).

7 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(2)(b)(iii) (as added: see note 2). For these purposes, 'declaration of incompatibility' means a declaration of incompatibility under the Human Rights Act 1998 s 4 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Family Proceedings Rules 1991, SI 1991/1247, r 10.26(1) (as so added). As to declarations of incompatibility see PARA 1025.

8 As to the meaning of 'court' see PARA 747 note 7.

9 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(3) (as added: see note 2).

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1025. Notification of Crown where declaration of incompatibility sought.

Where in a human rights claim¹, including a human rights claim made in respect of a judicial act², a party has included in his originating document³ or, as the case may be, answer⁴:

- 1405 (1) a claim for a declaration of incompatibility⁵; or
- 1406 (2) an issue for the court⁶ to decide which may lead to the court considering making a declaration of incompatibility⁷,

the court may at any time consider whether notice should be given to the Crown as required by the Human Rights Act 1998 and give directions for the content and service of the notice⁸.

The court must not make a declaration of incompatibility unless 21 days' notice, or such other period of notice as the court directs, has been given to the Crown⁹. The notice must be in the form directed by the court¹⁰ and must be served on the person named in the published list¹¹. Unless the court orders otherwise, the notice must be accompanied by the directions given by the court and the originating document and any answers in the proceedings¹². Copies of the notice must be served on all the parties¹³. The court may require the parties to assist in the preparation of the notice¹⁴.

1 See PARA 1024 et seq.

2 Ie a claim made under the Human Rights Act 1998 s 7(1): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 As to the meaning of 'originating document' see PARA 1024 note 2.

4 As to the meaning of 'answer' see PARA 1024 note 3.

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(6)(a), (18) (r 10.26 added by SI 2000/2267; Family Proceedings Rules 1991, SI 1991/1247, r 10.26(18) amended by SI 2001/821). As to the meaning of 'declaration of incompatibility' see PARA 1024 note 7. Where a party amends his originating document or, as the case may be, answer to include a matter referred to in the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(6)(a), the court will consider whether notice should be given to the Crown and give directions for the content and service of the notice: r 10.26(10) (as so added).

6 As to the meaning of 'court' see PARA 747 note 7.

7 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(6)(b) (as added: see note 5).

8 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(6) (as added: see note 5). As to the joining of a Minister as a party see PARA 1026. Where the claim relates to a judicial act (see note 2), the notice to be given to the Crown:

270 (1) must be given to the Lord Chancellor and be served on the Treasury Solicitor on his behalf (r 10.26(18)(a) (as so added)); and

271 (2) must also give details of the judicial act which is the subject of the claim and of the court that made it (r 10.26(18)(b) (as so added)).

9 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(4) (as added: see note 5).

- 10 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(11), (13) (as added: see note 5).
- 11 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(12) (as added: see note 5). The 'published list' is the list published under the Crown Proceedings Act 1947 s 17: see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 119.
- 12 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(14) (as added: see note 3).
- 13 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(15) (as added: see note 5).
- 14 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(16) (as added: see note 5).

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1026. Joining of Minister or other parties.

Where notice has been given to the Crown¹, a Minister or other person permitted by the Human Rights Act 1998 must be joined as a party on giving notice to the court². Unless the court orders otherwise, the Minister or other person permitted by the Human Rights Act 1998 to be joined as a party must, if he wishes to be joined, give notice of his intention to be joined as a party to the court and every other party; and, where the Minister has nominated a person to be joined as a party, the notice must be accompanied by the written nomination³.

¹ See PARA 1025.

² Family Proceedings Rules 1991, SI 1991/1247, r 10.26(5) (r 10.26 added by SI 2000/2267).

³ Family Proceedings Rules 1991, SI 1991/1247, r 10.26(17), (18) (as added (see note 2); r 10.26(18) amended by SI 2001/821).

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1027. Appeals.

In the case of an appeal for which permission to appeal is required, including an appeal relating to a judicial act¹, the court² must, unless it decides that it is appropriate to do so at another stage in the proceedings, consider the issues and give specified directions³ when deciding whether to give such permission⁴. If permission to appeal is not required⁵ and a hearing for directions would otherwise⁶ be held, the court must, unless it decides that it is appropriate to do so at another stage in the proceedings, consider the issues and give the specified directions⁷ at the hearing for directions⁸. If neither of the above provisions⁹ applies, the court must consider the issues and give the specified directions¹⁰ when it considers it appropriate to do so, and may fix a hearing for this purpose¹¹.

Where in any appeal a claim is made which relates to a judicial act¹² and the statutory provisions restricting the awarding of damages in proceedings relating to judicial acts done in good faith¹³ apply, that claim must be set out in the notice of appeal¹⁴ and notice must be given¹⁵ to the Crown¹⁶.

On any application or appeal concerning a committal order¹⁷ or a refusal to grant habeas corpus¹⁸, if the court ordering the release of the person concludes that his Convention rights have been infringed by the making of the order to which the application or appeal relates, the judgment or order should so state; but, if the court does not do so, that failure will not prevent another court from deciding the matter¹⁹.

1 Ie an appeal arising from a claim made under the Human Rights Act 1998 s 7(1): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 As to the meaning of 'court' see PARA 747 note 7.

3 Ie the directions in the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(6) (see PARA 1025).

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(7), (18) (r 10.26 added by SI 2000/2267; Family Proceedings Rules 1991, SI 1991/1247, r 10.26(18), (19), (20)(a) amended by SI 2001/821).

5 Ie if the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(7) (see the text and notes 1-4) does not apply.

6 Ie but for the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(8) (see the text and notes 7-8).

7 See note 3.

8 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(8) (as added: see note 4).

9 Ie neither the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(7) nor r 10.26(8) (see the text and notes 1-8).

10 See note 3.

11 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(9) (as added: see note 4).

12 Ie a claim is made under the Human Rights Act 1998 s 7(1): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

13 Ie the Human Rights Act 1998 s 9(3), (4): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

14 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(19)(a) (as added and amended: see note 4). In a notice of appeal to which r 10.26(19)(a) applies the appellant must:

- 272 (1) state that a claim is being made under the Human Rights Act 1998 s 7(1) in respect of a judicial act and that s 9(3) applies (Family Proceedings Rules 1991, SI 1991/1247, r 10.26(20)(a) (as so added and amended)); and
- 273 (2) give details of the Convention right which it is alleged has been infringed, the infringement, the judicial act complained of and the court which made it: (r 10.26(20)(b) (as so added)).

Where r 10.26(19) applies and the appropriate person (as defined in the Human Rights Act 1998 s 9(5): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) has not applied within 21 days, or such other period as the court directs, after the notice is served to be joined as a party, the court may join the appropriate person as a party: Family Proceedings Rules 1991, SI 1991/1247, r 10.26(21) (as so added).

As to the meaning of 'Convention right' see the Human Rights Act 1998 s 1(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** (definition applied by the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(1) (as so added)).

- 15 le in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 10.26(18) (see PARA 1025).
- 16 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(19)(b) (as added and amended: see note 4).
- 17 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(22)(a) (as added: see note 4).
- 18 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(22)(b) (as added: see note 4).
- 19 Family Proceedings Rules 1991, SI 1991/1247, r 10.26(22) (as added: see note 4).

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(iii) Administration in the Magistrates' Court

1028. Documentary evidence.

In any proceedings the parties must file¹ and serve on the other parties:

- 1407 (1) written statements of the substance of the oral evidence which the party intends to adduce at a hearing of, or a directions appointment² in, those proceedings, which must be dated, be signed by the person making the statement and contain a declaration that the maker of the statement believes it to be true and understands that it may be placed before the court³; and
- 1408 (2) copies of any documents on which the party intends to rely at the hearing of, or a directions appointment in, those proceedings⁴,

at or by such time as the justices' clerk or the court directs or, in the absence of a direction, before the hearing or appointment⁵.

A party may, subject to any direction of the justices' clerk or the court about the timing of statements, file and serve on the parties a statement which is supplementary to a statement served under these provisions⁶.

At a hearing or directions appointment a party may not, without the leave of the justices' clerk in the case of a directions appointment, or the court adduce evidence or seek to rely on a document in respect of which he has failed to comply with these requirements⁷.

1 As to the meaning of 'file' see PARA 894 note 2.

2 As to the meaning of 'directions appointment' see PARA 894 note 6.

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 9(1)(a) (r 9(1) amended by SI 1992/2068; SI 1997/1894). As to the meaning of 'court' see PARA 894 note 9.

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 9(1)(b).

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 9(1). As to delegation of his functions by a justices' clerk see PARA 1035.

6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 9(2).

7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 9(3).

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1029. Service of documents.

If a person on whom service of documents is required¹ is not known by the person serving to be acting by solicitor, service may be effected, unless the contrary is indicated, by delivering it to him personally² or by delivering at, or by sending it by first-class post³ to, his residence or his last known residence⁴. If a person on whom service of documents is required is known by the person serving to be acting by solicitor, service may be effected, unless the contrary is indicated:

1409 (1) by delivering the document at, or sending it by first-class post to, the solicitor's address for service⁵;

1410 (2) where the solicitor's address for service includes a numbered box at a document exchange, by leaving the document at that document exchange or at a document exchange which transmits documents on every business day⁶ to that document exchange⁷; or

1411 (3) by sending a legible copy of the document by facsimile transmission to the solicitor's office⁸.

1 ie by the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991.

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(1)(a)(i).

3 For these purposes, 'first-class post' means first-class post which has been prepaid or in respect of which prepayment is not required: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(2). In the case of service by first-class post a document is deemed to have been served, unless the contrary is proved, on the second business day after posting: r 4(3)(a).

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(1)(a)(ii).

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(1)(b)(i).

6 For these purposes, unless a contrary intention appears, 'business day' means any day other than a Saturday, Sunday, Christmas Day or Good Friday, or a bank holiday, ie a day which is, or is to be observed as, a bank holiday or a holiday under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321) in England and Wales: Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 2(1).

7 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(1)(b)(ii). In the case of service in accordance with this provision a document is deemed, unless the contrary is proved, to have been served on the second business day after the day on which it is left at the document exchange: r 4(3)(b).

8 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(1)(b)(iii).

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1030. Rehearing absent proper service.

Where an application has been sent to a respondent¹ and, after an order has been made on the application, it appears to the court² that the application did not come to the knowledge of the respondent in due time, the court may of its own motion set aside the order and may give such directions as it thinks fit for the rehearing of the application³.

¹ See in accordance with the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 4(1): see PARA 1029.

² As to the meaning of 'court' see PARA 894 note 9.

³ Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 24 (substituted by SI 1997/1894).

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1031. Timing of proceedings.

Any period of time fixed¹ for the doing of any act is to be reckoned in accordance with the following provisions².

Where:

- 1412 (1) the period, being a period of seven days or less, would include a day which is not a business day³, that day is to be excluded⁴;
- 1413 (2) the time for filing⁵ a document with the designated officer of the court expires on a day on which the office of the designated officer for the court is closed, and for that reason the document cannot be filed on that day, the document is filed in time if it is filed on the next day on which the office of the designated officer for the court is open⁶; and
- 1414 (3) a period of time within which or by which a certain act is to be performed in the course of proceedings is provided⁷, that period may not be extended otherwise than by a direction⁸ of the justices' clerk or the court⁹.

At the postponement or adjournment of any hearing or directions appointment¹⁰ in the course of proceedings or at the conclusion of any such hearing or directions appointment other than one at which the proceedings are determined, or as soon thereafter as is practicable, the justices' clerk must fix a date on which the proceedings are to come before him or the court again for such purposes as he or the court directs, and the designated officer for the court must serve¹¹ a copy of the order made on the parties to the proceedings¹².

1 Ie by the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991.

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 7(1).

3 As to the meaning of 'business day' see PARA 1029 note 6.

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 7(2).

5 As to the meaning of 'file' see PARA 894 note 2.

6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 7(3) (amended by SI 2001/615; SI 2005/617).

7 See note 1.

8 Ie under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 6(1): see PARA 895.

9 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 7(4) (amended by SI 1997/1894). As to delegation of his functions by a justices' clerk see PARA 1035.

10 As to the meaning of 'directions appointment' see PARA 894 note 6.

11 Ie in accordance with the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991.

12 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 7(5) (amended by SI 1997/1894; SI 2001/615; SI 2005/617).

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1032. Amendment of documents.

A copy of a document which has been filed¹ or served in any proceedings may not be amended without the leave of the justices' clerk or the court² which must, unless the justices' clerk or the court otherwise directs, be requested in writing³.

On considering a request for leave to amend a document, the justices' clerk or the court must either:

- 1415 (1) grant the request, whereupon the designated officer for the court must inform the person making the request of that decision⁴; or
- 1416 (2) invite the parties or any of them to make representations, within a specified period, as to whether such an order should be made⁵.

A person amending a document must file it with the designated officer for the court and serve it on those persons on whom it was served prior to amendment; and the amendments must be identified⁶.

1 As to the meaning of 'file' see PARA 894 note 2.

2 As to the meaning of 'court' see PARA 894 note 9.

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 10(1) (amended by SI 1997/1894). As to delegation of his functions by a justices' clerk see PARA 1035.

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 10(2)(a) (amended by SI 2005/617).

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 10(2)(b).

6 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 10(3) (amended by SI 2005/617).

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1033. Confidentiality of documents.

No document, other than a record of an order, held by the court¹ and relating to proceedings is to be disclosed other than to:

- 1417 (1) a party²;
- 1418 (2) the legal representative of a party³; or
- 1419 (3) the Legal Services Commission⁴,

without leave of the justices' clerk or the court⁵.

1 As to the meaning of 'court' see PARA 894 note 9.

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 14(a) (r 14 amended by SI 1997/1894).

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 14(b).

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 14(c) (amended by the Access to Justice Act 1999 Sch 14 para 3(3)).

5 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 14. As to delegation of his functions by a justices' clerk see PARA 1035.

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1034. Note of oral evidence to be kept.

The justices' clerk or the court¹ must keep a note² of the substance of the oral evidence given at a hearing of, or directions appointment³ in, any proceedings⁴.

1 As to the meaning of 'court' see PARA 894 note 9.

2 As to the meaning of 'note' see PARA 895 note 15.

3 As to the meaning of 'directions appointment' see PARA 894 note 6.

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 11 (amended by SI 1997/1894). As to delegation of his functions by a justices' clerk see PARA 1035.

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1035. Delegation by justices' clerk.

Anything authorised to be done by, to or before a justices' clerk¹ may be done instead by, to or before a person employed as a clerk in court² where that person is appointed by the Lord Chancellor to assist him and where that person has been specifically authorised by the justices' clerk for that purpose³. Any such authorisation must be recorded in writing by the designated officer for the court at the time the authority is given or as soon as practicable thereafter.⁴

1 The Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 15(2) states that these provisions apply to anything authorised to be done by, to or before a justices' clerk under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, Pt II (rr 2-25) or under the Justices Clerks Rules 1970, SI 1970/231, Schedule paras 15, 15D. The Justices Clerks Rules 1970, SI 1970/231, have been revoked and replaced by the Justices Clerks Rules 1999, SI 1999/2784, and reference should accordingly be made to the corresponding provisions of those rules.

2 For these purposes, 'employed as a clerk in court' means employed to assist a justices' clerk by acting in his place as a clerk in court in proceedings before a justice or justices: Justices' Clerks (Qualifications of Assistants) Rules 1979, SI 1979/570, r 2(1) (applied by the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 15(1)).

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 15(2) (amended by SI 2005/617).

4 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 15(3) (amended by SI 2001/615; SI 2005/617).

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(iv) Fees

1036. Fees in family proceedings.

The Family Proceedings Fees Order¹ makes provision for fees² payable in family proceedings in the High Court and in county courts under specified³ circumstances⁴.

Where by any convention entered into by Her Majesty with any foreign power it is provided that no fee is required to be paid in respect of any proceedings, the fees specified in the Family Proceedings Fees Order are not payable in respect of those proceedings⁵.

Provision is made for the remission or part remission of a fee⁶.

¹ The Family Proceedings Fees Order 2008, SI 2008/1054, made under the Courts Act 2003 s 92 (see **COURTS**).

² The fees are set out in the Family Proceedings Fees Order 2008, SI 2008/1054, Sch 1 column 2.

³ The items and directions as specified in the Family Proceedings Fees Order 2008, SI 2008/1057, Sch 1 column 1.

⁴ Family Proceedings Fees Order 2008, SI 2008/1054, art 2.

⁵ Family Proceedings Fees Order 2008, SI 2008/1054, art 3.

⁶ See the Family Proceedings Fees Order 2008, SI 2008/1054, art 4, Sch 2.

UPDATE

1036 Fees in family proceedings

NOTE 6--SI 2008/1054 Sch 2 amended: SI 2008/2856, SI 2009/1499.

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(v) Costs

1037. Costs generally.

Although the Civil Procedure Rules¹ do not apply to family proceedings except to the extent that they are applied to those proceedings by another enactment², the provisions relating to the assessment of costs³ do generally apply⁴.

The general rule in financial relief proceedings is that the court will not make an order requiring one party to pay the costs⁵ of another party⁶. However the court may make such an order at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)⁷. In deciding what order (if any) to make, the court must have regard to:

- 1420 (1) any failure by a party to comply with the Family Proceedings Rules⁸, any order of the court or any practice direction which the court considers relevant⁹;
- 1421 (2) any open offer to settle made by a party¹⁰;
- 1422 (3) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue¹¹;
- 1423 (4) the manner in which a party has pursued or responded to the application or a particular allegation or issue¹²;
- 1424 (5) any other aspect of a party's conduct in relation to the proceedings which the court considers relevant¹³; and
- 1425 (6) the financial effect on the parties of any costs order¹⁴.

Except in the case of an appeal against a decision of an authorised court officer¹⁵, an appeal against a decision in assessment proceedings relating to costs in family proceedings must lie, where the decision appealed against was made by a district judge of the High Court or a costs judge¹⁶, to a judge of the High Court¹⁷ or, where the decision appealed against was made by a district judge of a county court, to a judge of that court¹⁸. The provisions of the Civil Procedure Rules relating to appeals¹⁹ apply with modifications to every such appeal²⁰.

1 Ie the Civil Procedure Rules 1998, SI 1998/3132: see **CIVIL PROCEDURE**.

2 See CPR 2.1(1), (2); PARA 1005; and **COURTS** vol 10 (Reissue) PARA 575.

3 Ie CPR Pts 43-48: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1729 et seq.

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.27(1) (r 10.27 added by SI 2003/184; Family Proceedings Rules 1991, SI 1991/1247, r 10.27(1) amended by SI 2006/352). CCR Ord 38 and RSC Ord 62 does not apply to costs in family proceedings and CPR Pts 43, 44 (except 44.9-44.12), 47, 48 apply to costs in those proceedings with specified modifications: see the Family Proceedings Rules 1991, SI 1991/1247, r 10.27(1) (as so added and amended). CPR 44.3(1)-(5) (court's discretion as to costs: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1738 et seq) do not apply to ancillary relief proceedings: Family Proceedings Rules 1991, SI 1991/1427, r 2.71(1) (r 2.71 added by SI 2006/352). CPR 44.3(6)-(9) (costs orders which the court may make: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1741) applies to an order made under the Family Proceedings Rules 1991, SI 1991/1427, r 2.71 as it applies to an order made under CPR 44.3: Family Proceedings Rules 1991, SI 1991/1427, r 2.71(2) (as so added).

5 As to the meaning of 'costs' see CPR 43.2(1)(a); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1730 (definition applied by the Family Proceedings Rules 1991, SI 1991/1427 r 2.71(3) (as added: see note 4)). For these purposes 'costs' also includes costs payable by a client to his solicitor: r 2.71(3) (as so added).

6 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(4)(a) (as added: see note 4). See also *Practice Direction (ancillary relief: costs)* [2006] 1 WLR 634.

7 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(4)(b) (as added: see note 4).

8 le the Family Proceedings Rules 1991, SI 1991/1247.

9 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(5)(a) (as added: see note 4).

10 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(5)(b) (as added: see note 4). No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings, except as provided by r 2.61E (see PARAS 929-930): r 2.71(6) (as so added).

11 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(5)(c) (as added: see note 4).

12 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(5)(d) (as added: see note 4).

13 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(5)(e) (as added: see note 4).

14 Family Proceedings Rules 1991, SI 1991/1247, r 2.71(5)(f) (as added: see note 4).

15 CPR 47.20-47.23 apply to such proceedings: see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1801-1802. The Civil Procedure Rules apply to an appeal to which CPR 47.20-47.23 apply in accordance with these provisions in the same way they apply to any other appeal within CPR 47.20-47.23; and accordingly the Rules of the Supreme Court and the County Court Rules do not apply to any such appeal: Family Proceedings Rules 1991, SI 1991/1247, r 10.27(5) (as added: see note 4).

16 As to the meaning of 'costs judge' see CPR 43.2(1)(b); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1734 (definition applied by the Family Proceedings Rules 1991, SI 1991/1247, r 10.27(3)(a) (as added: see note 4)).

17 Family Proceedings Rules 1991, SI 1991/1247, r 10.27(2), (3)(a) (as added: see note 4).

18 Family Proceedings Rules 1991, SI 1991/1247, r 10.27(3)(b) (as added: see note 4).

19 le CPR Pt 52: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1657 et seq. The Civil Procedure Rules apply to an appeal to which CPR Pt 52 applies in accordance with these provisions in the same way they apply to any other appeals within CPR Pt 52; and accordingly the Rules of the Supreme Court and the County Court Rules do not apply to any such appeal: Family Proceedings Rules 1991, SI 1991/1247, r 10.27(5) (as added: see note 4).

20 Family Proceedings Rules 1991, SI 1991/1247, r 10.27(4) (as added: see note 4).

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1038. Divorce and dissolution proceedings.

In proceedings after a decree nisi of divorce, a conditional order of dissolution or a decree or order of judicial or legal separation, no order the effect of which would be to make a co-respondent or party cited liable for costs which are not directly referable to the decree or civil partnership order, as the case may be, is to be made unless the co-respondent or party cited is a party to such proceedings or has been given notice of the intention to apply for such an order¹.

A respondent, co-respondent or party cited may, without filing an answer, be heard on any question as to costs; but the court may at any time order any party objecting to a claim for costs to file and serve on the party making the claim a written statement setting out the reasons for his objection². A party is so entitled to be heard on any question whether or not he has returned to the court office an acknowledgment of service stating his wish to be heard on that question³.

¹ Family Proceedings Rules 1991, SI 1991/1247, r 2.37(3) (amended by SI 2005/2922). See also *Laxton v Laxton and Hitchcock* [1962] 2 All ER 364, [1962] 1 WLR 729.

² Family Proceedings Rules 1991, SI 1991/1247, r 2.37(1).

³ Family Proceedings Rules 1991, SI 1991/1247, r 2.37(2).

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1039. Estimates and statement of costs in proceedings for financial relief.

At every court hearing or appointment each party must produce to the court¹ an estimate in the prescribed form² of the costs incurred by him up to the date of that hearing or appointment³. Not less than 14 days before the date fixed for the final hearing of an application for financial relief, each party must (unless the court directs otherwise) file with the court and serve on each other party a statement in the prescribed form⁴ giving full particulars of all costs in respect of the proceedings which he has incurred or expects to incur, to enable the court to take account of the parties' liabilities for costs when deciding what order (if any) to make for financial relief⁵.

1 As to the meaning of 'court' see PARA 747 note 7.

2 For the prescribed form of estimate see the Family Proceedings Rules 1991, SI 1991/1247, Appendix 1A, Form H (added by SI 1999/3491; substituted by SI 2006/352).

3 Family Proceedings Rules 1991, SI 1991/1247, r 2.61F(1) (r 2.61F added by SI 1999/3491 and substituted by SI 2006/352). As to costs generally see PARA 1037 et seq.

4 See note 2.

5 Family Proceedings Rules 1991, SI 1991/1247, r 2.61F(2) (as added and substituted: see note 2).

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1040. Death of co-respondent.

Once the court has awarded costs against the co-respondent before his death, the order may be enforced against his estate after his death¹. Thus, if a co-respondent dies after he has been condemned in costs, the decree or order has been made absolute or final and he has agreed to pay the costs by instalments, such costs are recoverable from his estate².

1 *Rysak v Rysak and Bugajaski* [1967] P 179, [1966] 2 All ER 1036.

2 *Waddell v Waddell and Craig* [1892] P 226.

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1041. Costs in magistrates' court proceedings.

In any matrimonial or civil partnership proceedings in the magistrates' court the court¹ may, at any time during the proceedings, make an order that a party pay the whole or any part of the costs of any other party². A party against whom the court is considering making a costs order must have an opportunity to make representations as to why the order should not be made³.

1 As to the meaning of 'court' see PARA 894 note 9.

2 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 13(1) (amended by SI 1997/1894).

3 Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991, r 13(2).

Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARAS 1-541; VOLUME 73 (2009) 5TH EDITION, PARAS 542-1042)/9. JURISDICTION AND PROCEDURE/(7) ADMINISTRATIVE PROVISIONS/ (v) Costs/1042. Public funding.

1042. Public funding.

Where one or both parties are in receipt of public funding, costs orders against a publicly funded party or against the Legal Services Commission¹ and property and costs recovered for a publicly funded client² are governed by the Community Legal Service (Costs) Regulations 2000.

1 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, Pt II (regs 5-13); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1814.

2 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, Pt III (regs 14-24); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1814.